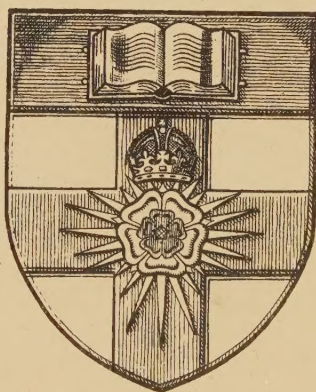


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OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

THE COURT OF APPEAL

ALL DIVISIONS OF THE HIGH COURT

AND

COURTS OF SPECIAL JURISDICTION

1954

VOLUME 1

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CORRIGENDA

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- p. 1447. *LLOYDS BANK, LTD. v. OLIVER'S TRUSTEE*. Line H.1: for "has been deserted can, as against third parties only, assert" read "has been deserted can, as against third parties, only assert".

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- p. 13. *S. v. S. Solicitors*: read "*Beckingsales*, agents for *Adcock & Williams*, West Bromwich (for the wife)" instead of as printed.
- p. 98. *HAWKINS v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL*. Case referred to No. 15: read "*Dunster v. Abbott*, [1953] 2 All E.R. 1572" instead of as printed. P. 103, line A.6: read "*Dunster v. Abbott* (15)" instead of as printed.
- p. 190. *MASON v. CLARKE*. Lines D.2 and 3: for "served notices on the defendant and the second plaintiffs" read "served a notice on the second plaintiffs".
- p. 201. *PARKINSON v. H. & J. PLUMPTON*. Line F.2: for "1951 (S.I., 1951, No. 637)" read "1953 (S.I., 1953, No. 1611)".
- p. 376. *HARTLEY v. MAYOH & CO.* Counsel: add "*Nelson, Q.C.*, and *C. M. W. Elliott* for the defendant board". P. 386: solicitors: add "*J. Bingham & Co.*, agents for *James Chapman & Co.*, Manchester (for the defendant board)".
- p. 511. *DAVIES v. DIRECTOR OF PUBLIC PROSECUTIONS*. Lines A.3 and 4: read "deserves all the reverence of the law" instead of as printed, deleting "but is not law actually". P. 514, line H.4: for "RESTATEMENT OF AMERICAN LAW, 2nd ed." read "CORPUS JURIS SECUNDUM".
- p. 631. *STOCKLOSER v. JOHNSON*. Line C.2: for "obligation to the defendant" read "obligation to the plaintiff". P. 633, counsel: read "*Beney, Q.C.*, and *Harold Brown* for the defendant. *N. Lawson* and *J. M. Holden* for the plaintiff" instead of as printed. P. 645, solicitors: read "*Lovell, Son & Pitfield*, agents for *Pitfield & Oglethorpe*, Petworth, Sussex (for the defendant); *Kenneth Brown, Baker, Baker* (for the plaintiff)", instead of as printed.
- p. 762. *DEAN v. PRINCE*. Fourth line from top of page: read "that the buyer would wish to carry on the existing business, and was not contemplating" instead of as printed.
- p. 862. *HEALEY v. A. WADDINGTON & SONS, LTD.* Lines A.2 and 3: for "second and third defendants" read "plaintiff".

THE
ALL ENGLAND
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LAW TIMES REPORTS
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MCLELLAN v. MCLELLAN.

C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), November 23, 1953.]

Husband and Wife—Maintenance—Application to High Court—Order for periodical payments—Date of commencement of payments—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

D By the Matrimonial Causes Act, 1950, s. 23 (1): "Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife . . . the court . . . may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . ." On an application by the wife under that sub-section,

E HELD: the court had discretion under the sub-section to order payments to be made as from the date of the summons, and not merely from the date of the finding of wilful neglect to provide reasonable maintenance.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 84, 85, Nos. 631-636.

APPLICATION by the wife.

F On May 27, 1953, the wife issued a summons for maintenance under the Matrimonial Causes Act, 1950, s. 23 (1). The husband was at that time paying maintenance at the rate of £500 a year free of income tax, and he paid sums of £125 on June 10, 1953, and on Aug. 6, 1953. On Nov. 13, 1953, KARMINSKI, J., found that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife. HIS LORDSHIP found the husband's annual income to be G £3,750, and the wife's to be £250, and ordered the husband to pay £850 a year less tax during joint lives, together with a further £150 a year less tax to be secured to the wife for her life. The wife now applied for an order that the payments should be made as from the date of the summons, alleging that the payments by the husband on June 10, 1953, and on Aug. 6, 1953, were in respect of the periods March-April-May and June-July-August, so that if the H payments under the order were to be made from the date of the order, namely Nov. 13, 1953, the wife would have been without maintenance for three months. On behalf of the husband it was contended (i) that under s. 23 (1) there was no provision for an order for alimony pendente lite, so that until the court had found the husband guilty of wilful neglect to provide reasonable maintenance there could be no award, and, therefore, the order for periodical payments could be effective only from the date of that finding, i.e., Nov. 13, 1953; (ii) that the payments made by the husband on June 10 and Aug. 6, 1953, were in respect

of the periods May-June-July and August-September-October; that the wife had not been left destitute; and, therefore, that on the merits the order should be effective from Nov. 13, 1953.

Ormrod for the wife.

V. O. Williams for the husband.

KARMINSKI, J.: I think I have power under the Matrimonial Causes Act, 1950, s. 23 (1), once wilful neglect by the husband to provide reasonable maintenance has been proved, to order payments to be made from the date of the summons. The sub-section says that

“ . . . the court . . . may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . . ”

The sub-section does not indicate from what date the order may be effective. I think the sub-section is intended to leave the question of date, as a matter of discretion, to the court. If, as counsel for the husband has claimed, an order can run only from the finding of wilful neglect, gross injustice might be done to a wife. Counsel for the wife has indicated some of the mischief which might follow, such as an obstructive husband deliberately holding up the course of the inquiry by a refusal to disclose his means and the disobedience, perhaps, of an order for discovery.

I feel little doubt that it is intended that the court shall have power under s. 23 (1) to order payments from the date of the application, as in the not dissimilar case where alimony pendente lite is awarded. The court has power, which it usually exercises, to make the order for alimony pendente lite effective from the date of service of the petition, and the order for maintenance usually runs from decree absolute. I think the discretion of the court is sufficiently unfettered by the sub-section to allow me to order the payments to be made from the date of the summons. It is fair to say, first, that there has been no delay or obstruction by the husband, and secondly, although, in my view, he was guilty of neglect to provide reasonable maintenance, I could not possibly have found on the figures that he had neglected to pay any maintenance at all. I think it right to order the maintenance to run from the date of the summons, credit to be given by the wife for all sums received from the husband since that date.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the wife); *W. T. Donovan* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

JOZWIAK v. SADEK AND OTHERS.

[QUEEN'S BENCH DIVISION (Ormerod, J., sitting with a jury), December 3, 4, 1953.]

Libel—Evidence—Identification of plaintiff as person libelled—Statements made at meetings—Anonymous telephone communications—Admissibility.

A In an action for libel in respect of words appearing in a newspaper, the defendants agreed that the words complained of bore the meaning alleged by the plaintiff, but denied that they related to him. The plaintiff sought to tender evidence of anonymous telephone messages received by him after publication of the matter complained of, and of statements made at public meetings, to show that the words complained of did relate to him.

B HELD: on authority and on general principle, evidence of the statements made at public meetings was admissible to show that the plaintiff was identified with the subject-matter complained of: *Hough v. London Express Newspaper, Ltd.* ([1940] 3 All E.R. 31), *Cook v. Ward* (1830) (6 Bing. 409), and *Du Bost v. Beresford* (1810) (2 Camp. 511), applied; and, further, that evidence of the telephone communications was admissible, although the jury should be warned to treat such evidence with caution.

C Cases referred to:

(1) *Hough v. London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31; [1940] 2 K.B. 507; 109 L.J.K.B. 524; 163 L.T. 162; 2nd Digest Supp.

(2) *Cook v. Ward*, (1830), 6 Bing. 409; 8 L.J.O.S.C.P. 126; 130 E.R. 1338; 32 Digest 85, 1159.

D (3) *Du Bost v. Beresford*, (1810), 2 Camp. 511; 170 E.R. 1235; 32 Digest 11, 14.

ACTION for damages for libel.

The plaintiff, a prominent member of the Polish community in London, sued the defendants, the author, proprietors, publishers, editor and printers, in respect of a story in Polish which was published on Feb. 20 and 21, 1953, in the "Polish Daily", a newspaper which had a very wide circulation among members of the Polish émigré community throughout the United Kingdom. The story, which on the face of it was fiction, concerned two persons who had committed suicide because of financial difficulties, and the suggestion was that these difficulties had been caused in an indirect way by a man who was the chairman of an association. Two well-known members of the Polish émigré community had committed suicide some time before the story was published, and the plaintiff was at all material times the chairman of the Association of Polish Merchants and Industrialists in Great Britain, an association in the Polish community which existed for the purpose of bringing members of the community together for business reasons and assisting them in various ways. The plaintiff alleged that the story was intended to refer to him, and that he was the person described in the story as being responsible for the financial downfall and suicide of the two persons concerned. On the issue whether the words complained of related to him, the plaintiff sought to tender evidence of anonymous telephone messages received by him after publication of the story and of statements made at public meetings. The jury retired and legal argument was addressed to the court.

H *Milmo* for the plaintiff.

Heathcote-Williams, Q.C., and *Stranger-Jones* for the defendants.

ORMEROD, J., stated the facts and continued: Counsel for the defendants agrees that the words of the story bear the meaning alleged, but the issue is whether or not those words relate to the plaintiff, i.e., whether or not the person referred to in the story would be identified as the plaintiff in the minds of any persons knowing the circumstances.

In these circumstances, counsel for the plaintiff seeks to tender evidence of anonymous telephone messages which the plaintiff received after the publication of this story, accusing him of being a murderer, and also evidence of statements which were made at public meetings, showing that the persons present at those meetings did, in fact, identify the plaintiff with the individual referred to in the story. Counsel for the defendants objects to that, first, on the ground that the use of the term "murderer" is extending the innuendo as it is pleaded, and, secondly, on the ground that this evidence is purely hearsay, and that, in the circumstances, it should not be admitted. A

I have come to the conclusion that it should be admitted, and I have come to that conclusion, putting it shortly, on the authorities which have been cited to me by counsel for the plaintiff. In the first place, he referred to *Hough v. London Express Newspaper, Ltd.* (1), in which the question arose whether the plaintiff could be identified with the matters referred to, and it was held that the evidence of persons who lived in the same street as the plaintiff and in the same district could be admitted, as it was necessary for the plaintiff to prove that they were persons who knew the special circumstances and might understand the words as having the meaning referred to. There are two older authorities which probably are more in point. One of them is *Cook v. Ward* (2), which was a libel action in which, in order to identify the plaintiff with the libel, evidence was called of laughter and statements which had been made at a vestry meeting. It was held that the evidence was admissible on that ground, i.e., on the ground that it identified the plaintiff with the subject of the libel. C Equally, in *Du Bost v. Beresford* (3), the question arose, although, in fact, the action was not a libel action, whether the subject of a picture was libellous, and it was held that evidence was admissible of remarks made by persons who saw the picture when it was exhibited, to show that those persons had identified the subject of the libel with the plaintiff. D The report is a short one, but the note is (2 Camp. 512):

"In the course of the trial LORD ELLENBOROUGH held upon argument, that the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law." E

On the authority of those decisions, and indeed, I think, on the application of the ordinary principles of evidence, I feel that I ought to admit the evidence of statements made at meetings of the Polish community, or sections of the Polish community, which took place after the publication of this story; and if that be so, I fail to see that I am extending the principle if, at the same time, I hold that evidence of telephone communications to the plaintiff in which similar statements were made is admissible in evidence. It may be that such evidence is of no very great value, and quite clearly the jury will have to be warned to treat evidence of that kind with the caution which is necessary; but at the same time I fail to see that such evidence should not be admitted, and I rule that it should be, and is, admissible. F G

[The action was later settled.]

Solicitors: *H. Davis & Co.* (for the plaintiff); *George & George* (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

R. v. RIDER.

[CHELMSFORD ASSIZES (Streatfeild, J., sitting with a jury), November 18, 1953.]

Criminal Law—Carnal knowledge—Girl under sixteen—Defence of reasonable belief—"First occasion"—Separate committals for trial on two separate occasions relating to two different girls—Trial on one indictment—Criminal Law Amendment Act, 1922 (c. 56), s. 2, proviso.

A By s. 2 of the Criminal Law Amendment Act, 1922: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge [of carnal knowledge of a girl under sixteen] under s. 5 . . . of the Criminal Law Amendment Act, 1885 . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." The accused was committed on two separate occasions by justices for trial at assizes on two charges of carnal knowledge of two different girls between the ages of thirteen and sixteen years, contrary to s. 5. At the trial both charges were included in one indictment.

C HELD: (i) a "charge" was made within the meaning of the section when the accused was charged before a court which had jurisdiction to determine the matter in question; where justices committed the accused for trial, there was no "charge" until he was tried on indictment; and, therefore, the accused was "charged" for the first time at the trial.

D (ii) although the accused was committed for trial on separate occasions, both charges were joined in one indictment, and, therefore, the accused was charged on one "occasion" for the purposes of the proviso to s. 2 of the Act of 1922.

R. v. Rogers ([1953] 1 All E.R. 206), applied.

E AS TO UNLAWFUL CARNAL KNOWLEDGE OF GIRLS OVER THIRTEEN AND UNDER SIXTEEN YEARS, see HALSBURY, Hailsham Edn., Vol. 9, p. 481, para. 826; and FOR CASES, see DIGEST, Vol. 15, pp. 846-848, Nos. 9308-9323.

Case referred to:

(1) *R. v. Rogers*, [1953] 1 All E.R. 206; [1953] 1 Q.B. 311; 117 J.P. 83.

F The accused, John Rider, was charged at the Essex Autumn Assizes at Chelmsford on Nov. 18, 1953, before STREATFEILD, J., on an indictment containing two counts charging him with carnal knowledge of two girls between the ages of thirteen and sixteen years on two separate occasions, contrary to the Criminal Law Amendment Act, 1885, s. 5. He had been committed for trial on the charge relating to one of the girls, and then, on a later occasion, on the charge relating to the other girl. He sought to set up the statutory defence laid down in the Criminal Law Amendment Act, 1922, s. 2, proviso.

G *F. H. Lawton* for the prosecution.

E. C. S. Russell for the accused.

H STREATFEILD, J.: I have to construe the meaning of s. 2 of the Criminal Law Amendment Act, 1922, which amended s. 5 of the Criminal Law Amendment Act, 1885, and laid down that reasonable cause to believe that a girl was of or above the age of sixteen should not be a defence to a charge under s. 5, provided, however, that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years should be a valid defence on the first occasion on which he was charged with an offence under s. 5.

The circumstances of this case are somewhat unusual. The accused is charged in respect of two girls under the age of sixteen and he was committed for trial by the justices in respect of one of them. He was then brought before the justices on a later and separate occasion and committed for trial in respect of the second

girl, and the case now comes before me on both charges, joined in one indictment. He seeks to claim that he is entitled to set up the statutory defence in respect of not only one girl, but both girls, on the ground that this, today, at the assize is the first occasion on which he has been charged with an offence under the section.

I cannot help thinking that this situation was not contemplated by the draftsmen of the Act of 1922, but, nevertheless, I have to give a construction to the words which were used, and I have to rule on what is meant by a "charge". When is a charge made? It is agreed by counsel that, within the meaning of the section, a charge is not that which is stated by a police officer verbally to a man when he is charging him with an offence. The next question is whether a man is charged before justices, or whether he is not charged effectively until he appears before a jury on an indictment. I have come to the conclusion that the proper construction to put on the word "charge" is that a man is charged before a court which has jurisdiction to determine the matter in question. That may well be justices, if they refuse to commit the accused person for trial. They are hearing the evidence as examining magistrates; they then determine the question whether there is a *prima facie* case for committal for trial, and if they find there is not, that clearly would be a charge before a court having jurisdiction to determine it. But if justices commit a man for trial they are not adjudicating on the case. The only thing they determine is whether there is a *prima facie* case to answer, and, if they think there is, they commit the accused. He is then brought before the court at assizes or quarter sessions on indictment, and it seems to me that then, for the first time, he is before a court having jurisdiction to determine the matter.

The next question for my decision is this. Having decided that the "charge" within the meaning of this section is the charge on indictment at assizes, what is meant by an "occasion". Is it one occasion or two occasions if a man appears on an indictment on two counts? Force is lent to the argument that there are here two occasions when one bears in mind that there have been separate committals for trial—by the same justices, but on separate occasions. For this purpose I think I must have regard to *R. v. Rogers* (1). It is true—as counsel for the prosecution has submitted—that one must not necessarily come to the conclusion that the construction of a word in one Act of Parliament bears precisely the same construction or meaning as it does in another Act of Parliament. The fact, however, remains that, under the Criminal Justice Act, 1948, in s. 21 and s. 22, there occurs three times the phrase "on . . . previous occasions" in connection with a conviction—a conviction on previous occasions. The Court of Criminal Appeal held in *Rogers*' case (1) that where a man is convicted of two offences which are charged in separate counts of an indictment, the resulting convictions form only one occasion of a conviction.

In those circumstances it seems to me to be difficult to put a different interpretation on the word "occasion" in the Act of 1922. The matter is not beyond doubt, but I think there is another principle that one ought to apply, and it is this. This section with its proviso exists for the purpose of the liberty of the subject, and, if there is any doubt about its construction, I think that one ought to lean more in favour of the subject than against him. I have come to the conclusion, applying, as I do, the principle of *R. v. Rogers* (1), that the occasion which is applicable here is the occasion of the defendant's appearance before this court on two counts of one indictment, and it follows that he is entitled to set up this defence in respect of both counts of the indictment.

Solicitors: *Arthur Morgan*, Chelmsford (for the prosecution); *G. Houghton & Son*, Romford (for the accused).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

**Re REES' WILL TRUSTS. LLOYDS BANK, LTD. v. REES
AND OTHERS.**

[CHANCERY DIVISION (Upjohn, J.), December 4, 1953.]

Will—Forfeiture clause—No advancement clause—Application of statutory power of advancement—Consent by life tenant to advancement—Trustee Act, 1925 (c. 19), s. 32 (1), s. 69 (2).

A By cl. 16 of his will dated Nov. 6, 1935, a testator directed his trustees to hold the net proceeds of sale of his residuary estate on trust to divide and pay the income thereof to his three grandchildren during their lives and after their deaths to divide the corpus equally between the respective children of his grandchildren who should survive them, per stirpes, B “provided that if any person to whom . . . any life interest is . . . given shall . . . become of unsound mind . . . or shall become bankrupt or assign or charge his . . . life interest or any part thereof . . . then . . . the . . . income given to such person shall cease. And after the cesser of any such . . . life interest in the lifetime of the [life tenant] my trustees may at their absolute discretion . . . during the life of the [life tenant] apply C any sums . . . for the maintenance support or otherwise for the benefit of the [life tenant] and his or her wife or husband and issue (if any) or any one or more of them exclusively . . . in such manner as my trustees shall . . . think fit.” No express power of advancement was conferred on the trustees by the will. On a summons to determine whether the D trustees were entitled to exercise, in relation to the contingent share in the residuary estate of any great-grandchild of the testator, the power of advancement conferred by the Trustee Act, 1925, s. 32 (1), and whether any life tenant, by giving his consent to an advancement under the said power, would forfeit his life interest,

HELD: (i) the proviso in cl. 16 of the will did not amount to the expression of a clear “contrary intention” within s. 69 (2) of the Act of 1925, and, therefore, s. 32 (1) was applicable and must be read into the will.

E (ii) the consent of a life tenant to an advancement under s. 32 (1) fell literally within the proviso to cl. 16 of the will, but the draftsman of the will must be deemed to have had in mind the statutory power, and could not have intended that consent to its exercise should work a forfeiture, and, therefore, the life tenant’s consent to the advancement of a great-grandchild would not cause a forfeiture of his life interest.

F *Re Stimpson’s Trusts* ([1931] 2 Ch. 77), distinguished.

Re Hodgson ([1913] 1 Ch. 34) and *Re Shaw’s Settlement, Re Wisely’s Settlement* ([1951] 1 All E.R. 656), applied.

AS TO FORFEITURE CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 542, 697, 790, paras. 795, 976, 1098; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.

G FOR THE TRUSTEE ACT, 1925, s. 32 (1) and s. 69 (2), see HALSBURY’S STATUTES, Second Edn., Vol. 26, pp. 99 and 157.

Cases referred to:

- (1) *Re Turner’s Will Trusts*, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; Digest Supp.
- H (2) *Re Garrett*, [1934] Ch. 477; 103 L.J.Ch. 244; 151 L.T. 194; Digest Supp.
- (3) *Re Mair*, [1935] Ch. 562; 104 L.J.Ch. 258; 153 L.T. 145; Digest Supp.
- (4) *Re Hodgson*, [1913] 1 Ch. 34; 82 L.J.Ch. 31; 107 L.T. 607; 40 Digest 561, 1008.
- (5) *Re Shaw’s Settlement, Re Wisely’s Settlement*, [1951] 1 All E.R. 656; [1951] Ch. 833; 2nd Digest Supp.
- (6) *Re Stimpson’s Trusts*, [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249; Digest Supp.

ADJOURNED SUMMONS to determine (i) whether on the true construction of the will of Robert Price Rees and by virtue of the Trustee Act, 1925, s. 32, the trustees for the time being of the said will, viz., the plaintiffs, Lloyds Bank, Ltd., and the first and eleventh defendants, were entitled subject to the consents made requisite by the said s. 32 to exercise, in relation to the contingent share of any great-grandchild of the testator in his residuary estate under cl. 16 of the will, the power of advancement contained in s. 32, and (ii) whether, on the true construction of the will, any of the testator's grandchildren giving his or her consent to an advancement under the said powers would forfeit his or her determinable life interest in the testator's residuary estate.

J. A. Armstrong for the plaintiffs, Lloyds Bank, Ltd.

R. Gwyn Rees for the seventh, eighth, ninth and tenth defendants, infant beneficiaries under the will.

J. K. Wood for the first, second, third, fourth, fifth, sixth, eleventh and twelfth defendants, the adult beneficiaries.

UPJOHN, J.: The first question that I have to determine is whether the trustee's power of advancement under the Trustee Act, 1925, s. 32, in favour of persons contingently entitled to capital is applicable to the Will of Robert Price Rees. By cl. 16 of his will dated Nov. 6, 1935, the testator gave the residue of his estate on trust for sale to pay his debts, and so forth, and on trust to divide and pay the income thereof to his three grandchildren, the first, second and third defendants, during their respective lives, and after their respective deaths he gave the estate over to those defendants' respective children who should survive them. The testator then provided that the life interest should be held on what are called "protective trusts". He did not, however, incorporate the Trustee Act, 1925, s. 33, but expressed the "protective trusts" in these terms:

"provided that if any person to whom any annuity or life interest is hereinbefore given shall either be at my death or thereafter become of unsound mind and be legally certified as such or shall become bankrupt or assign or charge his or her annuity or life interest or any part thereof or do or suffer anything whereby the said annuity or life interest or any part thereof would become payable to or vested in any other person then and in any such case the annuity or income given to such person shall cease. And after the cesser of any such annuity or life interest in the lifetime of the annuitant my trustees may at their absolute discretion without being liable to account for the exercise of such discretion in every or any year during the life of the annuitant apply any sums not exceeding in any one year the amount of the annuity or life interest hereinbefore given to him or her for the maintenance support or otherwise for the benefit of the annuitant and his or her wife or husband and issue (if any) or any one or more of them exclusively of the other or others in such manner as my trustees shall without being liable to account think fit."

The testator died on Nov. 27, 1935, and his will was duly proved.

I need not read s. 32 of the Trustee Act, 1925. It is sufficient to say that the Trustee Act, 1925, s. 32 (2) and (3) are satisfied, for the assets comprising the residue are held on trust for sale, and the will came into operation long after the commencement of that Act. Section 32, therefore, applies unless a contrary intention is expressed in the will: see s. 69 (2) of the Act. It is submitted by the trustees, who have very properly argued this point before me as representing unborn children, that the form of the protective life interest and the discretionary trust that arises thereunder on forfeiture is a contrary intention within the meaning of s. 69 (2). It is said that the trust after the cesser of the life interest, whereby the trustees have an absolute discretion as to the application in any one year of the amount of the annuity or life interest, indicates that the amount of the life interest would continue during the residue

of the life of the particular life tenant without diminution by reason of the reference to the words "the amount", and, therefore, there was a contrary intention which would exclude s. 32, for, of course, any application of moneys under that section would reduce "the amount" of the life interest. I was referred to *Re Turner's Will Trusts* (1), where it was held that a direction to accumulate negatives the power under the Trustee Act, 1925, s. 31 (1), to pay income to a person contingently entitled who had attained the age of twenty-one. The question is, however, one of the construction of the will, and, in my judgment, I do not find sufficient in the discretionary trusts to amount to a contrary intention within the meaning of s. 69. I think the proper view to take is this. This will is silent as to powers of advancement, and I must, therefore, assume that the draftsman had in mind the power conferred on trustees by s. 32. To exclude that beneficial power there must be expressed a clear contrary intention, and, in my judgment, the words I have read do not amount to such a clear contrary intention.

In my view, the true conclusion to draw is that s. 32 of the Act of 1925 applies, and, being applicable, it must be read into the settlement: see *Re Garrett* (2). That was a case concerning a restraint on anticipation, but CLAUSON, J., said ([1934] Ch. 482):

"As has been pointed out, the powers given by [s. 32] have effect subject to the terms of the instrument creating the trust: see s. 69 (2) of the Trustee Act, 1925; and one of the terms of the will is that Mrs. Croft shall not anticipate the income of the share in question. But, in my judgment, Mrs. Croft has, notwithstanding the restraint, power to give her consent to the exercise by the trustees of their power of advancement under the section. That power must be taken to be incorporated in and read as part of the will and Mrs. Croft's power of consenting is not, in my view, inconsistent with the restraint against anticipation imposed by the will. Further, it is to be observed that in this will there is no forfeiture clause, the presence of which might well make a difference and introduce matter for consideration."

I think that in that last sentence the learned judge was merely expressing a doubt whether, where there was a forfeiture clause, a consent to an advance would operate to forfeit the primary life interest. That is a matter with which I shall have to deal later.

It seems to me, therefore, that s. 32 of the Act of 1925 must be read into this will, and, thereupon, if, pursuant to the power of advancement, money is raised, the provisions of the will merely operate on what remains in settlement from time to time. Raising the money does not per se create a forfeiture: see *Re Mair* (3) where FARWELL, J., takes that view ([1935] Ch. 566).

The next question which I have to determine is whether, if the trustees exercise the powers conferred on them by s. 32, a life tenant, whose consent to any advancement is, by the terms of that section, necessary, by giving such consent forfeits his life interest and brings into operation the discretionary trust. That matter is not free from authority. It may, I think, be conceded that, reading the words of the forfeiture clause quite literally, "giving consent" under s. 32 is doing or suffering anything whereby the annuity or life interest or any part thereof would become payable to or vested in any other person. That, however, is not conclusive of the matter, for NEVILLE, J., in *Re Hodgson* (4), said ([1913] 1 Ch. 40) of the forfeiture clause in that case that

"... it should be read as though there had been inserted at the end of the forfeiture clause 'But this provision is not to affect any steps taken by the husband to enable the advances by the trustees hereinafter provided for to take effect'."

Of course, in that case the judge had to deal with an express power of advancement, there being at that time nothing corresponding to s. 32. That case was

recently followed by HARMAN, J., in *Re Shaw's Settlement, Re Wisely's Settlement* (5). He had there to consider a decision of LUXMOORE, J., in *Re Stimpson's Trusts* (6) where the learned judge came to a conclusion contrary to that of NEVILLE, J., in *Re Hodgson* (4), and held that giving consent to the exercise of a power of advancement under s. 32 operated to work a forfeiture. However, for the reasons pointed out by HARMAN, J., in *Shaw's case* (5), *Re Stimpson's Trusts* (6) cannot be regarded as a satisfactory decision, and HARMAN, J., felt himself at liberty to follow the decision of NEVILLE, J., in *Re Hodgson* (4) in preference to that of LUXMOORE, J., in *Re Stimpson* (6). HARMAN, J., was dealing with a case of an express power of advancement, and, having reviewed *Re Stimpson's Trusts* (6), he said ([1951] 1 All E.R. 659):

"In these circumstances the argument which appealed to NEVILLE, J., and appeals to me was not available. It may be that the decision in *Re Stimpson's Trusts* (6) may hereafter be followed in a case where an express advancement clause is lacking, and where, on the other hand, no use is made of the protective trusts set out in the Trustee Act, 1925, s. 33. I leave that question to be decided when it arises."

In my judgment, however, if the true view be, for the reasons I have given, that s. 32 must be read into the will, there can be no difference between a will containing an express provision written out in extenso and a will which incorporates s. 32.

I forbear to examine *Re Stimpson* (6). The judgment of LUXMOORE, J., on the point is not reported. I do not know what authorities were cited to him, nor for what reasons he came to his conclusion. In any event, that decision is plainly distinguishable from that before me for, in that case, the will was made in 1906, although it did not come into operation until 1929. The draftsman of the will cannot, in 1906, have had in mind a section of an Act to be enacted nearly twenty years later, whereas in this case I have no reason to doubt that there was no express provision as to advancement included in the will because the draftsman of the will before me must, in 1935, be taken to have been well aware of and to have relied on that section. Accordingly, for these reasons, it seems to me that the reasoning of *Re Hodgson* (4) and *Re Shaw* (5) is applicable to a case where s. 32 is incorporated into a will, whence it follows that a life tenant, by consenting to an advance, does not thereby forfeit his life interest. Accordingly, I must answer question (i) of the summons by saying that the trustees of the testator's will are, subject to the consents, entitled to exercise the powers of advancement conferred by s. 32, and such consent, if given, will not operate to forfeit the life interest.

Declaration accordingly.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Rees & Wood*, Cardiff (for all parties).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

S. v. S.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), December 2, 1953.]

Husband and Wife—Maintenance—Application to High Court—Interim order—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1)—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 56 (10).

A On June 23, 1953, the wife issued a summons for maintenance under the Matrimonial Causes Act, 1950, s. 23 (1). The husband was resident in Nigeria, and, because of the delay caused thereby, on Oct. 14, 1953, the wife gave notice of an application for an order for alimony pendente lite. On Nov. 12, 1953, the district registrar dismissed the application on the ground that the court had no power to make such an order. On appeal,

B HELD: the power under r. 56 (10) of the Matrimonial Causes Rules, 1950, to make an interim order under s. 23 (1) was (i) confined to a judge, and (ii) was given to him only when, at the hearing of an application under s. 23 (1), he decided to refer the matter to the registrar for investigation into the means of the parties; further, as an applicant for maintenance under s. 23 (1), the wife was not "a competent suitor . . . in a matrimonial cause" within the meaning of that phrase as used ([1927] P. 169, 177),

C in *Welton v. Welton*, and, therefore, there was no inherent power in the court to make an order for alimony pendente lite, and the wife's application failed.

Observations of LORD MERRIVALE, P., and LORD HANWORTH, M.R., in *Welton v. Welton* ([1927] P. 169, 177), distinguished.

D FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 84, 85, Nos. 631-636, and 3rd Digest Supp.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 56 (10), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 223.

E Case referred to:

(1) *Welton v. Welton*, [1927] P. 162; 96 L.J.P. 75; 136 L.T. 675; 27 Digest, Replacement, 486, 4253.

SUMMONS adjourned into court.

C. G. Heron for the wife.

Shenfield for the husband.

F COLLINGWOOD, J.: This is an appeal from a decision of the Birmingham District Registrar, who, on Nov. 12, 1953, dismissed the wife's application for an order for alimony pending suit.

G The wife issued an originating summons under the Matrimonial Causes Act, 1950, s. 23 (1), on the ground that the husband had wilfully neglected to provide reasonable maintenance for her. The husband is at present employed at Lagos, Nigeria, and because of this some delay in the proceedings was inevitable. Accordingly, on Oct. 14, 1953, the wife gave notice of an application to the court for an order that the husband pay her a weekly or monthly sum in respect of alimony pending suit. On Nov. 12, 1953, this application was heard and dismissed by the district registrar who held that there was no power in the court to make the order for which she asked. It is against this decision that the

H wife appeals.

It was submitted on behalf of the wife that the power to make such an interim order was given by the Matrimonial Causes Rules, 1950. It was contended that the effect of r. 56 (10) and (16) was to give to the court the same power as if this application were a matrimonial cause, the originating summons were a petition, and the wife were the petitioner. Rule 56 (16) provides:

"The provisions of rr. 9, 10, 11, 12, 13, 14, 23, 32, 35, 36, 69 and 70

shall apply to an application under this rule [i.e., an application under s. 23 (1)] as if it were a matrimonial cause and as if the originating summons were a petition and the applicant were the petitioner."

None of the above-mentioned rules has any bearing on the present application. Rule 56 (10) provides:

"On the hearing of the application [under s. 23 (1)] the judge may make such order as he thinks fit, or may refer the application to a registrar for an investigation into the means of the parties to the marriage and, pending the final determination of the application, the judge may make an interim order upon such terms as he may think just."

The power to make an interim order under this paragraph is clearly confined to a judge, and is given to him only when, at the hearing of the application under s. 23 (1), he decides to refer the matter to a registrar for investigation into the means of the parties. I find no other provision in the rules which confers on a judge the power to make an interim order in any other circumstances.

It was further contended that, apart from the rules, the court had an inherent power to make an interim order, and in support of this contention I was referred to *Welton v. Welton* (1). In that case the wife was suing for divorce on the ground of her husband's adultery, and pending suit she obtained in the registry an order for alimony. The husband appealed on the ground that in a previous suit, in which he was petitioner, the wife had been found guilty of adultery, and it was contended on his behalf that the court had no jurisdiction to grant alimony pendente lite to a wife who had been so found, despite the fact that the husband's petition had been dismissed on the ground that he had been guilty of conduct conducing to the wife's adultery. In the course of his judgment, on the husband's summons to rescind the registrar's order, LORD MERRIVALE, P., said ([1927] P. 169):

"So long as a wife was a competent suitor in the ecclesiastical court in a matrimonial cause the general practice of those courts was to require the husband to make provision according to his means for her maintenance and the costs of her suit. I know of no ground for doubting the accuracy of the statement on this subject contained in OUGHTON'S ORDO JUDICIORUM, Tit. 206, 207."

In the hearing in the Court of Appeal LORD HANWORTH, M.R., said (*ibid.*, 177):

"If, therefore, she is, as I agree with the President she is, a competent suitor, it appears to me that s. 190 (3) [of the Supreme Court of Judicature (Consolidation) Act, 1925], comes into play, and that giving full weight to the limitation imposed by s. 22 [of the Matrimonial Causes Act, 1857,] it is necessary for the court to bear in mind the effect of s. 31 [of the Act of 1857], and in those circumstances to say that there was power in the court to make an order for alimony pendente lite at a time when the measure or quality of the wrong to be imputed to the husband and to the wife has not been finally determined between them. It appears to me therefore that the first ground on which the case has been argued fails."

It was submitted that in the present case the wife was "a competent suitor . . . in a matrimonial cause" and, therefore, that the husband could be ordered to pay alimony pending suit.

The question with which the court was concerned in *Welton v. Welton* (1) turned on the effect of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3). That sub-section provided:

"On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation."

The contention on behalf of the husband in that case was: (i) A suit for divorce *a mensa et thoro* by a guilty wife could not be maintained; (ii) therefore, no order for alimony pendente lite could have been made; (iii) and, consequently, no such order could be made under s. 190 (3), the power of the court being limited to the extent to which the court had power to do so in proceedings for judicial separation. Both LORD MERRIVALE, P., and the Court of Appeal rejected this argument, holding that the effect of the sub-section was not to confine the power of the court to make interim orders to cases in which the facts were such as would warrant the court in making an order in proceedings for judicial separation, but to confer on the court a general power to make interim orders of the same nature and class as could be made in properly instituted proceedings for judicial separation.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3), is now repealed, and replaced by the Matrimonial Causes Act, 1950, s. 19 (1), s. 20 (1) and s. 22 (1). Section 19 (1) provides:

“On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.”

Section 20 (1) provides:

“On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.”

Section 22 (1) makes the same provision with regard to a petition for restitution of conjugal rights. The power of the court to make orders for maintenance where a husband has been guilty of wilful neglect to provide reasonable maintenance for the wife or the infant children of the marriage, as distinct from orders by way of ancillary relief, is derived from the Matrimonial Causes Act, 1950, s. 23 (1) (replacing the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, by which such a power was first given to the High Court). Section 23 (1) is as follows:

“Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.”

This sub-section contains no provision as to interim payments such as is to be found in s. 19 (1), s. 20 (1) and s. 22 (1). The only such provision is that which is to be found in r. 56 (10) to which I have already referred.

In my opinion, therefore, the wife in the present proceedings was not “a competent suitor . . . in a matrimonial cause” within the meaning of that phrase as used by LORD MERRIVALE, P., and LORD HANWORTH, M.R., in *Welton v. Welton* (1), and the district registrar was right in holding that he had no power to make the order asked. This appeal, therefore, fails.

Appeal dismissed.

Solicitors: *Adcock & Williams*, West Bromwich (for the wife); *John A. Behn, Twyford & Reece*, Liverpool (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

MINISTER OF HEALTH *v.* ROYAL MIDLAND COUNTIES HOME FOR INCURABLES, LEAMINGTON SPA, GENERAL COMMITTEE.

[CHANCERY DIVISION (Vaisey, J.), November 24, 25, 26, December 9, 1953.]

National Health Service—Hospital—“Institution for the reception and treatment of persons”—Home for incurables—National Health Service Act, 1946 (c. 81), s. 6 (1), s. 79 (1).

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D
A home for incurables, established in 1874, was a charity regulated by a trust deed dated June 27, 1884, and by rules and bye-laws. The object of the home was to give relief, by admission to the home or by pensions, to persons of good character and limited or reduced income, who were suffering from incurable or chronic diseases, or incapacity owing to injury or wounds. No person suffering from insanity, epilepsy, cancer or pulmonary tuberculosis was eligible as an in-patient, and no person was admitted unless he required medical supervision and nursing. There were three classes of patients: (i) paying patients, and (ii) free patients, both residing in the home, and (iii) pensioners, residing elsewhere. Immediately before the appointed day (July 5, 1948) under the National Health Service Act, 1946, the main purpose of the home was to provide the patients with the care and attention which they required in pleasant surroundings with the necessary nursing under adequate medical supervision. Although palliative medical treatment, treatment for intercurrent complaints, and physiotherapy were provided, such provision was subsidiary to the main purpose of the home and could not be regarded as either independent or concurrent purposes. Patients were admitted on the footing that no curative treatment would be given for their complaints, which in every case had to be regarded as incapable of cure. On the question whether the home was a voluntary hospital which was transferred to the Minister of Health under s. 6 (1) of the Act of 1946,

E
HELD: while the home was an institution for the reception of persons suffering from illness, it did not provide treatment for such persons, and, therefore, it was not a hospital within s. 79 (1) of the Act of 1946; nor would the home in ordinary parlance be described as a hospital; and it followed that the home was not a hospital within s. 6 (1) of the Act, and was unaffected thereby.

F
FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (1), s. 79 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 339, 403.

Cases referred to:

- (1) *Royal Victoria Hospital v. Wheatley*, (1951), unreported.
- (2) *Tendring Union v. Woolwich Union*, [1923] 1 K.B. 121; 92 L.J.K.B. 33; 127 L.T. 551; 86 J.P. 163; 37 Digest 315, 1136.

G
SPECIAL CASE stated by HAROLD CHRISTIE, Esq., Q.C., an arbitrator appointed to determine whether the Royal Midland Counties Home for Incurables at Leamington Spa (hereafter called “the home”) was a hospital within the meaning of the National Health Service Act, 1946, s. 79 (1), and whether the interests in and attaching to the home were transferred to and vested in the Minister of Health on July 5, 1948 (the appointed day under the Act) by virtue of s. 6 (1) of that Act.

H
The matter was referred to arbitration in accordance with the provisions of s. 6 (5) of the Act of 1946 and of the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888). The arbitrator made his award in the form of a Special Case.

The arbitrator found as a fact that immediately before the appointed day under the Act (July 5, 1948) the main purpose of the home was to provide the patients with the care and attention they required in pleasant surroundings

with the necessary nursing under adequate medical supervision. He found that, although the provision of palliative medical treatment, treatment for inter-current complaints, and physiotherapy were objects of the home, they were subsidiary to its main purpose and could not be regarded as either independent or concurrent purposes.

In dealing with the Scottish case of *Royal Victoria Hospital v. Wheatley* (1), the arbitrator said:

"It was held that under the provisions of the National Health Service (Scotland) Act, 1947, which are indistinguishable from the English Act, the Royal Victoria Hospital was a voluntary hospital, the premises of which vested in the Secretary of State. The Royal Victoria Hospital was established by royal charter for 'the reception and treatment of indigent and other persons in Dundee . . . who are suffering from incurable disease and are thereby rendered incapable of performing ordinary duties . . .' Insanity was excluded, but not cancer or tuberculosis. The evidence showed that a large proportion of the patients were suffering from inoperable cancer and that only patients with a short expectation of life, not more than a year, were admitted. The Lord President [LORD COOPER] referred expressly to such afflictions as advanced inoperable cancer, and thought that it would be a startling flaw in the scheme of the [Scottish] Act if Parliament had omitted to make provision for so obvious and clamant a need as the care of victims of incurable disease during the closing stages of their illness. The pursuers admitted that on the definition section alone they could not contend that the [Scottish] Act did not apply and the Lord President continued: 'This concession could not be withheld. Reading only the relevant parts of these provisions there is transferred to the Secretary of State every "institution for the reception and treatment of persons suffering from . . . any disability requiring : . . nursing"'. On the terms of the pursuers' charter and in view of the evidence, it is too plain for argument that the Royal Victoria Hospital is such an institution.' . . . The Lord President did however say that 'a hospital . . . devoted to alleviating the suffering and relieving the symptoms of the incurably ill, is incapable of being described as having any other main purpose than "therapeutic", as that expression is used in s. 9 [of the Scottish Act].' If I thought the two cases were really comparable I should feel that I ought to give great weight to the Lord President's observations, but I think they were really directed to an institution which was radically different from the home, and are not applicable to the situation with which I have to deal. Even if the Scottish case were binding on the English courts and therefore on me, I should regard it as distinguishable."

Cross, Q.C., and Denys B. Buckley for the Minister of Health.

Russell, Q.C., and H. E. Francis for the general committee of the home.

Cur. adv. vult.

Dec. 9. VAISEY, J., read the following judgment. This case raises a question which is easier to state than to solve, namely, whether the Royal Midland Counties Home for Incurables at Leamington Spa (which I will call "the home") is a hospital within the meaning of the National Health Service Act, 1946 (which I will call "the Act"), and was, as such, transferred to and vested in the Minister of Health as a nationalised institution on July 5, 1948, by virtue of s. 6 (1) of the Act. That question was, in the first instance, referred to arbitration in accordance with the provisions [s. 6 (5)] of the Act and certain regulations [the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888)] made thereunder, and was answered in the negative by the arbitrator in his award, stated in the form of a Special Case and bearing date July 29, 1953. This is, in effect, an appeal from his determination.

The history of the home, its constitution and present and past activities, are set out with great particularity in the award and the documents incorporated therein. For the purposes of this judgment I need only, for the moment, say that the home was established in 1874, that it is a charity, regulated by a trust deed dated June 27, 1884, and that my decision must largely depend on the rules which were in force on July 5, 1948, that being the appointed day under the Act. From these rules it appears that the object of the institution was to give relief, by admission to the home and the grant of pensions, to persons of good character and of limited or reduced income who were suffering from incurable or chronic diseases or incapacity through injury or wounds, but so that no person should be eligible for admission if suffering from insanity, epilepsy, cancer, or pulmonary tuberculosis, and that no case was to be admitted unless it required medical supervision and nursing. The omission of cancer is, I think, important.

The home was controlled and administered by a general committee, acting largely through a sub-committee called "the house committee", and it decided, with the assistance of reports from the visiting physician, Dr. Clayton, all questions relating to the admission or discharge of patients. The medical staff of the home consisted of the said visiting physician and a visiting surgeon, Mr. Dingley, both local practitioners, who visited the home on alternate days and were liable to be called in at any time in case of emergency. There was no resident medical officer.

There were three classes of patients—(i) paying patients, (ii) free patients—both of these classes residing on the premises—and (iii) pensioners, residing elsewhere. The average number of resident patients during 1947 was 117, of which about one-third were "free" and the remainder "paying", but the latter in fact paid only a fraction of the actual cost of the accommodation. Pensions were limited to £20 per annum, and the number of pensioners on July 5, 1948, was thirty-eight. Both free patients and pensioners were elected by votes of subscribers; paying patients, if accepted, were admitted in rotation. There was always a waiting list of all three classes. Each patient, on applying for admission, had to supply a medical certificate that he was suffering from a specified disease, was regarded as incurable, and was otherwise eligible under the rules. His application was then passed on to one of the visiting medical officers, and, if suitable, he was accepted by the committee to wait for a vacancy.

In 1948 there were forty-eight full-time and twenty-nine part-time members of the nursing staff, which appears to be a slightly lower proportion of nurses to patients than in a general hospital, and a smaller number of these were State registered nurses than in a general hospital. The senior members of the nursing staff appear to have been older than is usual in a general hospital, and, to quote the words of the arbitrator, the nursing required was "more routine and of a slower tempo".

It appears that the policy of the committee was to admit those who were likely to settle down for life and make the premises their permanent home, and only those applicants were accepted whose disease had reached such a stage that no real improvement was to be expected. On the other hand, patients who were likely to die very shortly were not accepted. The average length of time between the admission and the death of a patient would seem to have been about ten years, for the diseases from which the patients suffered were chronic diseases, and not those likely to be the immediate cause of death, which usually came from some other intervening cause or fortuitous disease such as pneumonia, the average death-rate being shown by the records to have been only ten per cent. per annum. The diseases from which the patients suffered were, in the main, either crippling diseases of the joints, such as osteoarthritis, or diseases of the nervous system, such as Parkinson's disease. Of the 112 patients actually in the home on July 5, 1948, eighty were women and thirty-two men, and of these eighteen were bedridden, most of the others getting about in wheel-chairs or on crutches or

with sticks, and no fewer than half of the patients regularly went away on holidays for periods up to a month.

A The secretary of the home, when asked "what sort of treatment" prospective patients would be likely to get, deposed that he was accustomed to say that "no treatment whatsoever was to be expected there", and this is important in view of the definition of a "hospital" in the Act as hereinafter mentioned. No doubt a great deal of palliative treatment was given at the home, and what the secretary was referring to, or thinking of, as not given there, was curative treatment. Treatment for the symptoms of the disease and to relieve pain was, undoubtedly, available, but the arbitrator held, and, I think, with justification, that patients were admitted on the footing that, while they would get the care and attention and nursing they required, they would not get any specific treatment for their complaint, which in every case had to be regarded as one not susceptible to, or capable of, cure. No doubt the medical officers did from time to time prescribe drugs such as sedatives, sleeping-tablets, aperients, and so forth, and notably hyoscine, which was used to reduce the tremors characteristic of Parkinson's disease. Cases of influenza or pneumonia would, undoubtedly, be treated by ordinary medical methods, but such complaints were not the relevant complaints, i.e., were not those in respect of which the patients were admitted, but incidental or intercurrent complaints. Considerable use was made of physiotherapy, and many of the patients received massage or radiant-heat treatment, or were given walking exercises. Such treatment was, undoubtedly, palliative and symptomatic rather than curative in character.

D The arbitrator was satisfied, and I also am convinced, that the atmosphere of the home was much less formal and more homelike than that of any hospital. The patients were given a very wide measure of freedom; the rules as to visiting hours were not enforced and, indeed, visitors were encouraged to come at any reasonable time. I think that at and immediately before July 5, 1948, the main purpose of the home was to provide the inmates or residents there with whatever care and attention they required in pleasant surroundings with necessary nursing and adequate medical supervision, and with palliative medical treatment, treatment for intercurrent complaints, and physiotherapy, as subsidiary to the main purpose of the home and not properly to be regarded as independent or concurrent purposes.

F In my judgment, this problem may be summarised thus: Was the institution in truth what it is designated to be, namely, a home, as contradistinguished from a hospital, or was it in truth a hospital, although styled a home? The matter does not, of course, depend on mere nomenclature, but on the facts of the case, and on the proper method of applying to those facts the provisions of the Act, and, in particular, the definitions contained in it. Those definitions, however, are, in my view, rather difficult to interpret, but they must have been framed with considerable care, because there were already some statutory definitions of the word "hospital" which might have been, but were not, adopted for the purposes of the Act. For example, the Road Traffic Act, 1930, s. 36 (2), provides that the expression "hospital" means "an institution . . . which provides medical or surgical treatment for in-patients"; in the Public Health Act, 1936, s. 343 (1), "hospital" is said to include "any premises for the reception of the sick"; while the Public Health (London) Act, 1936, s. 304 (1), defines "hospital" as meaning "any premises . . . for the reception of invalids . . ." If any of these comparatively simple definitions had been used in the Act the position might have been clearer than, perhaps, it is.

I will now turn to the Act and consider the definitions which are relevant, viz., the definitions of "hospital" and "illness". Section 79 (1) of the Act provides—omitting irrelevant words—that "'hospital' means"—not merely includes—

"any institution for the reception and treatment of persons suffering from illness or mental defectiveness . . .",

and " ' Illness ' includes "—not means—

"mental illness and any injury or disability requiring medical or dental treatment or nursing."

It is obvious that the home is an institution for the reception of persons suffering from illness, but can it be said that it is also an institution for the "treatment" of such persons? Again, does the definition of "illness" (which, unless the context otherwise requires, introduces nursing into the definition) enlarge the meaning of the word "treatment" in the definition of "hospital" so as to include mere nursing? While I think that the question might almost be reduced to the simple one of whether this is a case of a "home" in contradistinction to a "hospital", it may well happen that an institution described, not as a "hospital" but as a "home", is in fact a hospital, just as an institution described as a "hospital" may not be a hospital in any sense, statutory or other. I need only quote the well-known example of Christ's Hospital. I think that a resident in this home would not, in ordinary parlance, be described as being "in a hospital". On the other hand, the inmate of the Dundee hospital in *Royal Victoria Hospital v. Wheatley* (1) referred to by the arbitrator and hereinafter mentioned would most certainly be described as "in hospital", and would not be described as being "in a home".

The present case is, I think, rather a border-line case, but inasmuch as the Act is, in a sense, confiscatory in its operation, interfering with vested interests and rights, I think that I ought not to dispossess the general committee in favour of the Minister of Health unless the latter can convince me that the home necessarily comes within the definition. "Treatment" is probably the key word, and it is to be observed that the definition does not refer to care or nursing of or attention to sick persons but only to their treatment, and treatment certainly, to my mind, suggests something more than mere palliation and implies a process directed to the achievement of a complete (or at least a partial) cure. I think that the secretary was right when he said that the residents in the home could not expect treatment, in either a technical or a colloquial sense of the word. They came to live in comfort rather than to be cured, or even to secure improvement in their health.

Royal Victoria Hospital v. Wheatley (1) is superficially very like the present case. It is unreported, but transcripts of the opinions or speeches of LORD BLADES and the Lord President (LORD COOPER) are incorporated in the award, and I have perused them with attention. The difference between the facts there and here may be summarised by saying that while the home at Leamington is essentially a place in which its inmates come to live, the hospital at Dundee is one where they come to die. The home deals with cases in which there is a comparatively long expectation of life; the hospital very largely with cases in which death is more or less imminent, and particularly cases of cancer. I have already taken notice of the fact that the Leamington institution is called a home, while the Dundee institution is called a hospital, a fact which, while far from being conclusive, is at least significant. I need not refer to any of the other authorities mentioned in the award; none of them seems to me to govern this case, or, indeed, to afford me any real assistance in deciding it, except, perhaps, *Tendring Union v. Woolwich Union* (2), in which the distinction between "home" and "hospital" was drawn in a manner which appeals to me as quite appropriate.

I may be allowed to say that the arbitrator's award sets out the material facts and relevant circumstances of the case in what seems to me to be a most convenient form, and his conclusions are, in my judgment, well founded in every respect.

I hold and will declare that the home is not a hospital within the meaning of the Act and is unaffected by the provisions of the Act, and that the interests in or attaching to the premises held by trustees for the home immediately before July 5, 1948, were neither transferred to nor vested in the Minister of Health

on that day. I will also direct the Minister to pay to the respondents, the committee of the home, the costs of the arbitration and of this application, to be taxed as between party and party, and also to bear and pay the costs of the award, including the costs of a shorthand note of the proceedings before the arbitrator and of one transcript. The costs of the application are, in a like manner, to include the costs of a shorthand note of the present judgment and of one transcript.

- A I understand that the home has been taken over and dealt with on the assumption that it is, or was, a hospital, and that steps will be necessary for restoring the respondent committee to possession and control of the premises. The parties can, I am sure, be trusted to act with consideration and in a sensible manner. I will give them liberty to apply in case any difficulty arises. If there is an appeal from this order, matters should be left as they are until a final decision has been reached.

Order accordingly.

Solicitors: *Solicitor, Ministry of Health* (for the Minister of Health); *Farrer & Co.*, agents for *Field & Sons*, Leamington Spa (for the General Committee of the Home).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

C

NEW SOUTH WALES COMMISSIONER OF STAMP DUTIES v. PEARSE AND OTHERS. PEARSE AND OTHERS v. NEW SOUTH WALES COMMISSIONER OF STAMP DUTIES.

- D [PRIVY COUNCIL (Viscount Simon, Lord Reid, Lord Radcliffe, Lord Asquith of Bishopstone and Lord Cohen), October 22, 26, 27, 30, November 2, December 9, 1953.]

Privy Council—New South Wales—Estate duty—Company—Shares—Valuation—Basis—Jurisdiction of court to substitute its own discretion for that of commissioner as to mode of valuation—New South Wales Stamp Duties Act, 1920-1940, s. 124 (4), s. 127 (1) (c).

E

Privy Council—New South Wales—Legacy duty—Legal costs incurred by executor in connection with will—Rate of duty—New South Wales Stamp Duties Act, 1920-1940, s. 101b, sched. VII.

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Part of the estate of P., who died in 1946, consisted of shares in a company which were not, because of its articles, listed on a stock exchange. The respondents, his executors, included these shares in the inventory of assets of the estate for the purposes of death duty. They valued them on the basis of the average of the net profits of the company for the previous five years, which was capitalised at seven per cent. The appellant refused to accept this figure, and, in exercise of his discretion under the New South Wales Stamp Duties Act, 1920-1940, s. 127 (1) (c), where shares were not listed on a stock exchange, he adopted a sum for valuation based on the amount which, in his opinion, the holders of the shares would have received if the company had been voluntarily wound-up. The respondents appealed under s. 124 (1) of the Act by way of Case Stated against the appellant's assessment. The Supreme Court of New South Wales held that it had power under s. 124 to substitute its own discretion for that of the appellant as to the mode of valuation to be adopted, and this decision was confirmed by the High Court of Australia.

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HELD: reading the Act as a whole, its intention was to leave the court with unfettered power to review the conclusion reached by the appellant, and, in particular, s. 124 contained elaborate provisions for ascertaining the facts necessary to enable the questions submitted to the court to be determined; there was no right of appeal to a board of review or board of

appeal under the Act, and so, if the court had no right of review, the appellant's decision would be final although he had not heard any evidence or conducted anything in the nature of a judicial inquiry; and, therefore, the Supreme Court had jurisdiction to substitute its own discretion for that of the appellant as to the mode of valuation to be adopted.

By the first column of sched. VII to the New South Wales Stamp Duties Act, 1920-1940, which specifies rates of death duty payable on the final balance of estates of deceased persons, duty is payable "on so much of the final balance of the estate consists of—(a) property which passes under the will . . . to the widow or lineal issue of the deceased", and by the fourth column "on so much of the final balance of the estate as consists of property not otherwise provided for in . . . this schedule". By cl. 13 of the will of P., who died in 1946, the respondent, L., a solicitor and a trustee of the will, was to be entitled to charge, retain and be paid all usual professional or other charges incurred by him in relation to the will against the estate. The appellant assessed the respondent's professional charges under the fourth column of sched. VII to the Act.

HELD: clause 13 of the will conferred on the respondent a gift and enabled him to take out of the testator's assets something which the law would not otherwise allow, and the amount to which the respondent became entitled under cl. 13 was not property passing under the will to the widow or lineal issue of the deceased, but was properly assessed under the fourth column of sched. VII.

Cases referred to:

- (1) *Comr. of Stamp Duties for Queensland v. Beak*, (1931), 46 C.L.R. 585; 5 A.L.J. 275. D
- (2) *Pioneer Laundry & Dry Cleaners, Ltd. v. Minister of National Revenue*, [1939] 4 All E.R. 254; [1940] A.C. 127; 169 L.J.P.C. 1; 2nd Digest Supp.
- (3) *Minister of National Revenue v. Wright's Canadian Ropes, Ltd.*, [1947] A.C. 109; 2nd Digest Supp.
- (4) *Fraser (D. R.) & Co., Ltd. v. Minister of National Revenue*, [1949] A.C. 24; 2nd Digest Supp. E
- (5) *MacCormick v. Federal Comr. of Taxation*, (1945), 71 C.L.R. 283; 19 A.L.J. 78; [1945] A.L.R. 237.
- (6) *Denver Chemical Manufacturing Co. v. Comr. of Taxation (New South Wales)*, (1949), 79 C.L.R. 296; 23 A.L.J. 327; [1949] A.L.R. 759, 1004.
- (7) *Re Thorley*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 21 Digest 52. 345. F
- (8) *Re Brown*, [1918] W.N. 118.
- (9) *Re Pooley*, (1888), 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73; 42 Digest 122, 1178.

APPEAL by the Commissioner of Stamp Duties of New South Wales and **CROSS-APPEAL** by executors of a will from a judgment of the High Court of Australia, dated July 27, 1951, affirming a judgment of the Supreme Court of New South Wales, dated Oct. 30, 1950, on a Case Stated by the Commissioner of Stamp Duties of New South Wales, dated Aug. 2, 1950. The facts appear in the judgment. G

G. Wallace, Q.C. (of the Australian Bar), *Sir Frank Soskice, Q.C.*, and *E. B. Stamp* for the appellant. H

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *R. J. Parker* for the respondents.

Dec. 9. **LORD COHEN** : The appeal and cross-appeal in this matter raise two questions in relation to the estate of Mr. Henry Bowen Aylmer Pearse

(hereinafter called the testator) who died on Feb. 19, 1946. The question raised by the appeal is as to the proper basis of valuation for the purposes of the death duty payable under s. 101 of the New South Wales Stamp Duties Act, 1920-1940 (hereinafter called the Act), of certain shares in Plashett Pastoral Co., Ltd. (hereinafter referred to as the company). The question raised by the cross-appeal is whether the commissioners are entitled to levy the higher rate of death duty specified in the fourth column of sched. VII to the Act on the whole or any part of the sum of £250, being the agreed amount of the legal costs which the respondent, Langley, a solicitor and a trustee of the will of the testator, is entitled to charge against the testator's estate under the provisions of cl. 13 of his will.

It will be convenient in the first place to state the relevant provisions of the Act. Section 101D provides for the payment of a duty (therein called death duty) at the rate mentioned in sched. VII to the Act on the final balance of the estate of every person dying after the commencement of the Stamp Duties (Amendment) Act, 1939. Schedule VII specifies the rates of duty payable. They vary according to (a) the amount of the estate, and (b) the degree of relationship to the deceased of the persons to whom the property passes under his will or on intestacy. The latter variation is indicated in the headings to the four columns into which the schedule is divided. Their Lordships are only concerned with the first and fourth columns. So far as material, the heading to the first column reads:

“on so much of the final balance of the estate as consists of:—(a) property which passes under the will . . . to the widow or lineal issue of the deceased.”

The heading to the fourth column reads as follows:

“on so much of the final balance of the estate as consists of property not otherwise provided for in the first, second or third columns of this schedule.”

Section 105 provides, by sub-s. (1), that the final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate after making the authorised allowances in respect of his debts. Sub-section (2) provides that, where not expressly otherwise provided, the value of the property included in his dutiable estate shall be estimated at the date of his death. Section 117 imposes on the legal personal representatives certain obligations as to supplying information to the Commissioner of Stamp Duties of the State of New South Wales to enable him to assess the duty payable. Section 124 which is of great importance in determining the question raised by the appeal deals with the right of the legal personal representative to challenge the assessment made by the commissioner and is, so far as material, in the following terms:

“(1) . . . any administrator liable to the payment of death duty, who is dissatisfied with the assessment of the commissioner may, within thirty days after . . . notice of the assessment has been given to the administrator . . . and on payment of duty in conformity with the assessment, and of the sum of twenty pounds as security for costs, deliver to the commissioner a notice in writing requiring him to state a Case for the opinion of the Supreme Court. (2) The commissioner shall thereupon state and sign a Case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided, and shall deliver the Case so signed to the person by whom the same is required (hereinafter referred to as the appellant). (3) The appellant shall within seven days after receiving the Case cause the same to be set down for hearing before the next sittings of the full court at which the same can be heard. (4) On the hearing of the Case the court shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs. (5) If it is decided by the court that the assessment of the commissioner is erroneous, any excess of duty paid in conformity with such erroneous assessment, together with any fine paid in consequence thereof,

and the sum paid as security for costs shall be ordered by the court to be repaid to the appellant. (6) If it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the Case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the Case. Any such inquiry may be made before a judge of the court or the master in equity, and any such issue may be tried by any such judge or a judge of any district court sitting either with or without a jury as the court may direct. (7) On the hearing of the Case the court shall be at liberty to draw from the facts and documents stated in the Case any inference whether of fact or law which might have been drawn therefrom if proved at a trial."

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Section 125 empowers the commissioner to ascertain the value of any property by such means as he may think fit, but sub-s. (2) provides that his assessment shall be subject to appeal under s. 124 and his powers must also, as regards shares, be read as subject to s. 127, sub-s. (1) of which is in the following terms:

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"(1) (a) For the purposes of this Act, the valuation of shares in any company, whether incorporated in or out of New South Wales, shall be made upon the basis that the memorandum and articles of association or rules of the company satisfy the requirements prescribed by the committee or governing authority of the stock exchange at the place where the share register in which the shares being valued are registered is, to enable that company to be placed on the current official list of such stock exchange at the relevant time. (b) No provision in the memorandum or articles of association or rules of any company whereby or whereunder the value of the shares of a deceased or other member is to be determined shall be applicable in determining the value of the shares for the purposes of this Act. (c) Notwithstanding anything contained in the foregoing provisions of this sub-section the commissioner may in his discretion adopt as the value of a share of any class in any company the shares of which of that class are not listed on a stock exchange such sum as in the opinion of the commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound-up on that date upon which the value of the share is to be ascertained for the purposes of this Act."

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The company is admittedly a company the shares in which were, at the date of the testator's death, not listed on a stock exchange, and its articles of association contained provisions which would have made it impossible for it to become listed. It was a family company in the sense that, with the exception of one ordinary share held by the respondent, Langley, all the shares were held by the testator and his brother and sisters or by their respective husbands and children, but the testator did not hold a majority of the shares, and neither he nor his executors could have forced a winding-up against the wishes of the other shareholders. The testator had the right to be managing director and chairman for life, and had certain powers of appointing directors. The business of the company appears to have been the running of a station known as Plashett, and its assets consisted almost entirely of land and improvements thereon and livestock.

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The ordinary shares in the company held by the testator were included by the executors in the inventory of assets which was filed pursuant to s. 117 at the value of £2 6s. 6d. per share, this figure being supported by a valuation supplied by a firm of chartered accountants, Messrs. Robertson, Crane & Gibbons. This was based on the average of the net profits for the five years ended June 30, 1945, which, after deducting the preference dividend, left an average of £1,171 9s. This the accountants capitalised at seven per cent. in order to arrive at the value

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of the shares. The commissioner refused to accept this figure and, in exercise of his powers under s. 127 (1) (c), adopted the sum of £7 16s. 10d. per share as being the sum which, in the opinion of the commissioner, the holders of the shares would have received in a winding-up. He issued his notice of assessment on July 8, 1948.

The executors, being dissatisfied with the assessment, gave notice in writing on Aug. 6, 1948, requiring him to state a Case for the opinion of the Supreme Court of New South Wales. He did so on Aug. 2, 1950, and included seven questions for the opinion of the court. In view of the course which the proceedings subsequently took it is sufficient to state the first and fifth questions:

"(1) Whether in valuing the 2,986 'B' ordinary shares in the company the commissioner was justified in exercising the discretion conferred upon him by s. 127 (1) (c) of the Stamp Duties Act, 1920-1940, to value such shares upon a liquidation basis. . . . (5) Whether by reason of cl. 13 of the testator's will duty at the rate set out in the fourth column of sched. VII to the Act should be assessed on: (a) The full amount of £250. (b) Such amount less office overhead expenses. (c) The executor-solicitor's share of such full amount. (d) The executor-solicitor's share of the full amount less his proportion of overhead expenses. Or (e) No part thereof."

As the judges of the High Court point out, the exact meaning of the first question is not clear, but it is apparent from the judgments delivered in the Supreme Court that the real contest between the parties was whether the court had jurisdiction to substitute its own discretion for that of the commissioner as to the mode of valuation to be adopted. The Supreme Court held that it had that jurisdiction and the High Court was unanimous in upholding this decision. On the question raised by the cross-appeal, the Supreme Court held that duty at the higher rate was leviable on the whole sum of £250 and this decision also was upheld by the High Court, DIXON, C.J., and FULLAGAR, J., dissenting. Special leave to appeal to this Board against the decision of the High Court on the first point was granted on Sept. 4, 1952, on the terms that the costs in Australia remain as directed in Australia and that the respondents' costs as between solicitor and client both of the petition for such leave and of the appeal to Her Majesty in Council should be paid by the petitioner in any event. At that time no application was made by the respondents for leave to appeal against the judgment on the fifth question which held duty to be payable on the said sum of £250, but a petition for such leave was presented shortly before the main appeal was due to be heard. It was not opposed by the appellants and the Board resolved humbly to advise Her Majesty that leave should be granted. In the very exceptional circumstances of the case, to enable appeal and cross-appeal to be heard together, the Board agreed to dispense with the lodging of further Cases by the parties. This had the result that their Lordships did not have the advantage of seeing on this point the considered statement in writing of the reasons of the parties normally to be found in their respective Cases.

The Supreme Court of New South Wales regarded the point raised by the main appeal as concluded by the observations of the High Court in *Comr. of Stamp Duties for Queensland v. Beak* (1), where similar provisions in a Queensland Act [the Queensland Succession and Probate Duties Acts, 1892-1920] were under consideration, and the following passage is to be found in the unanimous judgment of the court (46 C.L.R. 597):

"The contention of the commissioner is that the appeal given by s. 50 [of the Queensland Act] does not extend to enabling the court to review the value adopted for shares by the commissioner in the exercise of the discretion conferred by the last paragraph in s. 47 . . . Clear words would be needed to withdraw from the general power of review given by s. 50 a particular process in making up the assessment essential to the result.

A reference to discretion and opinion is not enough for the purpose. The function of valuation is performed by means of discretion and opinion, and it is because as between the Crown and the subject a judgment of an officer of the revenue should not be conclusive that an appeal is given."

The High Court regarded the matter as open though they quoted the case above cited as authority for the proposition that clear words would be needed to withdraw from the general power of review given by s. 124 a particular process in making up the assessment essential to the result. They had, however, no hesitation in coming to the same conclusion as the Supreme Court as to the effect of s. 127 (1) (c). Having reached the conclusion that the whole question of valuation was at large, both courts decided that the mode prescribed by s. 127 (1) (c) was not the proper mode to apply. Their Lordships pause here to observe that they do not read the decisions of the court as excluding all reference to the value of the assets of the company in arriving at the proper valuation of the shares, but merely as deciding that it was wrong to assess the value of the shares under s. 127 (1) (c) by reference only to what the holder thereof might have received if the company went into liquidation on the date of the death of the testator.

Counsel for the commissioner began his argument by disputing the finding of the Supreme Court that the case was concluded against his client by the decision of the High Court in *Beak's* case (1). He pointed out that in that case the court was considering not the propriety of the exercise by the commissioner of his discretionary power to value shares in a company on the basis that the company went into winding-up on the death of a testator, but the correctness of the valuation, no attack being made on the basis selected. Their Lordships agree with this criticism and will, therefore, treat the observations of the High Court in *Beak's* case (1), so far as they relate to discretion only, as obiter.

The main submission of counsel for the commissioner was that the decision of the High Court was contrary (a) to three decisions of this Board on Canadian statutes and (b) to two decisions of the High Court of Australia. Before considering these decisions, their Lordships would observe that no assistance can be derived from a consideration of those provisions of English law which provide for an appeal to the courts by way of Case Stated, for, whether the appeal be from the Special or General Commissioners of Income Tax under the Income Tax Acts, from an arbitrator under the Arbitration Act, or from magistrates under the Summary Jurisdiction Acts, the appeal is from persons exercising judicial functions who are required to find the facts and the appeal is confined to questions of law. The decisions of this Board on which counsel for the commissioner relied were *Pioneer Laundry & Dry Cleaners, Ltd. v. Minister of National Revenue* (2), *Minister of National Revenue v. Wright's Canadian Ropes, Ltd.* (3), and *D. R. Fraser & Co., Ltd. v. Minister of National Revenue* (4).

In the *Pioneer Laundry* case (2), the court was asked to review the decision of the Minister under a section of the Canadian Income War Tax Act, 1927 (R.S.C., c. 97, s. 5), which provided that income should, for the purposes of that Act, be subject to a deduction of such amount as the Minister, in his discretion, might allow for depreciation. The Supreme Court of Canada had held that there was no power in the court to review the decision of the Minister. This Board dissented from this view, but, to quote the language of LORD THANKERTON who delivered the judgment of the Board ([1939] 4 All E.R. 259):

"... the court would not interfere with the decision unless . . . 'it was manifestly against sound and fundamental principles'."

In the *Wright's Canadian Ropes* case (3), the question at issue arose under s. 6 (2) of the same Act, entitling the Minister to

"disallow any expense which he in his discretion might determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer."

Their Lordships in that case came to the conclusion that the reference to "discretion" meant no more than that the Minister was made the judge of what is reasonable or normal, but expressed their agreement with the views expressed by the Board in the *Pioneer Laundry* case (2) as to the proper approach to be made by the court when reviewing the decision of the Minister.

In *Fraser's* case (4), the question arose under s. 5 (a) of the Income War Tax Act, 1927, as amended by a statute of 1940, and the principal question at issue was whether the Minister was authorised under that section to refuse to make any allowance for exhaustion of timber limits, or only authorised to determine the amount of the allowance. The Board, affirming the judgment of the Supreme Court of Canada, decided that the Minister could refuse to make any allowance. Their Lordships are unable to find in the judgment in that case any relevant statement of general principle which assists them in the case now before the Board.

The decisions of the High Court of Australia relied on by counsel for the commissioner were *MacCormick v. Federal Comr. of Taxation* (5), and *Denver Chemical Manufacturing Co. v. Comr. of Taxation (New South Wales)* (6).

The first of these cases arose under the Gift Duty Assessment Act, 1941-1942, s. 14 (i) (ii) of which provided that gift duty should not be payable in respect of any gift concerning which the commissioner was satisfied that certain conditions were fulfilled. Counsel relied on some observations of LATHAM, C.J., where he said (71 C.L.R. 299):

"This court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the commissioner of taxation, or in accordance with an opinion formed by him, and that upon an appeal the court cannot substitute the discretion or opinion of the court for that of the commissioner. But in these cases the court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the commissioner for re-consideration in accordance with law."

DIXON, J., pointed out (*ibid.*, 307) that in such cases the statute conferring the discretion usually provides for re-consideration on the merits by a board of review.

In *Denver's* case (6) the question arose under the Income Tax (Management) Acts, 1912, 1928, 1936 and 1941, of New South Wales. These statutes conferred on the taxpayer a right of appeal to a "board of appeal", and if he exercised it the Act enabled that board to substitute its decision for that of the commissioner. Their Lordships deciding that case held that the court could only interfere with the decision of the board of appeal if that board committed an error in law.

Their Lordships have carefully considered the judgments in the cases cited and the relevant provisions of the statutes there considered. These provisions seem to their Lordships so different from the provisions of the Stamp Duties Act (N.S.W.) that their Lordships are unable to regard the decisions in the cases cited as affording any assistance in the case now before the Board. They agree with the High Court that the decision in the present case must turn on the proper construction of the relevant sections in the Stamp Duties Acts. Their Lordships find themselves in complete agreement with the reasoning of the High Court on that problem as expressed in the following extracts from the judgment prepared by WILLIAMS, J.:

"There can be no question that if the statute intends that a discretion shall be exercised by a particular person and not by the court, the jurisdiction of the court is confined to supervising its exercise so as to ensure

that it is exercised according to law. The statute in such a case makes the particular person the sole judge of the existence or non-existence of the fact or other matter upon which the right or liability of the subject depends and the court is not at liberty to substitute its own opinion for his. If s. 127 (1) (c) of the Stamp Duties Act means that the commissioner is to be the sole judge of the appropriate method to adopt in valuing shares in a company not listed on a stock exchange, then the court in exercising its powers under s. 124 cannot interfere unless it can be shown that the commissioner has acted in contravention of some principle of law. For, to be effective, the discretion must be exercised, in the words of LORD MACMILLAN delivering the judgment of the Privy Council in *D. R. Fraser & Co., Ltd. v. Minister of National Revenue* (4) ([1949] A.C. 36) 'bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally'. It was not contended for the commissioner that the court was bound to accept the amount of the valuation arrived at on the basis of para. (c). It was admitted that the notional sums attributed to the shares by the commissioner upon the hypothetical winding-up were fully examinable. Its hands were tied only to the extent that it could be directed by the commissioner to adopt the mode of valuation prescribed by the paragraph. This attitude of counsel for the commissioner seems somewhat inconsistent. The paragraph would seem to protect the opinion of the commissioner as to the sums the shares would realise on a liquidation to the same extent as his discretion to adopt this mode of valuation. There is no half-way house. Either each and every activity of the commissioner under the paragraph is subject to complete judicial review under s. 124, or each and every activity can only be reviewed to the same limited extent. When the wide powers conferred upon the court by s. 124 are considered it is apparent, we think, that it was intended to make the decision of the commissioner to adopt the paragraph subject to complete judicial review. Section 124 contains elaborate provisions for ascertaining all the facts necessary to enable the questions submitted to be determined, and sub-s. (4) provides that on the hearing of the case the court shall determine the question submitted and shall assess the duty chargeable and also decide the question of costs. Duty is payable upon the final balance of the estate, and s. 105 provides that the final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate after making such allowances as are thereafter authorised in respect of the debts of the deceased. It also provides that, save as in this Act expressly provided, the value of the property included in his dutiable estate shall be estimated as at the date of the death of the deceased. If the duty is imposed upon the court of itself assessing the duty chargeable, it seems to us necessarily to follow that the court must itself value the property included in the dutiable estate. That does not mean of course that the court must value every item. It is only concerned with the items of value which are in dispute."

Counsel for the commissioner submitted that the High Court had ignored the fact that the only appeal allowed was by way of Case Stated, and suggested that this implied a limitation on the powers of the court in dealing with the questions submitted, but their Lordships would observe that there appears to be no limit on the number or scope of the questions of law or fact which the dissatisfied legal personal representative can require to be raised. Counsel also argued that the object of the section was to prevent evasion or undue limitation of the duty, and that this object would be defeated if the commissioner's decision to proceed under s. 127 (1) (c) was open to review. Their Lordships are unable to accept this contention.

Prior to 1924, shares in companies of a class not listed on a stock exchange were valued by analogy with shares in partnerships on the basis of the interest

of the shareholders in the assets of the company, but in 1924 this provision was altered, and a provision substantially in the form of sub-s. (1) (a) was introduced. In 1931 the present paras. (a) and (b) became law. WILLIAMS, J., who, their Lordships were informed, has had great experience of this class of case, states in his judgment that, notwithstanding the alterations of the law in 1924, shares of companies not listed on the stock exchange had, in rare instances, been valued on the basis prescribed in para. (c), and he suggests that para. (c) was introduced

- A to preclude the argument that this course was not permissible even in those cases where it was best calculated to arrive at a fair value of the shares. This explanation seems to their Lordships reasonable, but, be that as it may, their Lordships agree with WILLIAMS, J., that para. (c) contains no sufficient indication compelling the court to attribute to the legislature the capricious intention that the court should remain under the duty of deciding a dispute between the subjects
- B and the commissioner as to the value of the shares, but should be handcuffed to the particular mode chosen by the commissioner. Before their Lordships counsel for the commissioner somewhat faintly sought to resile from the admission made in the High Court, and to contend that the court had only limited powers even to review the opinion of the commissioner as to value. Their Lordships are unable to accept this argument since they agree with the High Court that, as
- C s. 124 confers such wide general powers of review both of fact and of law and imposes on the court the definite obligation to assess the duty chargeable, it is impossible to extract from s. 127 (1) (c) an exclusion from these powers of the right to question both the mode of valuation and the value adopted by the commissioner.

- Reading the provisions of the statute as a whole their Lordships are forced to
- D the conclusion that the intention of the statute was to leave the court with unfettered power of review of the conclusion reached by the commissioner. Apart from the considerations referred to by WILLIAMS, J., there are one or two other matters to which their Lordships may usefully refer. Thus, the statute gives no right of appeal to a board of review or board of appeal so that, if the appellant's argument was well founded, it would mean that, although the
- E commissioner had not heard any evidence or conducted anything in the nature of a judicial inquiry, his decision would be final. Moreover, if the court directed inquiries as to fact under sub-s. (6) and those inquiries disclosed facts which made it obvious that the adoption of the basis of valuation provided for by s. 127 (1) (c) would not lead to the ascertainment of the real value of the share, it would, none the less, if the argument of the appellant were to prevail, be powerless to rectify
- F the matter.

- The cross-appeal turns on the proper meaning to be given to sched. VII to the Act. It is obvious that the provisions of this schedule, which brings into the law as to death duty considerations which, in England, were relevant as regards legacy duty, but have never been relevant as to estate duty, may give rise to difficulties, since the amount on which death duty is chargeable may
- G include sums such as the amount of testamentary expenses to which no beneficiary will ever become entitled. Their Lordships will, however, confine themselves to the exact question which they have now to determine, viz., whether the amount which the parties have agreed as being the amount which the respondent, Langley, has received, or will receive, under cl. 13 of the will is assessable at the rate specified in the fourth column of that schedule and not at the rate
- H specified in the first column of that schedule. Their Lordships note that it is the practice of the Australian courts in questions of law and equity common to both countries to follow the decisions of the Court of Appeal in England where the decisions of the court in England appear to have settled the law. Their Lordships think that this practice is to the advantage of both systems of law, since it will enable the courts of either country to refer to the decisions of the other country for guidance in any field of law or equity common to both countries.

In the present case, the issue is whether the amount receivable by the respondent, Langley, under the authority to charge, retain and be paid his usual professional charges, contained in cl. 13 of the testator's will, ought to be regarded as property not otherwise provided for in the first, second or third columns of sched. VII. Their Lordships agree with the majority in the High Court that the decisions to which WILLIAMS, J., refers, and, in particular, the decisions in *Re Thorley* (7), and *Re Brown* (8), lead inevitably to the conclusion that such a provision as cl. 13 confers a gift on the executor and enables him to take out of the assets of the testator something which the law would not otherwise allow. *Re Brown* (8) is more directly in point than *Re Thorley* (7), since in that case EVE, J., held that the amount which the solicitor trustee would receive under a charging clause was a legacy which in the event which happened of a deficiency of assets must abate rateably with other legacies. It was not a decision of the Court of Appeal, but their Lordships think that it follows inevitably from the reasoning in *Re Thorley* (7) and *Re Pooley* (9). Their Lordships are unable to accept the explanation of these decisions suggested by DIXON, C.J., and FULLAGAR, J., and agree with the observations of the majority that, unless the High Court refused to follow the cases cited, the amount of £250 is property which falls within the fourth column of sched. VII to the Act. The decisions of the Court of Appeal in England are not, of course, binding on this Board, and the decisions now under consideration have been criticised in some of the textbooks. They have, however, never been doubted in any judicial decision, and they have been treated as good law for so long a period that their Lordships are not prepared to depart from the principles therein laid down. Counsel for the respondents agreed that the expression "pass" in the first column of the schedule had no technical meaning, and, if that is so, their Lordships are of opinion that the £250 in question is money to which the respondent, Langley, became entitled under the will, and is not property passing under the will to the widow or lineal issue of the deceased.

Before parting with this part of the case, their Lordships would observe that their task has been facilitated by the fact that the parties were able to agree the value of the benefit received, or to be received, by the respondent, Langley, at £250. No question was raised as to the benefit being a contingent legacy subject to a condition which had not been, and might never be, fulfilled. Their Lordships had not to determine the rate of duty which would be payable on such a legacy.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal and cross-appeal be dismissed. It was agreed between the parties that, in view of what transpired when leave to appeal was granted, the proper order as to costs in the event which has happened is that the respondents' costs of the appeal shall be taxed as between solicitor and client and shall be paid by the appellant, and that there shall be no order as to the costs of the cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors: *Light & Fulton* (for the appellant); *Burton, Yeates & Hart* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

JOHN HUDSON & CO., LTD. v. KIRKNESS (INSPECTOR OF TAXES).

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), November 30, December 1, 2, 1953.]

Income Tax—Deduction against profits—Wear and tear—Balancing charge—Wagons of coal merchants—Vesting in British Transport Commission—“Sale”—Income Tax Act, 1945 (c. 32), s. 17 (1)—Transport Act, 1947 (c. 49), s. 29, s. 30 (1).

On Jan. 1, 1948, railway wagons owned by the taxpayers and then under requisition by the Minister of Transport vested in the British Transport Commission under the Transport Act, 1947, s. 29, and under s. 30 compensation in respect of them became payable by the commission to the taxpayers, the amount being determined “by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI” to the Act. This amount was substantially higher than the written-down value of the wagons for income tax purposes, and as the taxpayers had received allowances under r. 6 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, they were assessed under s. 17 (1) of the Income Tax Act, 1945, to give effect to a balancing charge in respect of the excess of the original cost of the wagons over the written-down values.

HELD: the transfer of wagons under s. 29 of the Transport Act, 1947, was not a sale at common law, since it did not involve a mutual assent and a price; it was an acquisition authorised by statute and not a compulsory purchase, for which an independent procedure (involving the Acquisition of Lands (Authorisation Procedure) Act, 1946) and different compensation provisions were laid down: *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1927) (96 L.J.K.B. 735), distinguished; any assumption that a balancing charge could be made in such circumstances in s. 34 and s. 35 of the Finance Act, 1948, did not affect the construction of s. 17 (1) of the Income Tax Act, 1945; and, therefore, the wagons were not machinery or plant which had been “sold” within the meaning of s. 17 (1) (a) of the Act of 1945 and no balancing charge could be made under the sub-section.

Decision of UPJOHN J. ([1953] 2 All E.R. 64), affirmed.

FOR THE INCOME TAX ACT, 1945, s. 17 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 629; and FOR THE TRANSPORT ACT, 1947, s. 29, see *ibid.*, Vol. 19, p. 1055.

Cases referred to:

- (1) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.
- (2) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 3rd Digest Supp.
- (3) *Regent's Canal Co. v. Ware*, (1857), 23 Beav. 575; 26 L.J.Ch. 566; 29 L.T.O.S. 274; 53 E.R. 226; 40 Digest 188, 1568.
- (4) *Great Western Ry. Co. v. Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, 646.
- (5) *Inland Revenue Comrs. v. Wolfson*, [1949] 1 All E.R. 865; *sub nom. Wolfson v. Inland Revenue Comrs.*, 31 Tax Cas. 141; 2nd Digest Supp.

APPEAL against an order of UPJOHN, J., dated Apr. 29, 1953, and reported [1953] 2 All E.R. 64, allowing an appeal from the Special Commissioners of Income Tax, who had held that an assessment to give effect to a balancing charge had been properly made on the taxpayers under s. 17 (1) of the Income Tax Act, 1945, in respect of their former plant and machinery, consisting of railway wagons, which, when under requisition by the Minister of Transport, had vested in the British Transport Commission on Jan. 1, 1948, under s. 29 of the Transport Act, 1947. The taxpayers contended that the wagons were not “sold” to the

commission within the meaning of s. 17 (1) (a) of the Act of 1945, and, therefore, that no balancing charge could be raised in respect thereof. The Crown contended that the transaction was a sale within the meaning of the enactment.

Senter, Q.C., and *A. P. L. Barber* for the taxpayers.

Cyril King, Q.C., and *Sir Reginald Hills* for the Crown.

SINGLETON, L.J.: The Transport Act, 1947, by s. 1 set up a public authority to be called the British Transport Commission, referred to in the Act as "the commission". Part II of the Act provided for the acquisition by the commission of railway and canal undertakings and of certain railway wagons. The acquisition of railway wagons is dealt with in s. 29 to s. 32. By s. 29:

"Where, immediately before the date of transfer, any privately owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by reg. 53 of the Defence (General) Regulations, 1939—(a) the property in that wagon shall vest in the commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then cease; and (b) the Crown shall not be liable for any compensation under the Compensation (Defence) Act, 1939, or otherwise in respect of any damage to the wagon occurring during the period of requisition."

By s. 30 (1):

"Where under the last preceding section the property in any wagon vests in the commission, the commission shall, subject to the provisions of the three next succeeding sub-sections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI to this Act."

By s. 31 (1):

"Subject to the provisions of this section, the compensation payable by the commission in respect of a privately owned wagon vesting in them on the date of transfer shall be paid to the person who, immediately before the date of transfer, was the owner of the wagon."

By s. 32 (1):

"The amount payable by way of compensation in respect of a wagon the property in which vests in the commission on the date of transfer shall be satisfied in the manner provided by Part VI of this Act by the issue to the person entitled thereto of British transport stock."

The amount which was to be paid for railway wagons which were acquired by the commission under those sections was subject to s. 30 (2), (3) and (4). The amount specified in sched. VI to the Act, which is headed "Compensation for acquisition of privately owned wagons", and shows the amount payable for the different types of railway wagons, varies according to the year in which the wagon was built without reference to its condition, and the payment was to be made in British Transport Stock.

The taxpayers had 663 wagons to which s. 29 of the Transport Act applied, and on Jan. 1, 1948, the property in those wagons was transferred to and vested in the commission under that section. Paragraph 9 of the Case shows that:

"The [taxpayers] in due course received compensation for [their] wagons the property in which had vested in the commission. The amount of the compensation was substantially higher than the written-down value of the wagons for income tax purposes as appearing in the [taxpayers'] books. This written-down value was substantially lower than the original cost of the wagons. The balancing charge of £29,021, given effect to in the assessment to income tax for 1948-49 under appeal, represents, with the exception

of £963 referable to other matters and not in dispute, the excess of the original cost over the said written-down value. For reasons hereinafter appearing it was said for the [taxpayers] that [they were] not subject to any balancing charge in respect of the said excess."

Section 17 of the Income Tax Act, 1945, so far as material, reads:

- A " (1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . (3) If the sale . . . moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys."
- B
- C

- D The object of this section is that, if plant and machinery have been depreciated in the taxpayers' books and income tax allowances have been made, and the plant or machinery is subsequently sold at a higher price than its depreciated price, then the excess of the one over the other is subject to a balancing charge on which income tax may be levied. If the price for which the plant or machinery is disposed of is less than its written-down price, there is to be a balancing allowance. Although, so far as I know, no case of a balancing allowance has reached this court as yet, there have been one or two cases in which a balancing charge has been made.

- E It is claimed by the Crown that a balancing charge of £29,021 falls to be made on the taxpayers on the basis that the wagons which were acquired by the commission under s. 29 of the Transport Act, 1947, were sold to the commission within the meaning of the words in s. 17 (1) (a) of the Income Tax Act, 1945. The real question for decision is whether, by reason of s. 29 to s. 32 of the Transport Act, 1947, there was a sale to the commission of the wagons which I have already mentioned.
- F

The Special Commissioners held that the assessment on the taxpayers was properly made. Paragraph 14 (4) of the Case reads:

" . . . what took place was in our opinion a ' transfer of the ownership of a thing from one person to another for a money price ' "

- G Then they refer to HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 29, p. 5, para. 1, and they say:

- " . . . we hold that it was a sale. We do not doubt that the wrongful confiscation of a chattel, although accompanied by a subsequent payment of a sum called ' compensation ', would not constitute a sale. In this case, however, s. 29 of the Transport Act, 1947, vested the property in the [taxpayers'] wagons, which were already lawfully in the possession of the Minister of Transport under S.R. & O., No. 1085 of 1939, in the commission and the same enactment, by s. 30, provided compensation, to be computed under the provisions of sched. VI, which we hold was a money price. We think also that, if assent is necessary to the conclusion of a valid sale, it must be assumed to be present when a statute, such as the Transport Act, 1947, becomes law, since the [taxpayers as persons] living within the jurisdiction
- H

of the British Crown must assent to all such laws as are duly enacted, including the enactments contained in s. 29 and s. 30 aforesaid."

The last part of that finding was not sought to be supported by learned counsel for the Crown. The taxpayers appealed, and *УРЖОН, J.*, allowed their appeal, holding that there was no sale. The inspector of taxes appeals to this court.

In the Transport Act, 1947, the word "sale" is not used in relation to the acquisition by the commission of property of one kind or another. Sections 12 to 16 provide for the acquisition by the commission of railway and canal undertakings. Section 12 (1) reads: A

"Subject to the provisions of this Act, the whole of the undertakings of the bodies of persons specified in sched. III to this Act, being the bodies who fall within the class described in the next succeeding section, shall, on Jan. 1, 1948 (hereafter in this Part of this Act, and in the other provisions of this Act so far as they refer to the acquisition by the commission of the said undertakings, referred to as 'the date of transfer'), vest by virtue of this Act in the commission."

B

Section 12 specifies the date of transfer as Jan. 1, 1948, which is the date of transfer of all such undertakings under the Act.

Section 16 (1) of the Act provides for compensation for the acquisition of the railway and canal undertakings which are acquired C

"by reference to the values of the securities specified in sched. IV . . .", which, by s. 16 (2),

"shall be an amount equal to the aggregate value (computed in accordance with the provisions of the next succeeding section) of all the securities, if any, of that body existing immediately before the date of transfer . . ."; D

and under s. 16 (3):

"The compensation so payable shall be satisfied . . . by the issue . . . of British transport stock . . ."

in accordance with the provisions of sched. V.

E

Part III of the Act, s. 39 onwards, deals with the acquisition of certain road transport undertakings. Section 49 deals with the assessment of compensation in respect of road transport undertakings which are acquired, and the mode of compensation there is on quite a different footing from that contained in Part II as to railway and canal undertakings and as to wagons. For instance, in regard to compensation under Part III a number of different circumstances have to be considered, including under s. 47 (2) the amount which the property would fetch if sold in the open market. F

The real contest is whether there was a sale of the wagons to the commission, or, in other words, whether the plant was sold. But the argument has developed a little, and I think the questions for the consideration of the court may be stated in this way. First, was there a sale in the ordinary understanding of the word? Secondly, is there anything in the provisions of the Transport Act to lead one to say that what took place must, for the purposes of s. 17 (1) of the Income Tax Act, 1945, be regarded as a sale? Thirdly, was there a compulsory sale?, though it is not admitted by the taxpayers that a compulsory sale would have the effect for which the Crown contends, and it is disputed that there was a compulsory sale. The fourth question arises on s. 34 and s. 35 of the Finance Act, 1948, from which it is claimed on behalf of the Crown that, by analogy, one ought to say there was a sale, even if that did not appear elsewhere. G

Was there a sale in the ordinary understanding of the word? The word "sold" assumes a seller and a buyer. Unless there is some reason for giving a special meaning to the word, it must be given its ordinary meaning. Did the taxpayers sell their wagons to the commission? I am quite sure what the answer of the taxpayers would be, but that is not much help. What would anyone accustomed H

to the use of the words "sale" or "sold" answer? It seems to me that everyone must say "the taxpayers did not sell". Did the commission buy from the taxpayers? Equally, on the ordinary meaning of the word, I should find it difficult to say that the commission bought the wagons. In other words, there was not in this case a seller or a buyer, and that leads me to think that there was not a sale of the wagons in the sense in which the word is ordinarily understood. The wagons were acquired, as the Act says, and on Jan. 1, 1948, the property in those wagons vested in the commission. BENJAMIN'S SALE OF PERSONAL PROPERTY (2nd ed., p. 1), an authority on this subject, says:

"By the common law a sale of personal property was usually termed a 'bargain and sale of goods'. It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.: (i) Parties competent to contract; (ii) mutual assent; (iii) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (iv) a price in money paid or promised."

Counsel for the taxpayers, who relies on that passage, pointed out that in the circumstances of this case there is no mutual assent, nor, as he submitted, is there a price in money paid or promised, and on that he based his argument that here there was no sale—no sale according to the ordinary use of that word, or according to the definition of "sale" as accepted in the courts of this country generation after generation. I think that is right.

Is there anything in the provisions of the Transport Act to lead this court to say that what took place ought to be regarded as a sale within s. 17 (1) of the Income Tax Act, 1945? Again, I cannot see that there is anything in the Transport Act which should lead this court to take a view of the word "sold" in s. 17 (1) (a) of the Income Tax Act, 1945, other than that which it normally holds. An examination of the whole of the Transport Act, and in particular of s. 29 to s. 32, shows this. By s. 29,

"Where, immediately before the date of transfer, any privately owned railway wagon is under requisition . . .",

the property in that wagon shall vest in the commission on the day of transfer. It is a statutory vesting, a change of ownership brought about by statute. There is nothing in that section which has the appearance of bargain and sale, or of sale. Section 30 (1) provides:

"Where under the last preceding section the property in any wagon vests in the commission, the commission shall, subject to the provisions of the three next succeeding sub-sections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI to this Act."

That, counsel for the taxpayers submitted, is not a price. The value, in accordance with the method of arriving at it which is set out in sched. VI, is something which has to be paid, but, counsel submitted, it is not a price. I am not sure that that part of counsel's argument has quite as much force as his earlier submission that this is not a sale in any sense of the word. Then there is the provision that the mode of satisfaction of the compensation is to be by British Transport Stock. I do not find in these provisions anything which leads me to think that one ought to give the word "sold" in s. 17 (1) (a) of the Income Tax Act, 1945, any meaning different from that which it normally has. So, on the second point, it seems to me that the argument of the Crown fails, too.

Counsel for the Crown submitted that, if there was not a sale in the ordinary sense, there was a compulsory sale, that all the elements of a compulsory sale were present, and that this court ought to hold that consequently there was a sale for the purposes of s. 17 (1) of the Income Tax Act, 1945. Authorities cited

dealing with the compulsory acquisition of property showed that, when a stage is reached at which value has been fixed in the way provided by statute, the position of vendor and purchaser is created, so that the rights of the parties can be determined on a vendor and purchaser summons. I do not propose to refer to those authorities. I do not think that they apply to the circumstances of this case. In the case of a compulsory acquisition of land, it may be that something in the nature of a compulsory contract is reached. Thereupon, if the parties' rights have to be determined, that may be done on a vendor and purchaser summons. That is not this case. Section 8 of the Transport Act, 1947, authorises the commission compulsorily to purchase land for its own purposes. It appears to me that the section draws a clear distinction between compulsory purchase and what is done by the commission when it acquires railway undertakings or canal undertakings or railway wagons, or road haulage undertakings under later sections. Section 8 provides:

"The Minister may authorise the commission to purchase compulsorily any land which they require for any purpose connected with the discharge of their functions, and the Acquisition of Land (Authorisation Procedure) Act, 1946 (except s. 2 thereof) shall apply as if the commission were a local authority within the meaning of that Act and as if this Act had been in force immediately before the commencement of that Act."

Section 8 thus gives the commission power to acquire land compulsorily. If they do that, they have to comply with the provisions of the Lands Clauses Acts embraced in the Acquisition of Land (Authorisation Procedure) Act, 1946. They have to give the necessary notices. The owner of the land then may have an opportunity of agreeing what compensation shall be paid, if his land is to be acquired for the purposes of the public. Otherwise, the value is fixed by arbitration. That is the procedure under s. 8. It is wholly different from the provisions in s. 29, under which the ownership in the company's wagons vested in the commission on Jan. 1, 1948. The provisions as to payment of compensation are wholly different. I do not regard the vesting of the wagons in the commission as a compulsory sale or in the nature of a compulsory sale. It was an acquisition authorised by statute and paid for by way of compensation in the manner provided by the statute.

Counsel for the Crown referred us to *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1) in which *Newcastle Breweries, Ltd.*

"carried on the business of brewers and wine and spirit merchants, and in the course of this business kept large stocks of rum which had to be reduced and blended before sale. The blended product was sold either wholesale or retail in relatively small quantities. In January, 1918, the Admiralty, acting under the Defence of the Realm Regulations, took over about one-third of the stocks in question then owned by the respondent company. Payment of £10,315 was offered by the Admiralty, based on the actual cost of the rum and allowing a profit of about 1s. per proof gallon, and this amount was accepted on account by the respondent company, without prejudice to its claim for a larger amount."

Thereafter there was much litigation. The company proceeded by petition of right, but in the events which happened that was useless, and ultimately they had to claim before a tribunal which assessed the amount due to the brewery company as £5,309 10s. and that amount was paid to the brewery company some years after the rum had been taken. Thereupon, it was claimed by the inspector of taxes that the £5,309 10s., the second payment, which was a payment by way of compensation in one sense, ought to be included in the company's accounts for the year 1918-19. But the company contended that the sum was not a receipt of the company's trade or a profit arising from its trade or business, and that the rum taken over by the Admiralty in the foregoing circumstances was not, and

could not be said to have been, sold by the respondent company in the course of its trade or business or at all. ROWLATT, J., the Court of Appeal, and the House of Lords all held that the sum was a sum properly taken into consideration in the company's earnings for the year in which the sum had been taken. ROWLATT, J., said (12 Tax Cas. 934):

"The brewery company had a large quantity of rum, not yet refined or reduced or prepared for sale, which was requisitioned by the Admiralty . . .
 A Now the Admiralty took these goods at the beginning of the company's year which ended in 1918, and towards the end of the year, or in the summer, they paid £10,000, which they said was the cost, and some other allowances, plus 1s. a gallon profit. What was done upon that is perfectly clear to my mind. Neither party gave up anything. The Admiralty said that was what
 B they thought the sum was, and they were not prepared to pay any more, and the brewery company said it was not enough, but they took that sum; the Admiralty raised no objection. The brewery company said: 'We do not take it in satisfaction; we will reserve our rights to make any further claim which we may be advised to make', and the Admiralty said, 'Very well; we have no objection. You are at liberty to make any further claim'. That is what took place. Now if they had gone under the regulation they would
 C have got, to put it shortly, the cost to them plus the pre-war profit, as a price. That would have been a price. However, what they said was that this part of the regulation is invalid, and they went by petition of right to SALTER, J., and obtained a judgment from him which said that the price was not to be so determined or so limited; their right was to have the market value, to be assessed by the county court judge. Now, if they had got that, they again
 D would have got a price. But at that period the Indemnity Act came into effect, which avoided the judgment of SALTER, J., as well as other judgments in *pari materia* or within the ambit of the Act; and instead of that, it gave people in the position of the brewery company a right to go before a commission presided over by Sir Francis Kyffin Taylor."

E The learned judge added that they went before the tribunal, and in a passage relied on by counsel for the Crown he said (*ibid.*, 937):

"Now what is that except a compulsory sale of the rum? It seems to me, when you really look at the substance of the thing, it is in a very small compass. That is all it is, a compulsory sale of the rum."

F As I have said, that judgment was upheld in the other courts. In the House of Lords VISCOUNT CAVE, L.C., said (*ibid.*, 953):

"Two points are made on behalf of the appellants. First, it is said that the £5,300 is not a profit from the appellants' business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the appellants' capital. I cannot agree with that contention."

G So the gist of the decision was that, though the rum was acquired by the Admiralty, it was equivalent to a contract of sale. A profit was certainly earned by the company in respect of £5,309, and that had to be taken into the company's accounts. From that, counsel for the Crown submits that, where, as in this case, there is a compulsory acquisition, the vesting of the property of the taxpayers in the commission on Jan. 1, 1948, and payment is made therefor, that likewise
 H ought to be treated as a sale. I think the two things are wholly different, and the difference, indeed, is made clear by reference to the compulsory powers of purchase of land given in s. 8 of the Act. In my view, what took place cannot be held to be a compulsory sale.

The next point arises on s. 34 and s. 35 of the Finance Act, 1948. The sidenote to s. 34 reads:

"Remission of balancing charges and other provisions, in case of certain undertakings absorbed under nationalisation schemes."

The section does not apply in this case directly; that is shown by sub-s. (1) (b). It does, or might, apply to the provisions as to the taking over of an undertaking under s. 12 of the Transport Act, but it does not apply to s. 29. Section 34 provides:

"(1) The provisions of this section shall have effect where—(a) under any statutory provisions to which this section applies, property is transferred to a commission, authority, board, body or person; and (b) under the statutory provisions in question, the liability of the transferor arising from any balancing charge falling to be made on the occasion of the transfer becomes a liability of the transferee. (2) The transfer shall be treated for income tax purposes as a sale of property to which s. 59 (1) (a) of the Income Tax Act, 1945, applies and as if the parties to the sale had given notice of election under sub-s. (4) of that section."

The submission of counsel for the Crown is that that section shows that in other cases the draftsman of the Finance Act, 1948, had probably assumed that there would be or might be balancing charges, and if that was his view it provided some guidance or some help towards a true interpretation of the Transport Act, 1947. And he submitted that the position was carried further by s. 35 (2) which, like s. 34 (6), ends in this way:

"This section shall be deemed always to have had effect."

So that both sections have retrospective effect. Section 35 (1) reads:

"The question whether any and if so what balancing allowance or balancing charge falls to be made to or on the National Coal Board on the occasion of the transfer to the British Transport Commission under s. 29 of the Transport Act, 1947, of any railway wagons which the said board acquired under the Coal Industry Nationalisation Act, 1946, shall be determined as if s. 29 of the Finance Act, 1947, and sched. VII to that Act, had not been passed."

That shows, said counsel, that, at the time of the passing of the Act of 1948, the question had arisen whether there should be made, or whether there fell to be made, a balancing charge or allowance as between the National Coal Board and the British Transport Commission. Of course, balancing charges and balancing allowances had been first mentioned in the Income Tax Act, 1945, and I have no doubt that, by the time the Finance Act, 1948, was passed, someone had seen that s. 17 of the Act of 1945 might lead to a harvest one way or the other. I have no doubt that someone in the National Coal Board and someone in the British Transport Commission had discussed it. But that by no means shows that a balancing charge falls to be made.

Counsel for the ratepayers submitted that nothing in those two sections of the Finance Act, 1948, helped towards a true interpretation of the provisions of the Transport Act, 1947, and it seems to me that that submission is right. I would repeat what LORD RADCLIFFE said in *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (2) ([1952] 1 All E.R. 544):

"The beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

I believe it to be the duty of this court to determine the effect of the Transport Act from the wording of that Act itself. I do not find myself greatly helped by references to s. 34 or s. 35 of the Finance Act, 1948, or by references to the change which was made by the Income Tax Act, 1952, s. 292, or by the Finance Act, 1952, sched. VI. On the view which I take of the provisions of the Transport Act, 1947, namely, that there was in the circumstances of this case no sale, it seems to me that the judgment of UPJOHN, J., is right and that this appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. The Income Tax Act, 1945, s. 17 (1), laid down the events on which a balancing allowance or a balancing charge should fall to be made as follows:

A “ Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—
(a) the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise
B useless or no longer required . . . ”

C They were four clear, distinct events, and on the happening of any one of them certain consequences respecting a balancing charge or a balancing allowance followed. The taxpayers had been assessed to a balancing charge of £29,021 in respect of certain wagons which belonged to them, and which had been requisitioned by the Minister of Transport for a period and then, under the Transport Act, 1947, had been vested in the commission. Section 17 (2) provides:

“ Where there are no sale, insurance, salvage or compensation moneys . . . ”

D which clearly has reference to the events set out in sub-s. (1) (a), (b), (c) and (d), and then it goes on to deal with the balancing allowance, and the words are similarly used in sub-s. (3):

“ If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event . . . ”

E then the balancing charge comes into being. Section 68 (1) of that Act, the definition section, provides:

“ ‘ Sale, insurance, salvage or compensation moneys ’ mean, in relation to an event which gives rise or might give rise to a balancing allowance or a balancing charge to or on any person or is material in determining whether any, and, if so, what, annual allowance is to be made to a person under Part III of this Act,—(a) where the event is a sale of any property, the net proceeds to that person of the sale; (b) where the event is the coming to an end of an interest in property on or by reason of the coming to an end of a foreign concession, any compensation payable to that person in respect of that property; (c) where the event is the demolition or destruction of any property, the net amount received by him for the remains of the property, together with any insurance moneys received by him in respect of the demolition or destruction and any other compensation of any description received by him in respect thereof, in so far as that compensation consists of capital sums; and (d) where the event is that a building or structure ceases altogether to be used or that machinery or plant is put out of use, any compensation of any description received by him in respect of that event, in so far as that compensation consists of capital sums.”

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That is the machinery of s. 17, and I think it is important because all that we are really concerned with here is to say whether the event which took place, as described by my Lord, under the provisions of the Transport Act, 1947, was a sale as distinct from any of the other events in s. 17 (1). The problem is, not a simple matter, but a complicated and difficult matter.

By s. 29 of the Transport Act, 1947, the wagons were vested in the British

Transport Commission as from Jan. 1, 1948. Section 30 (1) uses the word "compensation":

"Where under the last preceding section the property in any wagon vests in the commission, the commission shall, subject to the provisions of the three next succeeding sub-sections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI to this Act."

And by s. 31 (1), it

"shall be paid to the person who, immediately before the date of transfer, was the owner of the wagon",

and, by s. 32 (1),

". . . by the issue to the person entitled thereto of British transport stock."

Schedule VI is not unimportant, because of the argument which has been addressed to us on both sides. It is headed: "Compensation for acquisition of privately owned wagons". "Year in which wagon was first built" is the heading of the first column, then there are columns for the weight, whether the truck is made of wood, and so on, and then the prices. Thus, the scheme set out in the Act was: "These wagons which admittedly are your property, though they have been requisitioned by us for use, shall now vest in the British Transport Commission, and you shall receive by way of compensation those sums which we have arbitrarily fixed (I use the word "arbitrarily" in no sinister sense) and you shall be paid that sum and no other".

If the test be, as I think it is, and as my Lord stated: Is that a sale within the ordinary connotation of the word "sale"? the first answer would appear to be clearly "No". The vendor had no choice as to whether he would sell or not, or as to the price or sum or compensation which he was to receive which was fixed by the schedule. He had no choice whatever as to the form in which he would get his payment. He was to have it by way of British Transport Stock whether he liked it or not. From that point of view it would have seemed, using the language in its ordinary sense, that a compulsory acquisition, a compulsory transfer, or some such phrase as that, was more appropriate to that particular transaction or event than the word "sale". But counsel for the Crown addressed a forcible argument on this matter, by saying: "Although the outward form of it may not appear to be a sale in the ordinary sense of that term, as it is customarily used, nevertheless, for the purposes of the Income Tax Act, 1945, it is a sale", and he relied on the words in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 29, p. 5, of which we were told the author was the late SCOTT, L.J.:

"Sale is the transfer of the ownership of a thing from one person to another for a money price."

The sidenote to that paragraph reads: "Sale and exchange or barter distinguished". Counsel relied on that, and said: "If that is right, we come fairly and squarely within it, because there is a transfer of the ownership of a wagon from one person to another for the money price set out in sched. VI to the Transport Act, 1947". The article deals in much more detail with what a contract of sale is, but great insistence was laid on that definition as being conclusive. It was said in terms: "Of course, the definition stated by the late Mr. BENJAMIN is there too, but, in a word, one should follow, not that, but this plain, simple declaration." Though one must not be overawed by great names, the late Mr. BENJAMIN admittedly was a great lawyer and a great authority on the sale of goods. The definition cited by UPJOHN, J., and by my LORD is his own. It comes from the edition which he prepared for publication and has been

incorporated in every subsequent edition of BENJAMIN'S SALE OF PERSONAL PROPERTY, and great respect should be paid to it. In that definition Mr. BENJAMIN lays stress on the question of mutual assent. Counsel for the Crown argued that mutual assent does not matter, and he cited *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1) in which time and time again the lords justices in the Court of Appeal and the lords of appeal in the House of Lords referred to this matter in terms of this kind. LORD PHILLIMORE said (12 Tax Cas. 954):

- A "The rum was purchased for trade purposes, and the particular sale was none the less a trade sale because the trade was forced upon the appellant company."

VISCOUNT CAVE, L.C., said (*ibid.*, 953):

- B "If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle."

And there are other observations to the like effect. That case was seeking to establish that a compulsory sale—as that was held to be—made no difference to the point which was then in issue, which was: "Were there profits which had been made? Had profits been made? If so, into what year of assessment do they fall?", and the House decided that profits had been made and that the fact that it was a compulsory sale made no difference. That case was pressed on us very strongly, as were the cases under the Lands Clauses Consolidation Act, 1845, particularly *Regent's Canal Co. v. Ware* (3) and *Great Western Ry. Co. v. Inland Revenue Comrs.* (4).

- D With great respect to counsel's argument, I do not propose to discuss the matter at length, but I cannot think that those cases, and the analogy sought to be drawn, have really got any true application to the facts with which we have to deal. Under the Lands Clauses Consolidation Act, 1845, most elaborate machinery is set up for the taking of land, machinery dealing with the questions of arbitration and agreement as to the price, and with the verdict of a jury in default of agreement, and so on, and I can very well understand that, in the machinery of that Act, one does quite clearly reach a point where one can say: "The position of vendor and purchaser is here created". But I cannot think that those cases and the principles applicable to them are really of very much assistance on the question of the taking of these wagons. The question here is the one simple matter: Was this a sale?

- F In *Inland Revenue Comrs. v. Wolfson* (5) LORD SIMONDS said, on a question of construction ([1949] 1 All E.R. 868):

- G "It was urged that the construction that I favour leaves an easy loophole through which the evasive taxpayer may find escape. That may be so, but I will repeat what has been said before. It is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words. It is the duty of the court to give to the words of this sub-section their reasonable meaning . . ."

- H It is argued here by counsel for the taxpayers that it is giving a strained and unnatural meaning to the word "sold" in s. 17 (1) (a) to call the taking of the wagons and the awarding of compensation under sched. VI a "sale"; and he referred us to two statutes. The Income Tax Act, 1952, s. 292 (1), provides:

"Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or an annual allowance has been made for any year of assessment to a person carrying on a trade, that is to say, either . . ."

where the machinery or plant ceases to belong to the person carrying on the trade, where there is a sale of the machinery or plant, or in any other

circumstances of any description; and I gathered that counsel's whole purpose in citing that section was to reinforce the words of LORD SIMONDS in the case which I have just cited, and say: "The legislature could, in s. 17 (q), have devised and inserted words which would have covered this transaction completely, as in s. 292 (1) they do, but one must not construe s. 17 (1) (a) of the Act of 1945 by putting in words which the legislature themselves did not do." On the first point in this case—Was there here a sale of the wagons?—I am of the same opinion as my Lord and URJOHN, J., that there was no sale within the meaning of s. 17 (1) (a). A

Counsel for the taxpayers said with force that for there to be a sale there must be a price, and there was no price here in any sense of the word, because the term "price" must connote some agreement or some assessment according to the value. At one stage in the argument I thought that the assessment of value under sched. VI, crude though it might be, might suffice because there wagons are taken according to their year, tonnage and structure, and a fixed value or sum is placed on them. But it is plain that it did not matter one iota what the condition of the wagons was. They might have been in the last stages of decay, but the sum laid down in sched. VI was automatically to be paid according to the year of building, the materials used, and the tonnage. Many arguments on both sides dealing with assent, and the construction of the words "price" and "compensation" were used before us. I agree with what my Lord said about them. I do not think that the event of the taking over of these wagons was within the words "the machinery or plant is sold". B

As regards s. 34 and s. 35 of the Finance Act, 1948, I understood the argument to be that, if one looked through the Acts one would find there a consistent scheme, that this transaction or event quite properly could be comprehended under the term "sale", and that it was only if one adopted the standard set by Mr. BENJAMIN that one fell into error: "Follow the Acts, follow the consistent scheme, and all will be well". Under s. 34 of the Finance Act, 1948, which by sub-s. (6) was to be deemed always to have had effect: C

"(1) The provisions of this section shall have effect where—(a) under any statutory provisions to which this section applies, property is transferred to a commission . . . (b) under the statutory provisions in question, the liability of the transferor arising from any balancing charge falling to be made on the occasion of the transfer becomes a liability of the transferee. (2) The transfer shall be treated for income tax purposes as a sale of property to which s. 59 (1) (a) of the Income Tax Act, 1945, applies and as if the parties to the sale had given notice of election under sub-s. (4) of that section." D

I will not read the relevant parts of s. 59, but it is perfectly plain that the purpose of s. 34 (2) could perfectly well have been achieved without any mention of the word "sale" at all. And to say that, because the words "treated for income tax purposes as a sale" within the meaning of s. 59 (1) (a) are found in the Act of 1948 leads to the conclusion that under the Income Tax Act, 1945, this was a sale, is a step which I myself find it extremely difficult to take. Similarly, it may very well be that s. 35 (1) impliedly says that there is to be a balancing charge on an occasion of this sort, but I do not think that that of itself lends very much assistance to the determination of the simple question in this case: Were the events as we now know them, which took place by virtue of s. 29, s. 30, s. 31 and s. 32, and sched. VI, a sale for the purposes of s. 17 (1)? With great respect to the arguments which have been addressed to us by the Crown, I am of opinion that they cannot be, and that the judgment of URJOHN, J., ought to be affirmed. E

HODSON, L.J.: I agree. F

Appeal dismissed.

Solicitors: Willis & Willis (for the taxpayers); Solicitor of Inland Revenue.

[Reported by F. A. AMES, Esq., Barrister-at-Law.] G

H

CALVERT v. MAYES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Barry, JJ.),
December 9, 1953.]

Criminal Law—Vagrancy—Living on earnings of prostitution—House and car knowingly permitted to be used for purposes of prostitution—No money paid to defendant by prostitutes—Vagrancy Act, 1898 (c. 39), s. 1 (1) (a), s. 1 (3), as amended by Criminal Law Amendment Act, 1912 (c. 20), s. 7 (1).

- A The respondent, the driver of a motor car, visited, in the evenings from October, 1952, to April, 1953, certain public houses known to be frequented by prostitutes. He parked his car outside and allowed it to be used for the purposes of prostitution, sometimes while it was parked, and sometimes while he was driving American service men back to their base camp. He would also on occasions drive American service men and prostitutes into the neighbouring countryside and either wait while sexual intercourse took place or return to fetch them the following morning. There were standard charges for the hire of the car which the men paid to him, the prostitutes getting their reward in the form of food, drink, and clothing. From January, 1953, to April, 1953, the respondent permitted his house to be used by prostitutes and service men for the purposes of prostitution, and during March, 1953, one of the prostitutes stayed at the respondent's house on the terms that she would pay for her board and lodging by prostituting herself with men whom she either brought herself to, or who were brought to her at, the house. On all these occasions, the respondent received money from the men, the prostitutes receiving their reward in the form of food, drink and clothing. An information was preferred against the respondent charging that he, being a male person, for a period of six months unlawfully and knowingly lived in part on the earnings of prostitution, contrary to the Vagrancy Act, 1898, s. 1 (1).

E HELD: (i) although all the money was paid direct to the respondent, he was in the same position as if it had been paid to the prostitutes and they had passed it on to him; it was being earned by prostitution; and so he was guilty of an offence against s. 1 (1).

F (ii) in any event, in the circumstances he had been proved to be habitually in the company of the prostitutes concerned and to have exercised direction and influence over their movements in such a manner as to show that he was aiding and abetting their prostitution, and, therefore, as he had failed to satisfy the court to the contrary, he was to be deemed to be knowingly living on the earnings of prostitution, and so had committed an offence under s. 1 (3) of the Act, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1).

G AS TO LIVING ON EARNINGS OF PROSTITUTION, see HALSBURY, Hailsham Edn., Vol. 9, p. 403, para. 683; and FOR CASES, see DIGEST, Vol. 15, pp. 851, 852, Nos. 9347-9351.

CASE STATED by the recorder of King's Lynn.

H At a court of summary jurisdiction sitting at King's Lynn on May 8, 1953, the appellant, Fred Calvert, a police superintendent, preferred an information against the respondent, Robert George Mayes, charging that for the previous six months at King's Lynn he, being a male person, unlawfully and knowingly lived in part on the earnings of prostitution, contrary to the Vagrancy Act, 1898, s. 1 (1). The justices convicted him and sentenced him to three months' imprisonment. He appealed to quarter sessions against the conviction and sentence.

On the hearing of the appeal the following facts were proved or admitted. The respondent, together with his wife and four children, occupied a house in King's Lynn. At all material times he was employed as an agricultural labourer.

In August, 1952, he was taught by one Douglas Haig Royle to drive a motor car, and thereafter he was employed by Royle as a part-time hire-car driver at a weekly wage of £2 plus commission. The hire-cars owned by Royle and driven by the respondent were not licensed hackney carriages. Throughout the period of twelve months immediately prior to the end of April, 1953, a number of young women, who were prostitutes and otherwise unemployed, came to King's Lynn on the advent of American air service men. They had no fixed place of abode and mostly frequented premises in King's Lynn, and, in particular, the Maid's Head public house and the Glendevon Hotel with the intention of introducing themselves to American service men for the purpose of prostitution. Throughout the period of six months immediately prior to the end of April, 1953, the respondent and Royle spent most of their evenings, with the exception of the time when the respondent was actually engaged in driving, inside the premises in question. The respondent knew that the women were prostitutes, he was habitually in their company, he exercised direction and influence over their movements, and generally aided and abetted their prostitution with American service men. On each occasion that he visited the premises in question, the car he drove was parked outside, sometimes empty and sometimes with one or more of the prostitutes sitting in it. The cars driven by the respondent were often used for the purposes of prostitution by the prostitutes and the service men in one or other of the following ways—(i) on journeys from King's Lynn to the American Air Force base at Sculthorpe, Norfolk (known as "base trips"), when sexual intercourse took place in the back of the car during the journey, or in some convenient place during a break in the journey. For these journeys, the standard hire charge was £2 which was paid to the respondent by the service men concerned, the prostitutes obtaining reward from the men in the form of food, drink, and clothing, though on one occasion one of them obtained from one man a small sum of money as such reward. A free service was provided for men at the base at Sculthorpe to King's Lynn with a late return at night; (ii) on journeys to barns, haystacks, or other convenient places in the countryside outside King's Lynn, where the prostitutes and men were left for the night and collected early the following morning, the men then being driven back to their base and the women brought back to King's Lynn; (iii) on short journeys to secluded places within or near King's Lynn when sexual intercourse took place either in the back of the car or in some convenient place nearby. The parties were then driven back by the respondent to the Maid's Head public house. The length of these journeys varied between three miles and two hundred yards. The respondent was paid 10s. by the men concerned for the use of the car, and the prostitutes obtained reward from them in the form of food, drink, and clothing; (iv) while standing outside the Maid's Head public house or Glendevon Hotel, when sexual intercourse took place in the back of the car. On one occasion the respondent and Royle were seen keeping watch about 10.45 p.m. outside the Glendevon Hotel, while an American service man and an unidentified girl had sexual intercourse in the back of the car; (v) for the conveyance of prostitutes and service men to the respondent's home for the purposes of prostitution. On some occasions, the prostitutes arranged their own meetings with the men and then arranged with the respondent to use his car. On other occasions, all the arrangements were made, and the parties brought together, by the respondent and Royle, or one or more prostitutes waited in the car until a service man or service men were brought to them by the respondent. At all times the respondent knew that his car was being used for the purpose of prostitution and he encouraged such use. During the six months' period the cars driven by the respondent were used frequently for the conveyance either of the prostitutes and service men or of one or more of the prostitutes in order to attract American service men. But for the presence of the prostitutes and opportunities for sexual intercourse, the car would have been used far less for journeys to the American base, and not at

all for the other journeys, and the income of the respondent and Royle would then have been considerably reduced. The prostitutes on no occasion paid for journeys in the car, even when they were driven alone by the respondent.

From the beginning of 1953 until the end of April, 1953, the respondent knowingly permitted his house to be used as a brothel, and he was convicted of that offence and sentenced to three months' imprisonment. During this period, his house was frequently used by the prostitutes and service men for the purposes of prostitution. The respondent charged the American service men £2 per night and the prostitutes obtained reward from them in the form of food, drink, and clothing. No meals or services, other than the use of a room for the night, were provided for the service men. During March, 1953, one of the prostitutes stayed for four weeks at the respondent's house on the terms that she should pay him for her board and lodging by prostituting herself with men whom she brought to, or who would be brought to her at, the house. The respondent informed her that receiving one man would suffice to cover the cost of her keep for a week. In accordance with this arrangement, she frequently prostituted herself with service men in the house, and on each occasion the respondent was paid by the man concerned. During March, 1953, at least one other prostitute lived for a week at the respondent's house and there prostituted herself on the same terms as the first prostitute. As in the case of the use of the car driven by the respondent, arrangements for the use of his house for the purposes of prostitution were made sometimes by the prostitutes and sometimes by the respondent. On all occasions he knew the purpose for which the house was being used, and encouraged such user. The house was not otherwise used as a boarding-house or for the accommodation of lodgers. But for the opportunities for sexual intercourse, the rooms at the respondent's house would have been let far less frequently, if at all, and he would not have been able to demand such a heavy charge for their use. On occasions, when they were short of money, some of the prostitutes were given sums of money by the respondent to enable them to purchase meals. On no occasion was any money or reward paid to the respondent by any of the prostitutes. The money paid by the service men to the respondent was for the use either of his house, or of the car, as a brothel.

It was contended on behalf of the appellant at the hearing of the appeal that, on these facts, the respondent had been proved guilty of the offence charged against him. It was contended on behalf of the respondent that, although the women concerned were prostitutes and he had knowingly permitted his house to be used as a brothel (on which charge he had been convicted) and had knowingly used his car for the purposes of prostitution, no money had ever been paid to him by any of the prostitutes, the money paid to him by the men had been paid solely for the use of the house or the car as a brothel, and, in those circumstances, he was not guilty of the offence charged against him.

The recorder allowed the appeal on the ground that, although the evidence would support a charge of keeping a brothel, there was no evidence to support a charge of living in part on the earnings of prostitution, and the appellant appealed.

Boreham for the appellant.

E. L. Gardner for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The respondent has a cottage in King's Lynn. He arranged for a prostitute to live in that cottage with him and it was found that during March, 1953, a young woman named Eady,

"one of the said prostitutes stayed for a period of four weeks at the respondent's said dwelling-house on the terms that she should pay the respondent for her board and lodging by prostituting herself with men whom she brought to, or who would be brought to her at, the said dwelling-

house. The respondent informed her that one man per week would suffice to cover the cost of her keep for that week."

What does that mean? She lives in the house and pays nothing, it is true, to the respondent. He says he will give her lodging and will board her, but she has to bring at least one man a week to the house, and when the man comes to the house he takes £2 from the man. Who earns the money? The woman earns the money. How does she earn the money? She earns it by prostitution. Why is he not then living wholly or in part on the earnings of prostitution? It is just the same as if the American service man had paid the girl £2 and she had handed over £2 to the respondent. The respondent is exactly in the position of a brothel-keeper who keeps girls on the premises and takes money from the people who come to the brothel. He is letting the room and letting the services of the woman.

The Vagrancy Act, 1898, provides:

"1 (1) Every male person who—(a) knowingly lives wholly or in part on the earnings of prostitution . . . shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

Section 1 (3), as amended by s. 7 (1) of the Criminal Law Amendment Act, 1912, provides:

"Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally, he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution."

It is said that the respondent has satisfied the court that he was not living on the earnings of prostitution because the learned recorder found that on no occasion was any money or reward paid to him by any of the prostitutes. Why? Because he took it from the man before the man paid the prostitute. The man was paying for the room with the prostitute in it with whom he was going to commit fornication. The respondent simply took the money before it reached the prostitute, and it seems to me clearly he was living on the earnings of prostitution.

There are other matters which are found by the learned recorder to which I had better refer in detail. So far as the respondent was concerned, the arrangement he made with this woman Eady clearly, in my opinion, brings him within the terms of the statute, but, no doubt, it is desired that we should consider the other part of the case, because this is what the recorder finds and, no doubt (as we are told), other cases are dependent on it:

"Throughout the period of six months immediately prior to the end of the month of April, 1953, the respondent and his employer . . . Royle spent most of their evenings, with the exception of the time when the respondent was actually engaged in driving, inside the [public houses where these women congregated]. The respondent knew that the said women were prostitutes, he was habitually in their company, he exercised direction and influence over their movements and generally aided and abetted their prostitution with American service men. On each occasion that the respondent visited the said premises the car he drove for the said Royle was parked outside, sometimes empty and sometimes with one or more of the said prostitutes sitting in it. The cars driven by the respondent were often used for the purposes of prostitution by the said prostitutes and the American service men who formed their clientele, in one or other of the following ways."

Then he sets out, first, the journeys from King's Lynn to the Air Force base. For these journeys the respondent was paid £2, and sexual intercourse took place in the back of the car or at some convenient place during a break in the journey.

"The said £2 was paid to the respondent by the American service men concerned for the use of the said car. The standard charge for the journey by hire car was £2. The prostitutes obtained from the American service men reward in the form of food, drink and clothing. On one occasion one of the prostitutes obtained from one of the American service men a small sum of money as such reward. There is a free service provided for the service men at the base . . . to King's Lynn with a late return at night."

A So these service men had means of making the journey, but they hired the cars driven by the respondent in order that they might indulge in sexual intercourse in the cars, and for that the respondent and his employer were receiving money which they would not have received if they had not knowingly permitted these prostitutes to behave in this way. The Case continues:

B "On journeys to barns, haystacks or other convenient places in the countryside of Norfolk outside the borough of King's Lynn where the said prostitutes and the American service men were left for the night and collected early the following morning: the American service men were then driven back to their base and the women brought back to King's Lynn. On short journeys . . . to secluded places within or near to the borough of King's Lynn when sexual intercourse took place either in the back of the car or in some convenient place nearby. The parties were then driven back by the respondent to the Maid's Head public house. The length of these journeys varied between three miles and two hundred yards. For these journeys the respondent was paid 10s."

There are then various other findings, and the learned recorder finds that

D "But for the presence of the prostitutes and opportunities for sexual intercourse the said car would have been used far less for journeys to the American base and not at all for the other journeys. The income of the said Royle and the respondent's commission would thus have been considerably reduced."

E In the circumstances, it seems to me quite clear that the respondent was trading in prostitution. He is living on the earnings of a prostitute, because the prostitutes are earning money which otherwise he would never have received. It does not seem to me to matter whether he received it from the hand of the service man or whether the man handed it to the girl and the girl handed it to him. In any case, she was earning the money by prostituting herself. The fact that the respondent was also driving the men back to the Air Force base does not seem to me to avail him by way of defence because, though it is true that, if it was a legitimate journey, he would have been paid the same sum of money, he would probably never have gone on these journeys because the service men would, presumably, have used the free transport provided if it were not for the fact that he was providing them with a prostitute to ride in the car with them.

G The learned recorder obviously gave great care to this matter. He came to the conclusion that the Act did not extend to this class of case. He found that the respondent was keeping a brothel—not only a brothel in his house, but, I think, he thought that the cars also were being used as brothels—but he did not consider there was an offence against the Vagrancy Act. In my opinion, that is not the right way to look at it. I think the words of the Vagrancy Act are quite wide enough to cover the conduct shown in this case. Each case, of course, must be dealt with on its own particular facts, but here I think we must reverse the decision of the learned recorder and say that the offence is proved, and, accordingly, the respondent will have to serve the sentence which was most rightly passed on him by the justices.

SELLERS, J.: I agree. The facts of this case are clearly within the mischief with which the Vagrancy Act was designed to deal, and the only question is

whether the facts bring it within the letter of that Act. It is clearly shown that the respondent was trading in prostitution, both in the use of his own home and in the activities of his employment with Royle in the use of motor cars which the respondent drove, both for journeys to promote this prostitution and for the direct use of the cars for that purpose. The vital finding of fact is that

"the respondent knew that the said women were prostitutes, he was habitually in their company, he exercised direction and influence over their movements, and generally aided and abetted their prostitution with American service men."

I am prepared to agree with my Lord that, although it may be an extension of the interpretation which has been given to this Act before, the facts of this case bring it under s. 1 (1) of the Vagrancy Act, 1898, which provides that,

"Every male person who—(a) knowingly lives wholly or in part on the earnings of prostitution"

commits an offence under the Act. It certainly comes, in my view, under s. 1 (3), which, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), provides:

"Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally, he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution."

The facts of this case clearly bring the respondent within that provision, and he has committed an offence under the Act unless he can satisfy the court that he was not living on the earnings of the prostitutes or of prostitution. The remarkable fact is that he made an arrangement as a landlord letting the services of his house—a room at any rate—and board and lodging to a prostitute on the basis that she should pay for that accommodation and those services by prostituting herself at least once a week, and he should get the proceeds of that prostitution. I should have thought that that came directly under the letter of the Act, and it in no way establishes the necessary facts which the respondent would have to establish to satisfy the court that he was not living on the earnings, in whole or in part, of prostitution.

Counsel for the respondent said that the interpretation which we are placing on this statute would leave the matter in a curious way because it would mean that a male person could be convicted under this Act in these circumstances but a female could not. I think that is an erroneous submission, because s. 7 (4) of the Criminal Law Amendment Act, 1912, makes provision in very much the same terms for the female:

"Every female who is proved to have, for the purposes of gain, exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting, or compelling her prostitution with any person, or generally, shall be guilty of an offence. . . ."

I do not doubt that, if any female (as did this male) entered into a bargain such as was entered into here that she should be paid rent for the use of her room for the prostitution of the tenant, she would have knowledge of the prostitution, she would be aiding and abetting it, and she would be getting from the earnings of the prostitute, in whole or in part, some benefit. I think that the argument on this point is fallacious, and that the Act can be so construed as to apply equally to male and female. I agree that this appeal should be allowed.

BARRY, J.: I agree. I feel that the decision of the court is dependent on the finding that the respondent knew that the women were prostitutes and habitually exercised direction and influence over their movements, aiding and

abetting their prostitution with American service men. In view of that finding, I am satisfied that these facts fall within the provisions of the Vagrancy Act, 1898, s. 1 (3), as amended by the Criminal Law Amendment Act, 1912.

Appeal allowed.

Solicitors: *Metcalf, Copeman & Pettefar* (for the appellant); *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

MORRIS AND ANOTHER v. SANDESS UNIVERSAL PRODUCTS.

[COURT OF APPEAL (Jenkins and Morris, L.J.J.), December 4, 1953.]

B *Libel—Defamatory words—Words capable of defamatory meaning—Statement by employer that servant dismissed.*

Practice—Preliminary point of law—Libel action—Issue whether words complained of capable of defamatory meaning—R.S.C., Ord. 25, r. 2.

C The defendants stated in a circular letter addressed to their customers that they had dismissed the plaintiffs who had now no connection whatsoever with the defendant company. The plaintiffs sued for libel, alleging that the words used by the defendants meant that the plaintiffs had been guilty of some discreditable conduct, and the defendants contended that the words complained of were incapable of a defamatory meaning. On that issue, tried as a preliminary point of law under R.S.C., Ord. 25, r. 2,

D HELD: the test to be applied by a judge in deciding whether or not words were capable of a defamatory meaning was whether a reasonable jury would be justified in finding that the words complained of were defamatory, and, notwithstanding the various inoffensive meanings which the words complained of might be said to be capable of bearing, it was impossible to hold that they were not capable of a defamatory meaning.

E Dictum of LORD PORTER in *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.* ([1950] 1 All E.R. 454), applied.

Per curiam: the question here raised was not a proper subject to be raised and disposed of as a preliminary point of law under R.S.C., Ord. 25, r. 2.

AS TO FUNCTIONS OF JUDGE AND JURY IN DEFAMATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 433-436, paras. 521-525.

F Cases referred to:

(1) *Nevill v. Fine Art & General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 32 Digest 72, 1010.

(2) *Capital & Counties Bank v. Henty*, (1880), 5 C.P.D. 514; 49 L.J.C.P. 830; 43 L.T. 651; *affd.* H.L., (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 32 Digest 21, 121.

G (3) *Beswick v. Smith*, (1907), 24 T.L.R. 169; 32 Digest 27, 167.

(4) *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449; 2nd Digest Supp.

APPEAL by the defendants against an order of LORD GODDARD, C.J., dated Oct. 29, 1953.

By their statement of claim the plaintiffs alleged, inter alia:

H

“(1) The defendants are distributors and retailers of carbon papers, inked ribbons and similar articles, and until on or about June 20, 1952, employed each of the plaintiffs as a sales manager each at a weekly salary of £18 10s. with commission. (2) On or about the said June 20, 1952 . . . each of the plaintiffs agreed orally with the defendants to determine their respective employments by the defendants, by the plaintiffs tendering their resignations and the defendants accepting the same. (3) At all material times

the defendants well knew that it was the intention of the plaintiffs on leaving their said employments to set up . . . in a business . . . (4) On and after the said June 20, 1952, the defendants falsely and maliciously wrote and published in a circular letter of and concerning the first plaintiff and of and concerning him in the way of his said business the words following, that is to say: 'Sandess Universal Products. Sandess Carbon Papers, Inked Ribbons, Stencils & Duplicating Inks . . . Dear Sirs, We wish to bring to your notice the fact that we have dismissed [the first plaintiff] from our employ, he having been our representative in your area, and finally, that he has now no connection whatsoever with our company. Yours faithfully, Sandess Universal Products.' Particulars. The said words were published by posting the said circular letter to—and to many score others, potential customers of the first plaintiff in the said business, and whether or not such publishees were in fact, as alleged in the said circular letter, situate in the area for which the first plaintiff had been the defendants' representative . . . (5) By the said words the defendants meant and were understood to mean that they had dismissed the first plaintiff from their employment against his will, and that the first plaintiff had been guilty of some conduct entitling the defendants to terminate his employment without notice or salary in lieu, or that the circumstances of the termination of the first plaintiff's employment were such as to be discreditable to the first plaintiff."

A

B

C

Paragraphs 6 and 7 repeated with respect to the second plaintiff the allegations set out in paras. 4 and 5 respectively.

On a request for particulars of the facts and matter on which the plaintiffs relied in support of the meanings alleged in paras. 5 and 7, the plaintiffs replied:

D

"Under para. 5. Under this paragraph, the first plaintiff will rely upon a secondary meaning of the word 'dismissed' and will contend that such a secondary meaning is 'to dismiss from an employment against the will of the employee, or to dismiss an employee who has been guilty of some conduct entitling the employer to terminate his employment without notice or salary in lieu, or to dismiss an employee in circumstances such as to be discreditable to the employee', and further, that in the particular facts and circumstances set forth in para. 1 and the first sentence of the particulars to para. 4 of the statement of claim the words complained of were calculated to convey and did convey such meaning with regard to the dismissal of the first plaintiff. Under para. 7. [like particulars with regard to the second plaintiff.]"

E

F

By their defence the defendants pleaded, inter alia, in answer to paras. 5 and 7 respectively of the statement of claim:

"The said words do not mean and were not understood to mean and are incapable of the alleged meanings, or any other defamatory meaning, and without the alleged meanings are no libel."

G

On July 7, 1953, it was ordered under R.S.C., Ord. 25, r. 2,

"that there shall be tried as a preliminary point of law the issue whether the words complained of in the statement of claim have in their ordinary signification any defamatory meaning or are capable of bearing the alleged defamatory meaning other than their ordinary meaning having regard to the facts and matters relied upon herein."

H

This preliminary issue came before LORD GODDARD, C.J., who on Oct. 29, 1953, decided that the words "dismissed from our employ" in a letter of the kind in question were capable of a defamatory meaning. The defendants appealed.

Aldous for the defendants.

Marnan for the plaintiffs.

JENKINS, L.J., stated the facts and continued: Counsel for the defendants says, in effect, that the particulars given of the facts and circumstances relied on by the plaintiffs as giving the words complained of any other than their usual meaning add nothing to what is alleged in the statement of claim. So far, I am disposed to agree with him. He says, further, that, taking the letter containing the alleged libel at its face value and construing the language used according to its ordinary signification, the words are incapable of a defamatory meaning. In support of his argument, he has referred us to *Nevill v. Fine Art & General Insurance Co.* (1), where the appellant acted for some time as agent to an insurance company at his own offices. After some correspondence as to a change of terms, on which the parties could not agree, the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his offices had "been closed by the directors". The question was whether or not the statement that the agency at the appellant's offices had been closed by the directors was capable of a defamatory meaning. We were referred by counsel for the defendants to the speech of LORD HALSBURY, L.C., ([1897] A.C. 73) where His Lordship said:

"In the original argument of *Capital & Counties Bank v. Henty* (2) in the Court of Appeal, I observe that BRETT, L.J., says this (5 C.P.D. 541): 'It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. Therefore I am of opinion that this document could not reasonably be taken in a defamatory sense by those to whom it was published according to the primary meaning of the language used in it'. And in this House LORD WATSON affirmed the same proposition in language to which I think my noble and learned friend, LORD SHAND, has already called attention. It would not be enough, therefore, in this case to say that some persons might have understood these words as conveying some reflection upon the honour or business capacity of Lord William Nevill. It stands, therefore, as it appears to me, a long way distant from what was done in *Henty's* case (2), where a communication was made to the persons who had to make payments to the brewer in the particular case, and they were informed that the cheques of such and such a bank were not to be received in future. That undoubtedly, as LORD WATSON points out, might possibly by some persons have been understood to convey some reflection upon the solvency of the particular bank upon which the cheques were drawn, but because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous."

Counsel also referred to *Capital & Counties Bank v. Henty* (2), in the House of Lords, and, in particular, to the speech of LORD WATSON (7 App. Cas. 788), who said:

"If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular, I should hold that it had a libellous tendency, although the language used is not in itself libellous. But, besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent."

LORD BRAMWELL said (*ibid.*, 793):

"I say, then, that the words are harmless in themselves, and that they



do not import or justify the inference of the plaintiffs' insolvency. If I am wrong in this, and if the words do impute or justify the inference of insolvency as a possible cause of the defendants' refusal to take cheques on the plaintiffs, I say that that is only one of several things which they import, or of which they justify the inference; that no action lies in such a case; that if it would lie against any one not interested to do and say what the defendants did and said, it does not lie against them who were so interested and did and said no more than they had a right to do."

Finally, counsel for the defendants referred to *Beswick v. Smith* (3). There the alleged libel, written by former employers, was:

"H. Beswick is no longer in our employ. Please give him no order or pay him any money on our account."

LORD HALSBURY said (24 T.L.R. 170) that:

"The words complained of, if taken in their natural meaning, would not convey to the mind of a person of ordinary intelligence the impression that any imputation was being made against the plaintiff. He did not deny that there might be a publication under such circumstances as to make that which was *prima facie* not libellous convey in fact a defamatory imputation. But that was not the case here. It was quite possible, and it seemed to him to be quite natural, that some of the defendant's customers might, in the absence of notice, have sent money or orders to the plaintiff. The ordinary and reasonable inference to be drawn from the notice which was sent was, perhaps, that the employment had terminated because the parties had quarrelled, but certainly not that the defendant was imputing anything criminal to the plaintiff. Such an inference seemed to him to be the invention of an imagination already tainted with the idea that there was something wrong in the termination of the employment. He thought that the appeal should be allowed, and judgment entered for the defendant."

On those authorities, counsel for the defendants submits that the most that can be said against the letter complained of in the present action is that somebody reading it might conceivably draw the inference that the first or second plaintiff, as the case might be, had been dismissed for discreditable conduct of some sort, but that that is no more than one of a number of possible inferences that a reasonable reader of this letter might draw. Therefore, he says, it would be wrong for the court, having regard to those authorities, to pick from several equally possible meanings the one injurious meaning and say on the strength of it that these words are capable of constituting a libel.

I confess that, on reading these authorities, I find it difficult exactly to appreciate the position in which they leave the matter. For many statements are capable of more than one meaning, and if these authorities are to be understood as ruling that an alleged libel is to be held capable of a defamatory meaning only in a case in which it cannot have any meaning other than a defamatory one, it seems to me that the task of a judge in deciding whether or not a case is one to be left to the jury would often be difficult, because so often the question what the words complained of might be held to mean by a reasonable person is likely to be nicely balanced. But I find assistance in this difficulty from *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.* (4), to which we were referred by counsel for the plaintiffs, and, in particular, from the following passage in the speech of LORD PORTER, where his Lordship said ([1950] 1 All E.R. 454):

"Some argument was presented to your Lordships as to the attitude which the judge should adopt where, in his view, the only inference which can be drawn from the words complained of is that they lie on the border-line, and it is impossible to say whether, when properly considered, they are capable of a libellous meaning or not. It is, of course, the duty of a judge in the

A first instance to put an accurate interpretation on the words used, and, having done so, to make up his mind whether they are capable of a defamatory meaning or not. Theoretically, if he is left in doubt, he should rule them incapable of a defamatory meaning, but this, I think, is a theoretical and not a practical difficulty. It is the judge's duty to make up his mind and, save in very exceptional cases, he can decide on which side of the line the words complained of are to be placed. If he comes to the conclusion that a reasonable jury would be justified in finding that they had a libellous tendency, he must leave it to them even though the words might also bear an innocent interpretation, or, to put it from the point of view of an appellate court, the question of libel or no libel should have been left to the jury if it cannot be said that twelve men could not reasonably have come to the conclusion that the words were defamatory. This, I think, is what LORD BLACKBURN means in his observations in *Capital & Counties Bank v. Henty* (2), when he says, quoting BRETT, L.J. (7 App. Cas. 786): ' . . . it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document '. It is in accordance with the test put by LORD SELBORNE, L.C., when he says (ibid., 745): ' The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense '. In the present case both the court of first instance and the Court of Appeal, though for different reasons, found the letter capable of a defamatory meaning, and I proceed to consider the second question whether there is any evidence of malice on the part of the respondents on this footing."

The matter, therefore, depends on the question whether or not a reasonable jury would be justified in finding that the words complained of had a libellous tendency, or, in other words; whether or not it can be said that twelve men could reasonably come to the conclusion that the words complained of were defamatory.

E Counsel for the defendants has suggested to us a variety of meanings for the word "dismissed", and he says that it does not, by any means, necessarily have a derogatory connotation. But, in my view, the function of the judge on such a matter is to endeavour to decide what meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. F Looking at this letter from that point of view, notwithstanding the various inoffensive meanings which the words: "We have dismissed [the first, or second, plaintiff]", might be said to be capable of bearing, I find myself unable to hold that the words complained of are not capable of a defamatory meaning, or that it is not possible that a reasonable jury might hold them to be defamatory. With the question whether or not they are defamatory, this court at this stage G has nothing whatever to do. That will be a question for the jury when the case comes to be tried.

H Accordingly, I would dismiss this appeal. I must say that, in my judgment, the procedure under R.S.C., Ord. 25, r. 2, is most unsuitable for the purpose for which it has been used in this case. If recourse is to be had to that rule on the question whether or not words complained of in a libel action are capable of a defamatory meaning, it seems to me that the practice may grow up of splitting libel actions into two stages, the first being concerned with the aspect of the case with which we have been occupied today and the second being the trial of the case itself in the event of the defendant's failing to put a summary end to the proceedings on the preliminary issue with which we are now dealing. That appears to me to be a most undesirable practice, and, in my view, a question such as that now raised is not a proper subject for an application under the procedure prescribed by R.S.C., Ord. 25, r. 2.

MORRIS, L.J.: I agree. The matter is, I think, clearly stated in *GATLEY ON LIBEL AND SLANDER*, 4th ed., p. 126:

"In determining whether the words are capable of a defamatory meaning the judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them."

Like **JENKINS, L.J.**, I also think that great assistance is derived from the passage ([1950] 1 All E.R. 454) in the speech of **LORD PORTER** in *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.* (4). It seems to me that, in deciding at this stage whether or not the words are capable of a defamatory meaning and whether or not the action should go forward for trial, we are entitled to have regard to facts and events which are of general and ordinary knowledge and to the general and ordinary understanding of words which are in common use. I agree with **JENKINS, L.J.**, that the test is whether or not a jury could reasonably come to the conclusion that the words are defamatory. I have no doubt, speaking for myself, that the words are capable of a defamatory meaning, and the result is that the case goes forward for determination whether the words bear the alleged, or any, defamatory meaning. I, therefore, agree that this appeal fails. I would also add that I am in further agreement with what **JENKINS, L.J.**, and **LORD GODDARD, C.J.**, in the court below, have said with regard to procedure.

Appeal dismissed.

Solicitors: *Stilgoes* (for the defendants); *Franks, Charlesly & Leighton* (for the plaintiffs).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

BOARLAND (INSPECTOR OF TAXES) v. MADRAS ELECTRIC SUPPLY CORPORATION, LTD. (In Liquidation).

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), November 23, 24, 25, December 9, 1953.]

Income Tax—Deduction against profits—Wear and tear—Balancing charge—Sale of undertaking to the Crown—Undertaking carried on by Crown—"Person [who] succeeds to any trade"—Inclusion of Crown—Assessment as if trade "discontinued"—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 11 (2), as substituted by Finance Act, 1926 (c. 22), s. 32 (1)—Income Tax Act, 1945 (c. 32), s. 17 (1).

A company sold its undertaking to the Crown, which carried it on so that the trade was not discontinued. The company was assessed to income tax for the period terminating on the date of the sale in the sum of £850,000 in respect of balancing charges under s. 17 (1) of the Income Tax Act, 1945, arising on the sale of machinery and plant included in the transaction.

HELD: the Crown was a "person" within the meaning of r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918 (as substituted by the Finance Act, 1926, s. 32 (1)), and, therefore, a person had succeeded to the trade within the meaning of the rule, the company was liable to be assessed as if the trade had been discontinued under the rule, and the balancing charges were properly made under s. 17 (1) of the Act of 1945.

Decision of **UPJOHN, J.** ([1953] 1 All E.R. 467), affirmed.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 11 (2), as amended by the Finance Act, 1926, s. 32, see

HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 164; and FOR THE INCOME TAX ACT, 1945, s. 17 (1), see *ibid.*, p. 629.

Cases referred to:

- (1) *R. v. Cook*, (1790), 3 Term Rep. 519; 100 E.R. 710; 42 Digest 690, 1043.
- (2) *Coomber v. Berks. JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- A (3) *Magdalen College, Cambridge, Case*, (1615), 11 Co. Rep. 66b; 77 E.R. 1235; *sub nom. Warren v. Smith, Magdalen College Case*, 1 Roll. Rep. 154; 81 E.R. 396; 42 Digest 689 1039.
- (4) *A.-G. v. Hancock*, [1940] 1 All E.R. 32; [1940] 1 K.B. 427; 109 L.J.K.B. 243; 164 L.T. 52; 2nd Digest Supp.
- B (5) *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; *sub nom. Inland Revenue Comrs. v. Gibbs*, 166 L.T. 345; *sub nom. R. v. Income Tax General Comrs. Ex p. Gibbs*, 24 Tax Cas. 221; 2nd Digest Supp.
- (6) *Hampden Ship Money Case*, (1637), 3 St. Tr. 826.
- (7) *Bank Voor Handel en Scheepvaart N.V. v. Slatford*, [1952] 2 All E.R. 956; [1953] 1 Q.B. 248; 3rd Digest Supp.
- C (8) *Inland Revenue Comrs. v. Barr*, (1953), 46 R. & I.T. 217; [1953] Tax Rep. 217.
- (9) *Inland Revenue Comrs. v. West. Inland Revenue Comrs. v. Reid*, 1950 S.C. 516; 31 Tax Cas. 402; 2nd Digest Supp.

D APPEAL by the company against an order of UPJOHN, J., dated June 18, 1953, and reported ([1953] 2 All E.R. 467) allowing an appeal by the Crown from a decision of the Special Commissioners of Income Tax, and holding that balancing charges in the sum of £850,000 had been properly made on the company under s. 17 (1) of the Income Tax Act, 1945, on the sale of its undertaking, including machinery and plant, to the Crown. The company contended that the Crown was not a "person" within the meaning of r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918; that that rule, requiring E the tax on the company to be computed as if the trade had been discontinued, did not apply; and that the company could not be assessed, therefore, under the sub-section.

The Attorney-General (Sir Lionel Heald, Q.C.), J. H. Stamp and Sir Reginald Hills for the Crown.

F *Millard Tucker, Q.C., and J. W. P. Clements* for the company.

Cur. adv. vult.

Dec. 9. The following judgments were read.

G SINGLETON, L.J.: The Madras Electric Supply Corporation, Ltd., the company, was incorporated under the Companies Acts, 1862-1900, on Jan. 27, 1906, with the object of carrying on in India the business of an electric light and power undertaking in all its branches. The undertaking was carried on under three licences granted by the government of Madras. Particulars of the licences are set out in paras. 6, 7 and 8 of the Case. Under the first two licences the local authority, with the sanction of the local government, had an option to purchase such portion of the undertaking as was in the area for which it was constituted, and a similar option was given to the local government if the local H authority did not elect to purchase. Under the third licence the Governor-General in Council had the option to purchase. The option was exercisable in each case on Aug. 29, 1947. The company carried on its business until that date. Notices to exercise the options were duly given.

On Aug. 27, 1947, an agreement was entered into between the government of Madras and the company, the effect of which is stated in para. 11 of the Case:

"... it was declared and agreed (inter alia) as follows:—1: that the

government of Madras and the company agreed to entrust the valuers with the work of valuation of the physical assets to be purchased by the government and to be sold by the company; 2: that the valuation to be made by the valuers should be in conformity with the first proviso to s. 7 (1) of the Indian Electricity Act, 1910. For the removal of doubts, it was declared that the company should not be eligible for any solatium to be added to such valuation in accordance with the second proviso to the said s. 7 (1) for determining the purchase price; . . . 7: that the company should hand over the undertaking to the government and the government should take over the undertaking from the company at the commencement of Aug. 29, 1947 . . .”

There followed a supplemental agreement of Aug. 29, 1947, by which it was witnessed:

“(1) that the company had on the date of execution of these presents handed over physical possession of the lands, buildings, works, materials and plant suitable to and used by the company for the purpose of the said undertaking . . . (2) the company hereby acknowledges to have received [certain moneys] (being a payment on account of the purchase price, provided for in the principal agreement of Aug. 27, 1947): (3) that the company undertook to execute and register in favour of the government of Madras a proper deed of conveyance and assignment of the lands, buildings, fixed machinery and plant.”

In due course the valuation forming the measure of the purchase price was agreed at Rs. 215 lakhs, excluding the sum to be paid to the company for service lines paid for by consumers (the valuation of which was reserved for arbitration). The sterling equivalent of this sum of rupees was £1,612,500, and the amount actually received by the company (due to exchange rates) was £1,611,437. On Sept. 29, 1950, the company went into voluntary liquidation. On the date of the sale, Aug. 29, 1947, the company ceased to trade. Its former undertaking continued to be carried on without interruption in Madras under the management of a department of the Madras government. Substantially all the company's former staff continued to work in the undertaking. On Mar. 30, 1951, the company made a formal conveyance and assignment of lands, buildings, fixed machinery and plant to the government of Madras.

It is claimed by the Crown that the circumstances give rise to an assessment to income tax in the sum of £850,000 in respect of balancing charges under Part II of the Income Tax Act, 1945. The claim is made in this way. Rule 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, provides that, if any person succeeds to the trade which until that time was carried on by another person, the tax payable for all the years of assessment by the person succeeding shall be computed as if he had set up or commenced the trade at that time, and the tax payable for all the years of assessment by the person who until that time carried on the trade shall be computed as if it had then been discontinued. It is said that on Aug. 29, 1947, the government of Madras succeeded to the business which the company had carried on until that time.

The next step leads to consideration of s. 17 (1) of the Income Tax Act, 1945:

“Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as ‘a balancing allowance’ or ‘a balancing charge’) shall, in the circumstances

mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs."

The reason for the introduction of this section is, I think, fairly clear. Under r. 6 of the Rules Applicable to Cases I and II of sched. D, a trader is allowed a deduction each year on account of wear and tear of machinery. He may sometimes be allowed less than he ought to be allowed: in other cases he may be allowed more than is warranted. If he continues in trade the matter may adjust itself in course of time. On the other hand, if he sells the plant or machinery before the trade is permanently discontinued there may arise a balancing allowance to him or a balancing charge against him, and the section is intended to provide for adjustment accordingly. We are not concerned with figures. It is sufficient to say that the claim of the Crown is that something in the neighbourhood of £850,000 falls to be included as a balancing charge in the company's assessment to tax.

It was common ground between the parties:—(i) that by reason of s. 17 (1) of the Income Tax Act, 1945, the balancing charges forming the subject of the assessment under appeal fell to be made on the company (if at all) for the year of assessment in the company's basis period for which the sale of its plant and machinery occurred; (ii) that for the purposes of the said Act such sale occurred on Aug. 29, 1947; (iii) that, by reason of s. 57 (2) of the said Act, the company's basis period for the year of assessment 1947-48 was the period on the profits or gains of which income tax for that year fell to be computed under Case I of sched. D in respect of its trade. The contention put forward on behalf of the company is that r. 11 (2) does not apply to the facts of this case and that no balancing charge can be made on the company. This is based mainly, if not wholly, on the submission that the sale of plant, etc., was a sale to the Crown, and it is claimed that the Crown is not a "person" within the meaning of that word in r. 11 (2). This contention was accepted by the Special Commissioners, from whom UPJOHN, J., allowed the appeal of the Crown. The company appeals to this court.

Counsel for the company drew our attention to s. 175 (2) of the Government of India Act, 1935, under which it is provided:

"All property acquired for the purposes of the federation or of a province . . . shall vest in His Majesty for those purposes."

He appeared to seek to draw a distinction between this case and other cases in which the State acquires property for the benefit of subjects. I do not see that any such distinction can be drawn. The undertaking was, undoubtedly, acquired for the public good and it vested in His Majesty for the purpose for which it was acquired. The options to purchase were exercised by the government of Madras. The two agreements of Aug. 27 and Aug. 29, 1947, were made between the government of Madras and the company—and the conveyance was to the government.

Learned counsel submitted that the Crown acquired the undertaking of the company and that r. 11 (2) has no application to such a case. He put his submission in this way. "The Queen is the monarch legislating with the other estates. The Finance Acts are all addressed to subjects, and charging orders cannot include the Crown itself. Therefore, the word 'person' in a charging order, or section, will not include the Crown. The Crown does not impose a tax on itself." He drew our attention to the preamble to the Finance Act, 1947:

"Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled . . . have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows—"

Counsel for the company added that sched. D was a charging schedule and the rules under it were charging rules, and it would not be right to read "person" in r. 11 (2) in two different ways. In other words, it could not include the Crown.

The old form of preamble is preserved. It is, however, recognised that the freedom of the monarch from taxation arises by virtue of the prerogative. In *R. v. Cook* (1) LORD KENYON, C.J., said (3 Term Rep. 522):

"Now although there is no special exemption of the King in this Act of Parliament, yet I am of opinion that he is exempted by virtue of his prerogative, in the same manner as he is virtually exempted from the 43 Eliz. and every other Act imposing a duty or tax on the subjects."

In *Coomber v. Berks. JJ.* (2) LORD BLACKBURN (9 App. Cas. 66) cited the words of LORD KENYON and referred (*ibid.*) to

"... the exemption, by virtue of the prerogative, of property actually occupied or enjoyed for the Crown."

Now, the Crown is a "person": see the *Magdalen College, Cambridge, Case* (3) (11 Co. Rep. 70a):

"And, first, it was resolved, (a) that the general words of the Act extend to the Queen, for the words are, 'To any person or persons, body politic or corporate;' and without question the Queen was a person, as it is said in 10 H. 7, 18a."

Indeed, it has not been disputed that the monarch is a person, but it is said that he (or she) is not a person within the meaning of that word in the Income Tax Act, 1918, or at least for the purposes of sched. D. It appears to me that this reasoning fails to draw a distinction between the word "person" and a "taxable person". I cannot see why we should not give the ordinary meaning to the word "person" when considering the provisions of r. 11 (2). Of course, the Crown is not chargeable under sched. D. That follows from the exemption arising from the prerogative. I draw attention to the words of WROTTESELEY, J., in *A.-G. v. Hancock* (4) ([1940] 1 K.B. 435):

"Section 1 of the Courts (Emergency Powers) Act, 1914, begins with the words: 'From and after the passing of this Act no person shall ...' Pausing there, [counsel for the defendant] said, and everybody, I think, must agree with him, that the word 'person' clearly can include the Crown, and it is for that reason that it has been necessary from time to time for the courts to remind themselves of the rule with which I am dealing."

It would be strange, indeed, if the provisions of r. 11 (2) were not to apply if the purchaser of a business—the one who succeeded to the trade—was the Crown or a department of State. It is difficult to think of any reason for any such distinction. And when one comes to apply s. 17 (1) of the Income Tax Act, 1945, it is worth noticing that there may be a balancing *allowance* or a balancing *charge*. It matters not who the purchaser is so long as the event in question happens before the trade is permanently discontinued.

Counsel for the company cited the words of LORD MACMILLAN in *Income Tax Comrs. v. Gibbs* (5) ([1942] 1 All E.R. 425):

"The important thing to ascertain is the meaning of the word 'person' in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes."

No question such as the present was under consideration, and I do not think that the citation carries us any further unless the submission is that the word

“person” throughout means taxable person—and counsel for the company did not make that a part of his case.

The contentions of the Crown are set out in para. 18 of the Case stated by the Special Commissioners. The submission of the Attorney-General was that the word “person” must be given its ordinary meaning apart from some compelling reason to the contrary, and that “person” includes the Crown and servants of the Crown. He argued that there is no difference for the purpose of r. 11 (2), whether the successor is the Crown, or the British Transport Commission, or the Post Office, or another company, or an individual, and, relying on the authorities I have mentioned, he submitted that the word “person” includes the Crown though the Crown is immune from taxation by reason of the prerogative. Junior counsel for the Crown, who followed, spoke of the Income Tax Acts as regulating the position between the Crown (a person) and other persons. The Crown, he said, is bound by the Income Tax Acts, but by virtue of its prerogative does not pay tax. He drew our attention to the use of the word “person” in the Act of 1918 as meaning a person other than a person taxable, e.g., s. 116, s. 132 (2), s. 133 (1) (b), s. 166 (10) and s. 190—and there are others.

It appears to me that the contention put forward on behalf of the company fails. I can find nothing to justify the giving of a limited meaning to the word “person” in r. 11 (2). It must, I think, be read in the ordinary way. I agree with the conclusion of UPJOHN, J., and I would dismiss the appeal of the company. I do not think that it is necessary for me to add anything to that which was said by UPJOHN, J., in relation to two cases recently before the Court of Session* except that counsel for the company desired to keep open the position arising on them.

BIRKETT, L.J.: I agree with the judgment of my Lord which has just been delivered. I have also had the opportunity of reading and considering the judgment which is about to be delivered by HODSON, L.J., and with that judgment I also agree. In those circumstances I do not desire to add a judgment of my own.

HODSON, L.J.: The main question in this appeal is whether in r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918 (as substituted by the Finance Act, 1926, s. 32 (1)), the word “person” includes the Crown. If the word “person” includes the Crown the appellant company, it is conceded, is liable to certain balancing charges, since the Crown has succeeded to its trade within the meaning of the rule. The balancing charge is borne by the company and the identity of the successor has no effect financially or otherwise. UPJOHN, J., held that, as a matter of construction, there was no ground for placing any limitation on the ordinary natural meaning of the word, and that in r. 11 (2) the word “person” includes the Crown, persons resident abroad, charity trustees and others who for different reasons may be found to be exempt from tax. I agree with his judgment and with the reasons given in support of it.

The appellant company bases its argument on the admitted fact that the purchaser of its undertaking was the Crown, and refers in particular to the Government of India Act, 1935, s. 175 (2), which came into force (other than Part II) by Order in Council on Apr. 1, 1937. The wording of this sub-section has been slightly varied by another Order in Council, but the material words remain:

“All property . . . shall vest in His Majesty for those purposes.”

The argument, accordingly, is restricted to this narrow proposition, that, the successor to the company being His Majesty in person, the word “person” in the charging sections of the Income Tax Acts cannot be construed as including His Majesty. It is said that it is not necessary to examine the nature of the royal prerogative which includes exemption from taxation, but that the company is

* *Inland Revenue Comrs. v. Barr* (8); *Inland Revenue Comrs. v. West*. *Inland Revenue Comrs. v. Reid* (9).

entitled to say that the word "person" in r. 11 (2) cannot, as a matter of construction, include the Crown in its personal capacity.

The court was reminded of the constitutional position set out by PROFESSOR HEARN in his GOVERNMENT OF ENGLAND at p. 18:

"The law places no restriction upon the extent of the royal power but rigorously defines the manner in which the several branches of that power may be exercised. In every part of public affairs the expression of the royal will is conclusive; but in each case the royal will must be stated through the appropriate channel."

Thus, in theory in the making of a statute

"The King is pars agens, the rest [Lords and Commons] are but consentientes",

per St. John arg. in *Hampden Ship Money Case* (6) (3 St. Tr. 863). Emphasis was placed on the preamble to the taxing Acts, which is set out in full in the judgment of UPJOHN, J. ([1953] 2 All E.R. 471), as showing that, having regard to the language of this preamble, the Crown, as grantee of the taxes, cannot be a person for tax purposes, and that, in the charging provisions of the Income Tax Act, 1918, "person" cannot sensibly include the Crown.

On the other hand, it is to be observed that, in numerous places in the Income Tax Act, 1918, the word "person" is used to include others than taxable "persons", or, to borrow the language of LORD MACMILLAN in *Income Tax Comrs. v. Gibbs* (5) ([1942] 1 All E.R. 425), "entities of assessment". This is the sense in which, as LORD MACMILLAN said, the word "person" is most generally used throughout the Income Tax Acts. Some dozen examples were given in argument on behalf of the Crown of places in the Acts where the word "person" does not denote an "entity of assessment", and as a pure question of construction I see no reason why the word "person" in a charging section also should not include the Crown. No question of taxing the Crown arises, so that there is no invasion of the Crown's prerogative by construing the word "person" in its natural and ordinary meaning. That the word "person" in an Act of Parliament is apt to include the Crown there is no doubt. The Crown is a corporation sole, and, therefore, a person: see s. 19 of the Interpretation Act, 1889. The authorities are all one way, the earliest cited being the *Magdalen College Case* (3) (11 Co. Rep. 70a), where the Year Book, 10 Hen. 7, 18a, is in turn cited for the sentence: "Rex est persona mixta." One of the latest cases cited was *A.-G. v. Hancock* (4), where WROTTESELEY, J., stated ([1940] 1 K.B. 435): "the word 'person' clearly can include the Crown".

The company perforce contended that the authorities drew a distinction between the Crown in its personal capacity and the Crown in its capacity as part of the constitution. In order to mark the distinction reference was made to 39 & 40 Geo. III, c. 88, s. 6, which provided that Crown lands when bought by private funds of the King are liable to parliamentary and parochial rates, and reference was made to the Crown Private Estates Act, 1862. I can, however, find no justification for the distinction between the Crown in its personal capacity and the Crown in the constitutional sense which the company seeks to draw.

The Crown usually can act only through its servants, and this consideration must apply to His Majesty as referred to in the Government of India Act, 1935, to which I have already referred. Thus, there is here no practical distinction between the Crown and Crown servants. There are a number of authorities where the claim for exemption from taxation of Crown servants has been considered. This claim has always been based on the royal prerogative that the King is exempted from taxation by virtue of his prerogative. In *R. v. Cook* (1) it was decided that the posthorse duty imposed by 25 Geo. III, c. 51, was not to be paid for horses employed for forwarding public expresses on the service of government. It was decided that the King was exempt from tax by virtue of

his prerogative. The Attorney-General pertinently observed that, if the contention of the company were correct, the proper question for argument would appear to have been, not: "Was there an exemption on the ground of prerogative?" but: "Were the horses 'royal horses'?" *R. v. Cook* (1) was considered in the House of Lords in *Coomber v. Berks. JJ.* (2), per LORD BLACKBURN (9 App. Cas. 71), who in connection with taxation spoke of "an implied exemption on the ground of prerogative".

A These principles were applied by the Court of Appeal in *Bank Voor Handel en Scheepvaart N.V. v. Slatford* (7). The actual decision there was that the office of Custodian of Enemy Property was not such as of itself to confer on its holder the immunity from tax belonging to the Crown, but there was an elaborate discussion on Crown immunity in the judgments, which proceeded on the basis that the Custodian was a person within the orbit of the charge created by sched. D to the Income Tax Act, 1918. The question was answered adversely to the claim for immunity. SIR RAYMOND EVERSHED, M.R., said ([1952] 2 All E.R. 969):

B "... the commonly used formula that the Income Tax Acts do not bind the Crown conceals the true principle, which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not thereby prejudiced."

C There is no prejudice to the Crown in this case in construing the word "person" in r. 11 (2) so as to include the Crown, and, as I have already indicated, I cannot distinguish the instant case from *Slatford's* case (7) by drawing a distinction between the King in person and servants of the Crown. The reasoning of all the judgments in *Slatford's* case (7) appears to me to be inconsistent with the claim
D put forward by the company that the Crown is immune, not because of the prerogative, but because it is not as a matter of construction covered by the word "person" in the charging sections of the Income Tax Acts. The common law rule as to the prerogative must be applied, but the Act must first be construed in the ordinary way. When the Act has been construed the Crown is entitled to set up its right against the construction if prejudiced thereby, and the construction will, when necessary, yield to the prerogative. There is nothing in r. 11 (2) which interferes with the rights of the Crown, so that there is no conflict between the statute and the prerogative. On the contrary, the Crown is relying on the section, as it is entitled to do.

E In my opinion, the word "person" is a general word which is apt to include the Crown, and it is, as the Attorney-General contended, a question of construction of the Act as a whole whether, in a particular case, the Crown is entitled to claim exemption by prerogative.
F

As to the subsidiary point taken by the company in reliance on the decision of the Court of Session in *Inland Revenue Comrs. v. Barr* (8), the report of that case appears to show that the concluding words of s. 17 (1) of the Income Tax Act, 1945, were overlooked by the court. Counsel for the company recognised this and found difficulty in supporting this decision by independent reasoning. We
G were informed that *Barr's* case (8) is now under appeal to the House of Lords. In the circumstances I am content to say that, as at present advised, I can find nothing useful to add to what UPJOHN, J., has said on the subsidiary point. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Sanderson, Lee & Co.* (for the company).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. COOK.

[LEEDS ASSIZES (Stable, J.), November 16, 17, 1953.]

Criminal Law—Carnal knowledge—Procuring of mental defective girl—Girl under statutory supervision—Mental Deficiency Act, 1913 (c. 28), s. 56 (1) (a) (b).

By s. 56 (1) of the Mental Deficiency Act, 1913: “Any person—(a) who unlawfully and carnally knows . . . any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or (b) who procures . . . any woman or girl who is a defective to have unlawful carnal connection . . . with any person or persons . . . shall be guilty of a misdemeanour . . .”

P., a certified mental defective, was not in an institution or certified house or approved home, or on licence therefrom, or under guardianship, but she was under the statutory supervision of a mental health social worker who boarded her out with the defendant's wife at the defendant's house. Evidence was given that while P. was at the house the defendant one morning asked her to go back to bed, followed her, and there had carnal connection with her. On a charge against the defendant under s. 56 (1) (b),

HELD: the facts alleged did not show that the defendant had procured P. to have the carnal connection with himself.

Per curiam: It was nowhere provided in the Act that it was an offence for a person to have unlawful carnal knowledge with a mentally defective female who was not in one of the categories mentioned in s. 56 (1) (a).

Cases referred to:

- (1) *R. v. Mackenzie & Higginson*, (1910), 75 J.P. 159; 6 Cr. App. Rep. 64; 15 Digest 849, 9329.
- (2) *R. v. Christian*, (1913), 78 J.P. 112; 23 Cox, C.C. 541; 15 Digest 850, 9330.

TRIAL before STABLE, J., and a jury.

The defendant was charged with the procuring of a mental defective girl to have unlawful carnal connection, contrary to s. 56 (1) (b) of the Mental Deficiency Act, 1913, the particulars being that between Apr. 12 and May 21, 1953, he procured Jean Pearson, a girl aged seventeen years, who was then a defective, to have unlawful carnal connection with himself.

The facts proved by witnesses for the prosecution were that on Jan. 15, 1951, the girl Pearson was certified as, and had ever since that date been, a feeble-minded person under the Mental Deficiency Acts. She had not been placed in any institution, certified house, or approved home, or placed out on licence therefrom or under guardianship, but she had been placed under the supervision of a Miss Appleyard, a mental health social worker, under the Mental Deficiency Acts. In April, 1953, Miss Appleyard boarded Pearson out with Mrs. Cook, the wife of the defendant, at the defendant's house. While Pearson was living at the house the defendant one morning asked her to go back to bed. She went and the defendant there had carnal connection with her. The defendant had carnal connection with her in similar circumstances on two subsequent occasions.

A. M. Hurwitz for the prosecution.

Dodson for the defendant submitted that there was no case to answer.

STABLE, J.: Members of the jury, a very odd situation has arisen here. Where a criminal charge is brought against a man, the obligation on the Crown is to prove to the satisfaction of the jury that an offence has been committed, and that an offence has been committed by the man against whom the charge is

brought. This particular case arises under an Act of Parliament, and that Act of Parliament, very properly, is intended to protect from the lusts and desires of the opposite sex women who are mentally defective and are not responsible for the control of their own actions and behaviour. It is a very delicate and difficult problem to say at what point the State can step in and say that sexual intercourse with a willing female becomes a criminal offence. There is nothing in the world more difficult than to define or to describe in words the degrees or gradations of personal character, whether one is seeking to describe intellectual ability or whether one is dealing with the emotional side of a human personality, but Parliament has to make the attempt and Parliament has created a class of person who is described as a "mental defective". It is a different class from that which we used to call lunatics—insane people. Parliament has created categories of mental defectives covering a pretty wide field of mental deficiency, and when a person has been certified by a medical officer as being a mental defective a number of things can happen. If it is a bad case the patient can be put into an institution, where he, or she, is deprived of his, or her, liberty and freedom. If he, or she—we will call it "she" for the purposes of this case—benefits from treatment, that girl may be let out on licence to see how she fares when she is landed in the rigour of the free world. Alternatively, a patient may be put, not in an institution, but under guardianship. Short of that the patient can be put under what is called "statutory supervision", which means that she is not put into a home nor put under the guardianship of anybody, but people like Miss Appleyard keep a watchful eye on her. The situation of this girl was that she was under the supervision of Miss Appleyard.

There is no doubt that Mr. Cook ought to be thoroughly ashamed of himself. He had intercourse with this girl while she was lodging in his house. But he is charged with a criminal offence, the offence being that he procured this girl to have intercourse with him. When we examine the Act of Parliament that makes such an act a criminal offence the first thing that strikes the eye is that Parliament says it is an offence to have intercourse with a mental defective who is in an institution, who has been in an institution but is out on licence, or who has been placed under a guardianship order (Mental Deficiency Act, 1913, s. 56 (1) (a)). It definitely does not say that it is a criminal offence to have sexual intercourse with a girl who is merely under statutory supervision, as this girl was. Therefore, the act of intercourse with this girl was not a criminal offence. If she had been under guardianship or if she had been an inmate of one of these homes it would have been an offence unless the defendant could have satisfied you that he did not know and had no reason to suspect that she was a defective, but Parliament has definitely refrained from making it a criminal offence to have intercourse with a girl in this girl's situation. Therefore, these acts of intercourse, however morally reprehensible, were not criminal offences.

To get over that difficulty the defendant is charged under another paragraph of the sub-section which makes it an offence to procure a defective girl to have sexual intercourse with a man. If the procuress is a woman who persuades a girl to the paths of immorality—it may be that she coaxes her away from home, holds out all sorts of glittering prospects and prizes—and procures the girl to go down the wrong road, that is another matter. It is not very easy to define what procurement amounts to, but we probably all more or less have a pretty good idea in our minds what it is. There is not a shred of evidence here that this man ever procured anybody. He did not get the girl to come into his house. He did not get her away from her mother. Nobody suggests that the admirable Mrs. Cook was a procuress, getting hold of this girl for immoral purposes. Inasmuch as the Act has most specifically refrained from making the act of intercourse itself a criminal offence, there is no evidence before you on which you can convict this man of an offence under it. You may think there is a defect

in the law, but you have no alternative but to return a verdict of Not Guilty against this man.

Verdict: "Not Guilty."

Solicitors: *R. C. Linney*, Wakefield (for the Crown); *Carter, Bentley & Gundill*, Pontefract (for the defendant).

[*Reported by G. M. SMAILES, Esq., Barrister-at-Law.*]

A

EASTBOURNE CORPORATION *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

[CHANCERY DIVISION (Danckwerts, J.), December 8, 9, 10, 11, 1953.]

Entertainments Duty—Exemption—"Recitation"—"Music hall or other variety entertainment"—Humorous "patter" with music—Light musical concert—Performance dominated by variety performer—Finance Act, 1946 (c. 64), s. 8 (1)—Finance Act, 1952 (c. 33), s. 3 (1).

B

A local authority arranged a series of entertainments on premises belonging to them. The entertainments were presented on an open stage without scenery, and comprised mostly musical performances, vocal and instrumental. The entertainments fell into three groups: (a) those which, although largely musical, included performances partially musical and partially consisting of monologue and the telling of humorous stories, or dialogue, of amusing character, described as "patter", given by artistes well-known in the field of variety, light entertainment and the music hall; (b) those wholly musical, which could be described as light musical concerts, and which did not include a performance which could be called a variety or music hall act; and (c) those dominated by a well-known performer in the variety theatre, doing the act which he or she gave in the variety theatre. The local authority claimed exemption from entertainments duty in respect of the entertainments.

C

D

HELD: (i) the non-musical parts of entertainments (a) did not constitute "recitation" by the performers within the Finance Act, 1946, s. 8 (1), and, the non-musical parts not falling within any other head of s. 8 (1), the local authority was not entitled to exemption in respect of those entertainments.

E

(ii) entertainments (b) were not "music hall or other variety entertainment" within the Finance Act, 1952, s. 3 (1), and, therefore, were not by that sub-section excluded from the operation of s. 8 (1) of the Act of 1946, which accordingly exempted them from duty.

F

(iii) entertainments (c) were variety entertainments within s. 3 (1) of the Act of 1952 and no exemption was due in respect of them.

FOR THE FINANCE ACT, 1946, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1317.

G

Case referred to:

(1) *Barnes v. Jarvis*, [1953] 1 All E.R. 1061; 117 J.P. 254.

WITNESS ACTION.

Eastbourne Corporation claimed declarations that entertainments organised and provided by them at the Winter Garden, Eastbourne, on July 20, 21, 28, Aug. 28, and Oct. 30, 1952, consisted of one or more of the items referred to in the Finance Act, 1946, s. 8 (1), and that the said entertainments were not "music hall or other variety entertainment" within the meaning of s. 3 (1) of the Finance Act, 1952, and were, therefore, exempt from entertainments duty.

H

Millard Tucker, Q.C., and J. W. P. Clements for Eastbourne Corporation.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), Viscount Hailsham, Q.C., and J. P. Ashworth for the Commissioners of Customs and Excise:

A DANCKWERTS, J.: This is an action brought by Eastbourne Corporation against the Commissioners of Customs and Excise. The action relates to five concerts which were put on by the corporation in a place called the Winter Garden, which is the property of the corporation. The concerts were given without any stage scenery on an open stage, without any drop curtain, but merely side curtains which were drawn across the stage at the beginning and at the end, and in the course of the first part of the entertainment. A claim for entertainments duty has been made by the Commissioners of Customs and Excise, and the corporation seek to establish that they are entitled to exemption

B from that duty under the Finance Act, 1946, s. 8 (1).

It will be convenient first to refer to the relevant statutes. The duty in question was imposed by the Finance (New Duties) Act, 1916, which provides, by s. 1 (1):

C "There shall . . . be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an excise duty (in this Act referred to as 'entertainments duty') . . ."

at certain rates. "Entertainment" is defined in s. 1 (6) in these words:

D "The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held."

It is, perhaps, worth while also to refer to s. 1 (5), which has been partially repealed (by the Finance Act, 1946, s. 8 (2)), but which is not without interest. That sub-section provided:

E "Entertainments duty shall not be charged on payments for admission to any entertainment where the commissioners are satisfied . . . (b) that the entertainment is of a wholly educational character (any question on that point to be determined in case of difference by the Board of Education); or . . . (d) that the entertainment is provided for partly educational or partly scientific purposes by a society, institution or committee not conducted or established for profit, or is provided by any such society or

F institution, which has been founded with the object of reviving national pastimes, in furtherance of that object."

The Finance Act, 1935, s. 1 (3), as amended by the Finance Act, 1946, s. 7 (2) and s. 8 (3), provides for duty at reduced rates in certain cases:

G "The said duty shall be charged at the reduced rates set out in sched. I to this Act in a case where all the performers whose words or actions constitute the entertainment are actually present and performing, and the entertainment consists solely of one or more of the following items, namely, a stage play, a ballet (whether a stage play or not), a performance of music (whether vocal or instrumental), an eisteddfod, a lecture, a recitation, a music hall or other variety entertainment, a circus, a travelling show, a menagerie or any game or sport other than the racing or trial of

H speed of animals, vehicles, motor vessels or aircraft."

The Finance Act, 1946, s. 8, introduced a provision which is of immediate concern in this action:

"Entertainments duty on certain entertainments provided by bodies which are not profit making. (1) Entertainments duty within the meaning of s. 1 of the Finance (New Duties) Act, 1916, shall not be charged on payments for admission to any entertainment which consists of one or more of the

following items, that is to say—(a) a stage play; (b) a ballet (whether a stage play or not); (c) a performance of music (whether vocal or instrumental); (d) the exhibition of a cinematograph film; (e) a lecture; (f) a recitation; (g) an exhibition of artistic work; (h) an industrial exhibition; (i) an eisteddfod, where the commissioners are satisfied that the entertainment is provided by a society, institution or committee which is not conducted or established for profit and that the aims, objects and activities of the society, institution or committee are partly educational.”

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There are two comments to be made in regard to that Act before I pass on. First of all, from the nature of the performances with which I am concerned, it is plain that there are only two provisions in sub-s. (1) which are capable of applying to the performances in question: “(c) a performance of music (whether vocal or instrumental)” and “(f) a recitation”. Secondly, one has to observe that the test of the nature of the society, institution or committee which is essential for the purposes of exemption from duty is left to the decision of the commissioners, and the objection has been taken (and in the circumstances it seems to be a sound objection) that it is not open to me to decide whether or not the Eastbourne corporation is a society, institution or committee of the kind which is there mentioned. There may be other proceedings in which that point may be brought to the decision of the court, and the decision arrived at by the commissioners may possibly be questioned in that way. But so far as relief in this action is concerned, it is clear to me that I am severely handicapped by these provisions which fetter my jurisdiction. The present form of action, therefore, is not particularly convenient for dealing with the questions which the parties wish to have decided, and for that reason I was not much attracted by a suggestion which arises out of the defence, that the number of cases which I shall have to consider in the ambit of the questions to be decided should be enlarged by reference to a number of other entertainments.

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Another thing to observe in regard to s. 8 is this. Apparently the legislature has changed its mind as to the way in which the claim for exemption shall be dealt with, because, whereas under the Act of 1916 the exemption depended, to some extent at any rate, on the educational nature of the entertainment which was presented, under the provisions of this Act of 1946 the requirement of educational character is removed from the entertainment itself and is transferred to the body which is putting on the show. In other words it is not for me to consider (and, indeed, it is immaterial) how great or how little is the educational value of the entertainment which is provided.

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The remaining statute to which I have to refer is the Finance Act, 1952. Section 2 of that Act provides for three scales of entertainments duty, the lowest of which is obviously intended to apply to performances which are performed by living and acting performers in view of the audience. The next highest scale is one which applies to games and sports and such matters, and the highest scale, the third, applies, for instance, to cinematograph performances. Section 2 (2) provides that the first scale, i.e., the lowest,

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“... shall be applicable in the case of any entertainment where all the performers whose words or actions constitute the entertainment are actually present and performing and the entertainment consists solely of one or more of the following items, namely—(a) a stage play, (b) a ballet (whether a stage play or not), (c) a performance of music, (d) an eisteddfod, (e) a lecture, (f) a recitation, (g) a music hall or other variety entertainment, (h) a puppet or marionette show, (i) a circus, a travelling show or a menagerie.”

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So it is to be observed there that a music hall or other variety entertainment which may not qualify as including solo items which fall within item (e) and item (f), i.e., “a performance of music” or “a recitation”, may qualify for duty at the lowest rate.

With those observations, let me turn to the important provision which is s. 3 (1). This sub-section provides:

"An entertainment consisting of one or more of the items specified in s. 8 (1) of the Finance Act, 1946 (which sub-section exempts an entertainment consisting of one or more of certain specified items which is provided by a body not conducted or established for profit whose aims, objects and activities are partly educational), shall be treated as not falling within the said sub-s. (1) if it is a music hall or other variety entertainment."

That completes the statutory provisions with which I am concerned. It is plain that, in order to come within the provisions relating to exemption in these statutes, first, the individual items contained in the programme of the entertainment must fall within one or other of the items specified in s. 8 (1) of the Act of 1946 and further, taken together, they must no amount to either "music hall or other variety entertainment" whatever that may mean.

The action in this case, so far as the statement of claim is concerned, relates to five concerts—to give them the term which is used by the plaintiffs—taking place on five dates in 1952, i.e., July 20, 21, 28, Aug. 28 and Oct. 30. The common feature of all those entertainments is that they consist of a number of items, the greater part of which, at any rate, are of a musical nature, either vocal or otherwise, but, in some cases, an item is included which is not of a musical character. In those cases (and also in the case of one concert which is entirely, I think one would gather, of a musical character) one or more items consisting of a performance by a greater or less well-known variety performer is included.

I turn now to the individual concerts in question, and I will deal first with the concert of July 20, 1952, which was a Sunday. That contains a number of musical items, and an item or two items which are only partly musical given by well-known variety performers principally known, I should say, in respect of broadcasting, Mr. Richard Murdoch and Mr. Kenneth Horne, whose performance, it appears, consisted at least in part of what is called "patter", and, no doubt, was of an extremely amusing character.

In the second concert, that of July 21, 1952—which was a Monday, and not a Sunday—and those on subsequent days with which I am not concerned, there were again turns or performances of a musical character, but there was introduced a compère known as "Flotsam", who is very well-known in the broadcasting world, who introduced the various items, and there was a performer included whose name is Tommy Fields and who is described in the programme as "the world famous light entertainer". He is very well known, it would appear, in the variety world. On July 28, in addition to the musical items, there was a very well-known variety entertainer who has also been described as "the spirit of the old music hall", Mr. Robb Wilton ("Mr. Muddlecombe, J.P."), who gave a monologue and told stories of an amusing character.

I will deal first with those three concerts because, as it seems to me, they have similar elements contained in them. Putting on one side the musical items in each of those entertainments, one finds that there was given, in each case, by one or more persons, a performance which included, in addition in two cases to singing, either considerable monologue or dialogue which was not of a musical nature; and it appears, therefore, that, if those items are to qualify for the purpose of s. 8 (1) of the Act of 1946, it is necessary to find that they, to that extent at any rate, amounted to a recitation. The word "recitation", according to the dictionary, it would appear, has a meaning of this kind: "The act of reciting that which is recited", and then under "recite" is: "To repeat, deliver or rehearse as something already prepared, written down, committed to memory, or the like". Those definitions I have taken from WEBSTER'S COLLEGIATE DICTIONARY, but I think they are very similar to those which are to be found in other dictionaries.

It is contended that these performances in question, which I have just mentioned, do fall within the terms of those definitions because the artists concerned carefully prepared their various (apparently impromptu) observations, and learned them by heart before they gave the performance, and, therefore, it is said, they were reciting something which they had already learned. That would be, no doubt, from the point of view of the plaintiffs, of course, a convenient and easy way of reaching the result. Unfortunately, dictionary definitions do not always present the living picture of the act or matter which they are describing, and it is necessary to use what LORD GODDARD, C.J., has called in *Barnes v. Jarvis* (1) ([1953] 1 All E.R. 1063) one's common sense in regard to these matters. In my view, if one applies one's common sense to the word "recitation" in the context of these particular Acts, one cannot come to the conclusion that the legislature had in mind something of the nature of the monologue given by that very excellent comedian Mr. Robb Wilton, or, indeed, the sparkling entertainment given by Messrs. Richard Murdoch and Kenneth Horne, or the bright entertainment provided by Mr. Tommy Fields. It is not necessary for me to consider whether "Flotsam" was reciting or not, because I do not think that is really material for the purpose of this case. I have, therefore, come to the conclusion that, in each of the three concerts of July 20, 21, and 28, 1952, there was an element which cannot be brought within any of the heads contained in the Finance Act, 1946, s. 8 (1). That is enough to dispose of those three concerts, but, for reasons which I will discuss in a few minutes, I think that they also fail to qualify for exemption from duty on another ground.

The fourth concert was that of Aug. 28, 1952, and that appears to have been wholly musical in its composition. There was no variety performance of any sort introduced that really matters, and the witnesses for the commissioners did, indeed, say that, in their opinion, it was a light musical concert, and was not a variety entertainment. It seems to me that that was clearly the case, and, indeed, the contrary was not pressed against the plaintiffs by the commissioners. Accordingly, in my view, it is plain that the entertainment of Aug. 28, 1952, consisted entirely of performances of music, either vocal or instrumental, and was not a "music hall or other variety entertainment".

I now come to the entertainment which to me is the most difficult of all to decide on, and that is the entertainment of Oct. 30, 1952, which appears to have been one of a series of entertainments included in what is called by Mr. Harold Fielding, the producer, "Gracie Fields' Concert Tour", and consisted of an overture and incidental music played by Ron Millington at the organ, "Singing songs from the shows" by a singer called John McHugh, "Canada's harmonica virtuoso, Tommy Reilly", another performer called Stephane Grappelly from "The Hot Club of France", and finally in two parts a performance by Miss Gracie Fields. Miss Gracie Fields, I was told, sang as many as twenty-six songs. She interposed a short speech describing her pleasure at having returned to Eastbourne, and she made some jokes or other observations in between her songs. It was clear that the songs which she sang, although they were not all of a humorous nature, were very much the same as those which she had sung on other occasions on the variety stage. I do not think that the interposition of a speech by the performer to her audience, or some incidental jokes, prevent the performance being a performance of music, but it is plain that the presence of Miss Gracie Fields dominated the whole of this entertainment.

I was provided with a great deal of evidence. A number of experts (or persons who were termed experts) gave evidence on each side as to the nature of a variety entertainment, and the question is one of considerable difficulty in some circumstances. In my view, the evidence of Mr. Macqueen-Pope came closest to a picture of the true situation when he said that an entertainment given in conditions such as those which prevailed in the case of these five entertainments became a variety entertainment if it was dominated by a well-known variety

performer doing the act which he or she did in the variety theatre or in a recognised variety performance. It seems to me that the first three concerts on July 20, 21 and 28, 1952, were dominated and coloured by the presence of variety entertainers, and they plainly became variety entertainments. Though I think the matter is, perhaps, somewhat more difficult in the case of the concert of Oct. 30, 1952, because it is conceivable that a variety performer might so alter his or her style that he or she might appear in another entertainment in, perhaps, quite a different character, it cannot be said that the performance by Miss Gracie Fields on Oct. 30, 1952, was of such a different nature from the normal performance which she would give in an ordinary variety entertainment. Therefore, the conclusion which I reach in the case of this entertainment also is that it was dominated by a variety performer, and became a variety entertainment.

I have not troubled to consider very carefully the meaning of "music hall" in the context of the statute because the term seems to have become rather obsolete for the purposes with which I am concerned. I was told, indeed, that "music hall" has been superseded by "variety entertainment". It is sufficient, therefore, I think, if I consider the matter from the point of view of variety entertainment, and on that issue the conclusion which I reach is that the plaintiffs are entitled to succeed in regard to the entertainment of Aug. 28, 1952, but they fail in their claim in respect of the other four entertainments mentioned in the writ.

In the case of the entertainment of Aug. 28, 1952, I am prepared to make a declaration that the entertainment at the Winter Garden, Eastbourne, Sussex, on Aug. 28, 1952, consisted of one or more of the items referred to in the Finance Act, 1946, s. 8 (1), and that the said entertainment was not "a music hall or other variety entertainment" within the meaning of the Finance Act, 1952, s. 3. Otherwise, in my judgment, the action fails.

Judgment accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *F. H. Busby*, town clerk, Eastbourne (for the corporation); *Solicitor of Customs and Excise* (for the commissioners).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re OLD SILKSTONE COLLIERIES, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
November 30, December 1, 2, 1953.]

Company—Reduction of capital—Extinguishment of preference stock—Colliery undertaking—Assets transferred to National Coal Board—Voluntary liquidation intended later—Creation of special rights in favour of preference stockholders on previous reductions of capital—Coal Industry Nationalisation Act, 1946 (c. 59), s. 25 (1).

On Jan. 1, 1947, the company's colliery undertaking vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946, and, as the company had no other commercial activities, it was its intention to go into voluntary liquidation when all the compensation payable under the Act was received. From 1948 to April, 1953, it was the declared policy of the directors that they would defer consideration of any adjustment scheme under s. 25 of the Act of 1946 until all questions of compensation had been settled. In 1950 the company's issued paid-up capital was £556,414 5s., divided into £198,780 six per cent. cumulative first preference stock, a similar amount of five per cent. non-cumulative second participating preference stock, and £158,854 5s. ordinary stock. On a winding-up, the first preference stockholders were entitled to repayment of their paid-up capital in priority to all other stockholders, and the second preference stockholders in priority to ordinary stockholders, and neither class of preference stockholders had a right to any further participation in the company's surplus assets. By art. 6 of the company's articles of association (which was made applicable to stock as well as to shares) the special rights attached to any class of shares might be modified or abrogated only with the consent in writing of the holders of three-fourths of the issued shares of the class, or with the sanction of an extraordinary resolution passed at a separate general meeting of such holders. By art. 48, the company was empowered to reduce its capital by special resolution. By art. 65, the first preference stockholders were not entitled to receive notice of or attend or vote at any general meeting unless their preference dividend was in arrear or unless the business of the meeting included a resolution "directly and prejudicially affecting the special rights" attached to their stock. By July, 1950, a certain amount of compensation had been received, and, by a circular dated July 28, 1950, the directors proposed to apply some of the money, for which the company then had no use, in reducing the capital by £198,780, by returning to the preference stockholders half of their paid-up capital. As it was apprehended that the repayment was not strictly in accordance with the first preference stockholders' rights under the articles, the proposal was first sanctioned at extraordinary general meetings of each class of preference stockholders, and, on Aug. 22, 1950, at an extraordinary general meeting of the whole company at which all the stockholders were enabled to vote, a special resolution for the reduction was passed. After the provisions dealing with the reduction of the two classes of preference stock by paying back to the holders of each class half of the capital then paid up thereon, the resolution contained the following proviso: "but so that notwithstanding such reduction of capital the holders of the said first preference stock, second participating preference stock and ordinary stock shall respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Coal Industry Nationalisation Act, 1946, if the said reduction of capital had not taken effect." On Oct. 16, 1951, after separate extraordinary meetings of each class of preference shareholders, a special resolution was passed for a further reduction of capital by a repayment of

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5s. to each preference stockholder for every 10s. of such stock held by him. This resolution contained a proviso in practically the same terms as that in the resolution of 1950. Both these reductions were confirmed by the court. On Apr. 24, 1953, the directors issued a circular in which they said, *inter alia*, that they and their professional advisers were of the definite opinion that the rights of the preference stockholders under s. 25 (1) of the Act of 1946 were of no monetary value, and, accordingly, they proposed to repay the preference stockholders at par. They went on to say that their proposals had been submitted to two named associations for the protection of the interests of shareholders, who were "recommending their interested members to vote in favour of the resolutions to be proposed at the extraordinary general meeting and to take no part in promoting or supporting any proposal for an adjustment scheme." The two associations referred to had, in fact, only a very small interest in the company. On May 19, 1953, at a meeting to which only the holders of second preference stock and of ordinary stock were summoned, the company purported to pass a special resolution for the reduction of capital by returning the whole of the capital paid up on the first and second preference stocks and cancelling those two classes of stocks. On a petition to the court for an order confirming the reduction, a number of the preference stockholders contended (a) that the special resolution of May 19, 1953, had not been validly passed, and, alternatively (b) that, in the circumstances of the case, the reduction was not fair or equitable.

HELD: (i) the provisos to the special resolutions of Aug. 22, 1950, and Oct. 16, 1951, respectively, were not merely declaratory of an existing statutory right which was common to all classes of stockholders, but gave contractual effect, as between the members of the company, to a right which formerly existed purely as a statutory right, and, by way of contract between the members, they conferred, by reference to s. 25 of the Act of 1946, a right which could not exist by the unaided operation of the section itself; in any adjustment proceedings, the expectations of the different classes of stockholders had to be measured, not on the footing of the paid-up capital as it existed on Jan. 1, 1947, but according to their amounts as existing at the date of adjustment, but the proviso to the resolutions of 1950 and 1951 entitled a preference stockholder to make the same claim under s. 25 as he could have made if the reductions of 1950 and 1951 had not been effected; and, therefore, as a result of the resolutions of 1950 and 1951 a special right, within the meaning of art. 6 and art. 65, was attached to each class of preference stock; the effect of the special resolution of May 19, 1953, was to modify or abrogate that right, and, therefore, as the requirements of art. 6 and art. 65 had not been complied with, the resolution was not validly passed, and the court could not confirm the reduction.

(ii) the proposed reduction operated unfairly to the preference stockholders, who had agreed to the earlier reductions on the understanding that they would remain entitled to claim, in adjustment proceedings under s. 25, the same adjustments as they could have claimed if those reductions had not been made, and, therefore, assuming that the resolution of May 19, 1953, was validly passed, the court, in the exercise of its discretion, would not confirm the reduction as it was unfair and inequitable.

Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd. ([1949] 1 All E.R. 1068), distinguished.

AS TO REDUCTION OF CAPITAL, see HALSBURY, 1949 Edn., Vol. 5, pp. 173-188, paras. 309-334; and FOR CASES, see DIGEST, Vol. 9, pp. 148-162, Nos. 833-946, and Digest Supps.

Cases referred to:

- (1) *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068; [1949] A.C. 462; [1949] L.J.R. 1190; 1949 S.C. 90; 2nd Digest Supp.
- (2) *Prudential Assurance Co., Ltd. v. Chatterley-Whitfield Collieries, Ltd.*, [1949] 1 All E.R. 1094; [1949] A.C. 512; 2nd Digest Supp.
- (3) *Birmingham & District Land Co. v. London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 11 Digest, Replacement, 226, 909. A
- (4) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 21 Digest 310, 1137.
- (5) *Salisbury v. Gilmore*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 31 Digest, Replacement, 378, 5069.
- (6) *Jorden v. Money*, (1854), 5 H.L. Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868; 21 Digest 292, 1041. B
- (7) *Re Dorman, Long & Co., Ltd., Re South Durham Steel & Iron Co., Ltd.*, [1934] Ch. 635; 103 L.J.Ch. 316; 151 L.T. 347; Digest Supp.
- (8) *Re Selfridge's (Holdings), Ltd.*, (1948), unreported.

APPEAL by preference stockholders from an order of VAISEY, J., dated July 13, 1953, confirming a proposal by a colliery company to reduce its capital by repayment of the whole of its preference capital which had not already been repaid, and CROSS-APPEAL by the company from a proviso to the order. C

On the transfer of the company's colliery undertaking to the National Coal Board on Jan. 1, 1947, under the Coal Industry Nationalisation Act, 1946, the commercial activities of the company came to an end and its intention was to go into voluntary liquidation when the compensation payable under the Act was received. The issued capital of the company, which was fully paid-up, was divided into six per cent. cumulative first preference stock, five per cent. non-cumulative second participating preference stock, and ordinary stock. On a winding-up the preference stockholders were entitled to repayment of the capital paid up on their stock in priority to the ordinary stockholders (the first preference stockholders having priority over the second preference stockholders), and to no further participation in the company's surplus assets. In 1950 the company passed a special resolution for the reduction of its capital by returning to the two classes of preference stockholders 10s. for each £1 of such stock held by them, with a proviso that they should respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Act of 1946 if the reduction had not taken effect. In 1951 a special resolution was passed for a further reduction of capital by returning to the preference stockholders 5s. for each 10s. of such stock held by them, with a proviso in similar terms to that contained in the resolution of 1950. These two reductions were sanctioned by the court. On May 19, 1953, the company passed the following resolutions: (i) for the reduction of the capital by returning the whole of the capital paid up on the preference stocks; (ii) for payment of the dividends on those stocks from Jan. 1, 1953, to the date when the reduction should take effect; and (iii) amending the articles in regard to capital. Some of the holders of each class of preference stock contended that the court should not confirm the proposed reduction (a) as it had not been validly passed, and (b) as it was not fair and equitable. In support of contention (a) they claimed that special rights, within the meaning of the company's articles, had been conferred on them by the provisos to the earlier resolutions for reduction of capital, and that the provisions of the articles in regard to the modification or abrogation of special rights had not been complied with. VAISEY, J., confirmed the reduction subject to a proviso that any rights which the preference stockholders might have under s. 25 of the Act of 1946 should not be prejudiced by the reduction and that, for the purpose of s. 25, they were to be deemed to be in possession of their respective holdings notwithstanding that the whole of the capital paid up on such holdings had been returned. D E F G H

J. G. Strangman, Q.C., and P. R. Oliver for the objectors.
Sir Andrew Clark, Q.C., and P. J. Sykes for the company.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from an order made by VAISEY, J., on July 13, 1953, whereby he confirmed a reduction of the capital of the Old Silkstone Collieries, Ltd., to the extent stated in the order, but subject to the following proviso:

A “Provided that such reduction of capital is to be without prejudice to such (if any) rights as the first preference stockholders and second participating preference stockholders respectively of the company have or would have had under s. 25 of the Coal Industry Nationalisation Act, 1946, if the reduction of capital hereby confirmed had not been effected and so that for the purpose of the said section and for that purpose only the holders of the said preference stocks at the date of this order their executors administrators and assigns are to be deemed to be and to continue to be in possession of their respective holdings of such preference stocks respectively notwithstanding that the whole of the capital paid up on such holdings shall have been returned by virtue of the said resolution and this order.”

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 C In reference to that proviso, the language used in his judgment by the learned judge was as follows. After saying that there was great force in the objections which had been put forward on behalf of the preference stockholders, he continued:

D “I should be extremely reluctant, and, indeed, should probably refuse to confirm this reduction, if the result were to be what the objectors anticipate, but I have come to the conclusion that it is possible to deal with this case in a way which will obviate the difficulty altogether.”

The way in which he dealt with it (and which, he hoped, would obviate the difficulty) was by adding the proviso which I have read. Counsel for the objecting preference stockholders contended that the proviso inserted by the learned judge would be ineffective to achieve the end intended, because the extinction of any stockholding in the preference stockholders at the time when any application under s. 25 of the Coal Industry Nationalisation Act, 1946, was made would disable them from having any locus standi before the tribunal. Counsel for the company agreed that the proviso on which the learned judge pinned such hopes would be ineffective. We have, therefore, unfortunately had to consider this matter on the footing that that is so. From the short passage which I have read from the judgment of VAISEY, J., it is, at the very least, doubtful whether he would have confirmed the reduction if he had been of opinion that he could not, as he said, obviate the difficulty, and it has become necessary, accordingly, for this court, in the light of the concession made by both sides, to consider what ought to be done.

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 G Two quite distinct points have been raised by the objectors. The first is of this nature. It is said that, as a result of certain previous reductions of capital, there was created in favour of each class of preference stockholders a special right within the meaning of the company's articles of association, so that, by the terms of the articles, it was incompetent for the company effectively to resolve on the now proposed reduction of capital save, inter alia, with the assent of separate meetings of the classes of preference stockholders concerned. If that view is right, it is not in doubt that this petition must be refused, since there were no such separate meetings of the two classes of preference stockholders. Secondly, the objectors contended that, even if no such special rights were created, still, in all the circumstances of this case, the court, in the exercise of its discretion, ought to refuse its sanction to this proposal on the general ground that it is not fair or equitable as between the classes of stockholders concerned. As the learned judge in the circumstances expressed no concluded view on either point, we have

thought it desirable that we should express a view on both points, though it is our view that the objectors are entitled to succeed on the first point, and, therefore, it is not, strictly, necessary to express any view on the question of fairness. Still, it may be desirable in the interests of the company itself that we should give reasons for a conclusion on both matters so that they may regulate their affairs hereafter in accordance with our view.

The Old Silkstone Collieries, Ltd., is a company which, as its name implies, was, before the coming into effect of the Coal Industry Nationalisation Act, 1946, concerned with the business of coal mining. Its commercial history shows that, until shortly before that Act came into operation, its success had not been of an outstanding character, a fact illustrated by the circumstance that during 1944 and 1945 none of its shares ever stood on the Stock Exchange at a price equivalent to par. But towards the end of its commercial life the company had begun to work on profitable seams of coal so that its prospects from the commercial point of view had become much more promising. But whatever might have happened to this commercial adventure had it not been for the Act of 1946, the coming into operation of that Act put an end altogether to the company's commercial activities. It is not suggested that the company proposes, or has ever proposed, to continue in business in some other form. In other words, this is a case in which, when all the compensation has been received, the company will go out of existence, and all its surplus assets will be divided among its stockholders. It was in anticipation, therefore, of that final demise that in the summer of 1950 the company put forward the first of its reduction proposals. The proposal was introduced to the stockholders by a circular dated July 28, 1950. At that time the issued paid-up capital of the company consisted of £198,780 of first preference stock, an exactly similar amount of second participating preference stock, and £158,854 5s. of ordinary stock. There was, in addition, a considerable amount of nominal but unissued capital, and for the purposes in hand it is not necessary to take up time by referring further to that nominal capital. The rights of the respective classes of stockholders had been varied to some extent from time to time, and in July, 1950, the rights of the first preference stockholders under the articles were these. They were entitled to a fixed cumulative preferential dividend of six per cent. on the amount paid up (or credited as paid up) on the stock, but to no further right of participation in the company's profits. They were entitled on a winding-up to repayment of the capital paid up in priority to all other stockholders, but to no further participation in the surplus assets of the company. Their voting rights were strictly limited by the amended art. 65, which was to the effect that they were not entitled to attend and vote at general meetings of the company unless the preferential dividend was in arrear to the extent there stated, or unless the business of the meeting included the consideration of a resolution "directly and prejudicially affecting the special rights" attached to that stock. The second preference stock carried the right to a five per cent. non-cumulative preferential dividend ranking after the preferential dividend on the first preference stock, but with a further right to participation in the profits of the company, *pari passu* with the ordinary stockholders, up to but not beyond a further five per cent. on the paid-up capital on the second preference stock. The second preference stockholders, like the first preference stockholders, were not entitled in a winding-up to any participation in the surplus assets of the company beyond the amount required to repay the paid-up capital on their stock, to which they were entitled in priority to the ordinary stockholders. Their voting rights were more extensive than those of the first preference stockholders in that there was no limitation to their right to attend and vote at ordinary meetings of the company. There was, however, an article in the form usually met with in limited companies and described as a modification of rights clause. That is art. 6, which provided:

"If at any time the capital of the company is divided into different classes

of shares, the special rights attached to any class may either with the consent in writing of the holders of three-fourths of the issued shares of the class, or with the sanction of an extraordinary resolution passed at a separate general meeting of such holders (but not otherwise), be modified or abrogated . . . ”

A The article was made applicable in the case of stock as well as of shares. I pause to note that the phrase “special rights” is the same as is found in art. 65. Article 48, the terms of which need not be otherwise noticed, contains a power to reduce the capital of the company by special resolution. The only other matter which I will mention is that on occasions on which all the stockholders would be entitled to vote, each preference stockholder was entitled to one vote for every £1 of his stock, whereas each ordinary stockholder was entitled to one vote for every one shilling of his stock.

B Before I read the circular of July, 1950, to which I have referred, it will be convenient to refer to s. 25 of the Coal Industry Nationalisation Act, 1946, which plays a very important part in the special circumstances of this case. Section 25 (1) is as follows:

C “Provision shall be made by regulations for due regard being had, as between classes . . . of members . . . of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interests in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company’s assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by . . . the memorandum and articles of association of the company.”

E The vesting date for the purpose of the Act of 1946 was Jan. 1, 1947. By July, 1950, the recovery by the company of the compensation for the transfer of its coal mining undertaking to the State had advanced a certain stage, but not far. The total amount of compensation payable to the company has not yet been settled. What it may ultimately amount to is, obviously, a matter of some doubt. The claims put forward by the directors of the company on the company’s behalf so far appear to have exceeded by a large amount the figures which the National Coal Board have intimated as the sum properly payable, or (at least in one case) F which the valuers appointed under the Act have been disposed to award. If the estimates put forward by the company were eventually to prevail, it seems reasonable to suppose that there would be a substantial distributable surplus in the hands of the company after the paid-up capital had been repaid, whereas, if the more gloomy prognostications of the National Coal Board were to prevail, G the total available surplus would be of a much reduced character.

It was in those circumstances that the circular of July 28, 1950, was sent. In that circular the late chairman thus expressed himself to all the stockholders:

H “You will recollect that in my statement, circulated May 1, 1950, with the 1949 accounts, I stated it was the intention of the board to submit to stockholders a repayment of capital scheme. The company has substantial liquid funds which have accumulated from cash received for compensation in respect of stocks of stores, wagons, etc. Additionally, a substantial loan from the parent company to a wholly owned subsidiary has been repaid. Your board has therefore decided to recommend that in the interests of the company and the stockholders the moneys for which the company has no present use shall be applied to the repayment of 10s. to the first preference stockholders and second participating preference stockholders for every £1 of such stock held by them. Section 25 of the Coal

Industry Nationalisation Act, 1946, provides for the adjustments of rights as between the holders of preference and ordinary stocks. It is your board's intention that any rights stockholders may have under s. 25 shall be retained until the amount of compensation payable to the company is determined. Whilst the proposal to repay 10s. per £1 of stock to both classes of preference stockholders is not strictly in accord with the rights of first preference stockholders under the company's articles of association, in that they are entitled to prior repayment of capital, your board draw attention to the fact that if the whole of the first preference stock was repaid, these stockholders would be deprived of any rights which they may have under s. 25 as the stock would cease to exist. The funds which will be available for stockholders on determination of final compensation will be such that no prejudice can result to the priority rights of the first preference stockholders by the scheme now submitted. The proposals involve a payment of £198,780 which is available . . . "

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Inclosed with the circular were notices of extraordinary general meetings, first, of the first preference stockholders, secondly, of the second participating preference stockholders, and, finally, of the company. Since it was apprehended (and, I doubt not, rightly) that the repayment was otherwise than in strict accordance with the stockholders' rights under the articles, the terms of art. 6 made it necessary that the proposal should have the sanction of extraordinary resolutions of both classes of preference stockholders. The resolution for reduction which was to be submitted to the extraordinary general meeting of the whole company (and, having regard to what I have said, all the stockholders, preference and ordinary, were treated as entitled to vote at it) took the form: "That the capital of the company be reduced . . . " I then pass over the figures, for I need only re-state that each class of preference stockholders suffered a fifty per cent. reduction of the capital paid-up on that stock. Then there follow these highly pregnant words:

C

D

" . . . but so that notwithstanding such reduction of capital the holders of the said first preference stock, second participating preference stock, and ordinary stock shall respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Coal Industry Nationalisation Act, 1946, if the said reduction of capital had not taken effect."

E

That reduction of capital was duly confirmed by the court.

I now pass over a period of slightly more than a year when the second stage in what, I think, must plainly be treated as a gradual process of total liquidation was reached. The present chairman, who had become chairman on the death of the previous chairman, then sent to the stockholders a circular following, in some respects, the circular which had been sent by his predecessor. It is dated Sept. 21, 1951, and opens thus:

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"Further proposed part repayment of capital. You will recollect that following the authority of class meetings of first preference stockholders and second participating preference stockholders held Aug. 22, 1950, a repayment of 10s. to the first preference stockholders and second participating preference stockholders for every £1 of such stock held by them on Oct. 31, 1950, was made on Nov. 1, 1950."

H

After stating that the company had now received £100,000 Treasury Stock in part satisfaction of compensation, the chairman went on to say:

"Your board has decided to recommend that in the interests of the company and the stockholders, the money for which the company has no present use shall be applied to the repayment of 5s. to the first preference stockholders and second participating preference stockholders for every 10s. of such stock held by them."

Then follows this reflection of what had been said on the previous occasion:

- A “Section 25 of the Coal Industry Nationalisation Act, 1946, provides for the adjustment of rights as between the holders of preference and ordinary stocks. It is your board’s intention that any rights stockholders may have under s. 25 shall be retained until the amount of compensation payable to the company is determined. Whilst the proposal to repay 5s. per 10s. of stock to both classes of preference stockholders is not strictly in accord with the rights of the first preference stockholders under the company’s articles of association, in that they are entitled to prior repayment of capital, and therefore requires consent of class meetings, your board draw attention to the fact that if the whole of the first preference stock was repaid, these stockholders would be deprived of any rights which they may have under s. 25 as the stock would cease to exist.”

B The chairman then refers to the notices enclosed and says in regard to them:

- C “These, [the resolutions] preserve the rights (if any) of preference stockholders under s. 25, cover the necessary alterations in the company’s articles of association regarding capital, and preserve the existing voting power of stockholders.”

- D Again, having regard to the fact that the proposals departed from the strict rights inter se of the stockholders, art. 6 was regarded as applicable, and separate extraordinary meetings were held of each class of preference stockholders. The form of resolution proposed for the company followed in form almost identically the form on the previous occasion. The result was to reduce the preference stock by fifty per cent. of what remained, i.e., to twenty-five per cent. of what it had originally been. Again, at the end of the essential resolution was the sentence:

- E “. . . but so that notwithstanding such reduction of capital the holders of the said first preference stock and second participating preference stock shall respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Coal Industry Nationalisation Act, 1946, if the said reduction of capital had not taken effect.”

- F It will be noticed that in the proviso in this case there is omitted any reference to the ordinary stockholders, as occurred in the first resolution, but counsel have agreed that nothing relevant to this appeal turns on that fact. That reduction of capital, like its predecessor, was duly confirmed by the court.

- G The first question, therefore, which the court has to decide is: Did those resolutions have the effect of creating in favour of each class of preference stockholders a special right, something which they had not got before, and a right peculiar to their stocks respectively, for, if so, it is conceded that the total elimination of the preference capital was incompetent without the approval of the preference stockholders under art. 6. In my judgment, that was their effect. But, before I state my reasons, I should lay a foundation to what follows, both on this point and, in some measure, on the second point of general fairness, by a reference to *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.* (1) and, immediately following, *Prudential Assurance Co., Ltd. v. Chatterley-Whitfield Collieries, Ltd.* (2). Those were cases in which schemes for reduction of capital came before the House of Lords, in the first case from the Inner House of the Court of Session and, in the second case, from this court. In each case the argument for the objectors was, inter alia, that a reduction scheme involving total repayment to the preference shareholders would disqualify them from any right to make a claim for adjustment under s. 25 of the Act of 1946, and, therefore, the proposal was unfair and inequitable. The House took the view that those objections were unfounded. In the course of the speeches in

the *Scottish Insurance Corpn.* case (1), expression fell from all their Lordships which must have somewhat dashed the hopes which preference shareholders may have entertained that some considerable fruit was necessarily to be gathered from the provisions of s. 25 and the regulations made thereunder. But I think it would be going far too far to suggest that their Lordships indicated that, in such a case as the present, preference stockholders could in no circumstances have any valid expectation of recovering any compensation or adjustment under the section and the regulations made thereunder. If they had so indicated, it seems to me that they would have rendered Parliamentary intention, as expressed in s. 25, almost wholly nugatory. What, I think, fairly summarises the views which their Lordships expressed is to say that the expectations which may be entertained by preference stockholders (or, indeed, any class of members of a company) under that section must be, at the present time, at any rate, doubtful and speculative. I take as an example the language of LORD NORMAND at the end of his opinion in the *Scottish Insurance Corpn.* case (1), where he said ([1949] 1 All E.R. 1084):

"If that section [s. 25] opens to the preference stockholders a prospect of advantage, of which they could be deprived only by a reduction of capital involving the extinction of their shares before liquidation, I would be prepared to hold that the reduction was unfair. But neither s. 25 nor the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I., 1948, No. 2360), which have been made under it since this case was before the Court of Session, justify any firm expectation of advantage to the preference stockholders. How the regulations will be applied by the tribunal is a matter of doubtful speculation."

He then went on to say that in that case he thought the ordinary stockholders were not bound to await the operation of the regulations before exercising the powers which they had under the articles of the company in question.

In the present case, it is the substance and gist of the contention of counsel for the company on this point that the provisos to the resolutions of 1950 and 1951 introduced by the words "but so that" serve, at most, as a mere declaration of the existing statutory right, whatever it is, and speculative as it certainly is (according to the speeches in the House), arising out of s. 25. But I think that that contention overlooks, first, that, whatever might be the nature and value of the statutory right, the incorporation of these terms into the resolution makes it, in effect, a special right attached to the preference stocks. Whether that alone would suffice for the purposes of the present appeal, it is unnecessary to state. For, in my judgment, the words which have been used go further. I think it impossible to read those words as meaning otherwise than that, notwithstanding the reduction, the preference stockholders are entitled to make their claim on the footing that they are still proprietors of the amount of stock which they would have held had there been no reduction of their capital. Indeed, counsel for the company, as I followed him, expressly so conceded. Taking, by way of illustration, the case of the first preference stockholders, the material words are:

"... but so that notwithstanding such reduction of capital the holders of the first preference stock . . . shall respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 [of the Act of 1946] if the said reduction of capital had not taken effect."

After the 1951 resolution the holdings of the first preference stockholders had been reduced to twenty-five per cent. of their original amount, but I read the proviso as stating that, notwithstanding that reduction, for the purposes of making their claim under s. 25 and vis-à-vis the ordinary stockholders, they are entitled to present that claim on the footing that they hold four times the amount of the stock which at the material date they would, in fact, hold. Put another

way, it would be equivalent to saying that, for the purposes of such an application, they would be holders of first preference stock carrying the right to a fixed preferential cumulative dividend at the rate, not of six per cent., but of twenty-four per cent. What effect that would have, in the circumstances of the case, on the mind of the tribunal which is given the task of deciding the question posed in s. 25, it is not necessary to decide, but I find it impossible to reject the view that, by being given that special right or privilege, the preference stockholders have had created in their favour a "special right" within the meaning of art. 6 and art. 65 of the company's articles of association. It was contended by counsel for the company that, assuming, as he concedes, the meaning of the resolution to be as I have stated it, still it is merely declaratory of the words of the section, but with that contention I am unable to agree. I agree with counsel for the company that, having regard to the terms of s. 25 (1), the estimation of expectation of income is to be made as though the Coal Industry Nationalisation Act, 1946, had not been passed, that is to say, by having regard to what those expectations would have been on Jan. 1, 1947. But I am unable to go on from that to hold that a stockholder, who between Jan. 1, 1947, and the date of his application has suffered a reduction by payment off of his capital by seventy-five per cent., is, by the section, entitled to prefer his claim on the footing that no such reduction had taken effect. It seems to me not in doubt that, in order to qualify any stockholder as an applicant under the section, he must be a member of the company at the time of his application and a holder of shares of the class in respect of which the application is made. For that reason, it is conceded here that the proviso which the learned judge introduced into his judgment would not be effective, because (it is said) the proviso could not make into members persons who had ceased to be members. But it does not seem to me to follow that the claimant is to be treated as though he held the amount of stock which he happened to hold six years ago and before any reduction took effect.

Some argument was also addressed to us about the meaning of the word "relative" in the phrase "their relative expectations of income yield" in s. 25 (1), but it does not seem to me that anything turns on it. It seems clear that the function of the tribunal is to attempt, so far as may be (to use the language of the sub-section) to give effect as between the competing claims of two classes of shares, on the one hand, to their respective or relative (and it may be the words are synonymous) expectations of income yield and, at the same time, to their respective or relative rights under the articles in regard to repayment of capital and otherwise. One final point may be mentioned. It was said by counsel for the company that, assuming everything else to be against him, still the last words in the resolution did not import any such permanence in their effect as to give any special right—in other words, that they merely said, in effect, that the rights of the preference stockholders would be as stated until such time as the company, in exercising its power aliunde in the articles, chose to put an end to them. I doubt whether that helps the company's argument, because, if I am right so far, so long as they remain, these are special rights which can only be taken away under the articles by observing the restrictions of art. 6. But I also think, as JENKINS, L.J., observed during the argument, that in its context the word "remain" should fairly be construed as meaning "should remain either until such time as the compensation or adjustment under the Act of 1946 has been paid or until the time for applying under the Act has expired."

For those reasons, then, I am of opinion that the effect of the resolutions in 1950 and 1951 was to create special rights. If that view is correct, then, as counsel for the company concedes, the only course open to this court is to refuse the petition. But we have heard full argument on the other and more general matter, and, for reasons which I have already given, I think it right to express my view also on the general question of fairness of the proposed scheme. In approaching that matter, I have in mind again what was said in the House of

Lords in the *Scottish Insurance Corpn.* case (1) and the *Prudential Assurance Co.* case (2), and the somewhat nebulous character of the rights which this section has been apt to confer, and, in proceeding to deal with this matter, I do so on the assumption, of course, that the terms of the two resolutions in 1950 and 1951 were, contrary to the view which I have expressed, not apt to create any special rights at all. I also accept the view which found support in those two cases, and for which counsel for the company contended, that the onus in this matter lies on those who seek to establish that the scheme ought to be rejected as unfair. One other matter must be stated, and stated in no uncertain terms, as a prelude to my judgment on this part of the case, and that is that no kind of imputation whatever is made in this case against the absolute good faith and impartiality of the directors. It does, indeed, so happen that the three directors hold small quantities only of the stocks of all three classes. It is, therefore, quite plain on the facts that the directors had no personal interest in the matter which would be in the least likely to conflict with their duty to do the best they could for their company and for the stockholders in it. For some reason, at which it is possible to hazard a guess but which is quite immaterial, it is, I think, quite clear that the view now taken by the board of the possible benefits which classes of stockholders generally, and preference stockholders in particular, might derive from the operation of s. 25 and the regulations made thereunder has undergone a change. It is impossible to read the earlier circulars, or the references in the chairman's speeches four and five years ago or even less, and conclude otherwise than that the directors then thought that there was some substance in the prospects tendered by s. 25 of the Coal Act. I will make reference to the chairman's observations in one or two of the early reports of the directors. In the report which accompanied the accounts for the year ended Dec. 31, 1948, the chairman stated, under the heading of "Coal Industry Nationalisation Act", the condition of affairs which then existed in regard to the award and distribution of the £164,000,000, odd which had been set apart for the former proprietors of the coal industry. He stated that the interim income which was payable under the terms of the Act "is the main and in some cases the only source of revenue in many colliery undertakings", and he expressed the doubts which he entertained for the prospects of the stockholders if that interim income ceased to be payable or did not amount to a large enough sum to discharge the various income obligations of the company. He said:

"Your directors feel that no adjustment scheme can be usefully contemplated until the amount of compensation falling to the company is known."

That statement was made after a reference to s. 25 in which he stated that provision is there made

"for the adjustment of interests of different classes of debentures and shares in attachment to distribution of final compensation."

He was, therefore, making clear that his board's policy was to postpone consideration of any adjustment scheme until the compensation payable to the company had been paid in full. Again, in 1949, he drew attention to the same point. He referred to the compensation procedure and to its partial satisfaction, and said:

"It is obvious that the reduced interim revenue payments will not enable us to meet outgoings and maintain present dividends on our present issued capital over the years pending finality of compensation payments."

He concluded by saying:

"I am impelled to warn stockholders that unless present procedure re valuations is speeded up, we shall not, in my opinion, reach finality before

1954, if then. This is an additional and cogent reason for proceeding with our 'repayment of capital scheme'".

In the light of that state of affairs, these schemes for repayment were put forward, and it is, in my judgment, essential not to lose sight of the fact that the company was not proposing to continue in business. From what I have read, it is manifest that, as occasion offered and the compensation was payable, the directors intended gradually (in effect) to liquidate the company, but to await the receipt of final compensation before embarking on any adjustment scheme. It is in the light of that essential matter of fact, as I think, that one must interpret the true inference and effect of the statements in the circulars of 1950 and 1951. The vital words—and I repeat them, though the whole passages which I have earlier read ought to be borne in mind—are:

- A "It is your board's intention that any rights stockholders may have under s. 25 shall be retained until the amount of compensation payable to the company is determined."

That must also be read together with the forms of resolutions which accompanied the circulars, including the provisos, which, of course, on this view, did not operate to confer special rights, but did plainly operate to emphasise in no uncertain terms the statement already read, viz., that the board's intention was to keep alive the interests of the preference stockholders at least to an extent sufficient to enable them to avail themselves of whatever rights, effective or otherwise, s. 25 offered to them.

- C So I come to the proposals which led up to the passing of the resolution for reduction which is now before the court, reduction involving, essentially, the total extinction of the preference stockholders as classes and, therefore, as is conceded, complete elimination of any right which they might have to make application under the section. It is, I think, not unimportant to bear in mind that, although the payment of final compensation has not occurred, still there is a right, as I read the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, for these classes of stockholders to initiate proceedings themselves at any time, if the company on its part does not think fit at this time, or at any time, to put forward what is called an adjustment scheme. Counsel for the company frankly admits that between 1951 and the spring of 1953 the directors had suffered a change of heart or mind in this matter. The circular of Apr. 24, 1953, which accompanied the notice of meeting and the form of resolution for the third reduction of capital, is, obviously, framed to make clear the view of the directors that these rights of the preference stockholders, which, according to the earlier circulars, the board had intended to preserve, were, in fact, of no value whatever. In the light of what had gone before, it is, perhaps, startling to find that the proposal to eliminate altogether both classes of preference stockholders was regarded as not requiring a special meeting of either class, and even as not requiring or enabling the first preference stockholders to attend and vote at the general meeting. But, startling though it appears, that view is, of course, correct, unless it is postulated that the resolution did involve a modification or abrogation of special rights attached either to the first preference or the second preference stockholders. The circular states, among other things:

- H "Your directors and their professional advisers have given very careful consideration to the terms of repayment of the preference stock. The company's articles of association specifically provide for repayment at par. The previous capital repayments preserved the rights (if any) of the preference stockholders under s. 25 of the Coal Industry Nationalisation Act, 1946."

That section is then set out and a reference is made to the regulations made under it. There is then a statement showing the actual dividends paid in the years 1938 to 1946 inclusive on all three classes of shares. They show that the

first preference shares received altogether over those years 58½ per cent., the second preference shares received approximately fifty per cent., including their further participation, and the ordinary stockholders twenty-four per cent. Then comes this passage:

"Your directors and their professional advisers are therefore of the definite opinion that no monetary value can be attached to the first preference stock and second participating preference stock as to any right which may exist under s. 25 (1) of the Coal Industry Nationalisation Act, 1946. Accordingly, they propose repayment at par. These proposals have been submitted to and discussed with the Association of Investment Trusts and the British Insurance Association Investment Protection Committee who are recommending their interested members to vote in favour of the resolutions to be proposed at the extraordinary general meeting and to take no part in promoting or supporting any proposal for an adjustment scheme. The use of an adjustment scheme would only invoke long delay and expense and in view of the foregoing it is hoped that the preference stockholders will accept the proposed repayment terms."

The board, then, were expressing the hope that both classes of preference stockholders (though, as I have said, the first preference stockholders were not entitled to attend and vote at the meeting which was being summoned) would accept the advice tendered and would refrain from exercising the one right which, in the circumstances, they had, viz., the right to make an application for an adjustment scheme or to serve notice on the company to do so.

The question then is posed: In view of what the directors stated, is it shown to be unfair or inequitable—I state it thus because of the onus of proof—now to propose to the preference stockholders their own total extinction? I must say that I have felt doubt about it, partly because of a fear that the view that there was here unfairness or inequity might be thought to reflect in some measure on the good faith of the directors. I have already said that no such reflection can possibly be made. After some vacillation in my own mind, I have come to the conclusion that this is a scheme which, in the circumstances, the court ought not, in its discretion, to sanction, and that it is not, according to the ordinary common sense of this matter, fair or equitable. I follow the force of the contention of counsel for the company that the earlier circulars did no more than state the intention of the board at the time, and, if that is a fair reading of them and no more, that any sensible stockholder should say to himself: "Well, that is what they think now, but there is no reason why they should not change their minds, and, indeed, they cannot bind themselves and their successors not to change their minds". But my view is that, in the circumstances of the case, so clear and unequivocal an expression of the board's intention does mean, and would reasonably be taken to mean, something more than that. The earlier reductions were but stages in the final liquidation and distribution of the company's assets, and, where the chairman twice makes it plain that it is part of the board's policy to postpone any consideration of an adjustment scheme and to retain for the preference stockholders these rights, whatever they might be, and where on both the first two occasions the two classes of preference stockholders were invited to support the reductions on that footing expressly—and I pause to note that the first preference stockholders particularly were asked to accept that statement of policy as the justification for a departure from strict rights—when all that is done, I think there is here such a representation of policy on the part of the board that it is not fair or equitable for them now to say to the preference stockholders: "Well, we have changed our minds and that which was held out to you as the chief inducement to assent before is now to be taken away altogether". It seems to me the matter is one to be judged by ordinary common sense. It is not to be forgotten that the ordinary shareholders obtained an advantage as a result of the earlier reductions. As the chairman had rightly

pointed out, as matters then stood, the income available was not likely to be sufficient to maintain existing dividends if all the capital remained outstanding. Therefore, there was to be this reduction and a consequent relief of the charges against income for the benefit of the ordinary stockholders.

Counsel for the objectors referred us to the well-known passage in the judgment of BOWEN, L.J., in *Birmingham & District Land Co. v. London & North Western Railway Co.* (3), where the learned lord justice used the following language (40 Ch.D. 286):

"The truth is that the proposition [stated by LORD CAIRNS, L.C., in *Hughes v. Metropolitan Ry. Co.* (4) (2 App. Cas. 448)] is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied. I will not say it is not a principle that was recognised by courts of law as well as of equity."

That passage was cited and approved by MACKINNON, L.J. ([1942] 1 All E.R. 463), in a characteristic judgment in *Salisbury v. Gilmore* (5), where the learned lord justice observed the distinction validly to be drawn between the *Birmingham & District Land Co.* case (3), on the one hand, and *Jorden v. Money* (6), on the other. The rights of the different classes of stockholders in a company are contractual rights derived from the company's articles of association. But I need not go so far as to say that this case necessarily falls within the exact terms of the language used by BOWEN, L.J. That language seems to me sufficient, at any rate, to justify the view that, looking at this matter from a common-sense man-of-the-world point of view (if I may use those phrases), it was inequitable, after so much had been said and such promises had been given, and after such statements of policy on the part of the board had been made, for the board to turn round and reverse all that had gone before.

It is always the function of the court to look with care at (as it is said, to scrutinise closely) schemes of this character or, at any rate, complicated schemes. No one would call this case complicated, and, therefore, all that MAUGHAM, J., said in *Re Dorman, Long & Co., Ltd.* (7), is not necessarily applicable to a simple and straightforward case like this. I have in mind the criticisms which MAUGHAM, J., then made of a statement in a circular before the court to the effect that the trustees of certain debenture stockholders had approved the scheme and recommended its acceptance. It turned out that the trustees were a bank who had a very strong interest in another capacity, seeing that they were at the time owed as bankers approximately one and a half million pounds. Our attention in this case has been drawn forcibly by counsel for the objectors to the passage in the circular of Apr. 24, 1953, starting with the words: "These proposals have been submitted to . . .". So far as the facts are concerned, it appears that there were three stockholders of the company who were members of the Association of Investment Trusts. Of those three, one of them, Electrical and Industrial Investment Co., Ltd. held approximately the same amount, and not a large amount, of each stock. The other two, according to the evidence, never received any recommendation on the matter from the association, and one of them is an objector to the scheme. Three stockholders of this company were members of the British Insurance Association. One of them held only ordinary stock, and another, Royal Exchange Assurance, held such small amounts of each stock that it obviously had little or no substantial interest in the matter. We have been told that the reason why the three members of the first association did not receive any recommendation from their association was that, unhappily, the

association had not available a register showing the relative holdings which was sufficiently up to date. But whether or not individual members of the association were, in fact, informed, matters, perhaps, not so much. The effect, the meaning, the sting, as it has been said, of the sentence in the circular is obvious. The persons to whom it was addressed, particularly the two classes of preference stockholders who were asked to accept the proposed repayment, plainly were being told: "It is really no good your pinning any hopes on your rights, if any, under s. 25 of the Act of 1946. As you see, these very important bodies are of opinion that there is nothing to be obtained under the section, and they will give you no support". I should have thought it obvious that any stockholder, who had been a little inclined to stand up for his own rights, would (to say the least) be greatly discouraged on reading that sentence. But his discouragement would, I should have thought, have been much mitigated had he known the slight interest which the members of these high-sounding bodies really had in this company. I think, therefore, that a statement of this kind, without any further explanation of the extent and character of the interests which are involved, does have so important an effect on the mind of the ordinary individual stockholder that the use of such argument in a circular is undesirable, *prima facie*, without sufficient explanation to give it its true significance. In saying that, I gather from counsel for the objectors that I am repeating what I myself said as a judge of first instance in *Re Selfridge's (Holdings), Ltd.* (8), when my observations were approved afterwards in this court. It is, again, only just to the directors to state that the form of words which they put in was a form settled for them by the representatives of these two bodies, who are in the happy position of being able to suggest forms of words for which afterwards they bear no responsibility whatever. But I do not think, in the circumstances, that anything really is added by this circumstance. However much one might regret the insertion of this kind of statement, it seems to me that the real question of fairness or unfairness falls to be determined by reference to what had gone before, though I do not minimise the point that, had it not been for that statement, an individual might have had sufficient confidence in his rights under s. 25 to have made an application, or to have served a notice on the company that he wished to make an application, under the section. For the reasons which I have stated, my view (which I believe to have been the view which VAISEY, J., was inclined to entertain) is that, if I am wrong on the first point, then I think that this is a case in which the court, in its discretion, should not have confirmed this proposed reduction. But it is sufficient, having regard to the view which I take on the first point, to say that, the resolutions not being properly passed, the proper course for this court is to refuse the petition and to allow the appeal.

JENKINS, L.J.: I agree. The first question which this court has to decide is whether the special resolution purporting to have been passed on May 19, 1953, for the reduction of the capital of the company by returning the whole of the capital paid up on the first preference and second participating preference stocks, and cancelling those two classes of stock, was validly passed.

The articles of association of the company contain in art. 6 the following provision in regard to modification of rights:

"If at any time the capital of the company is divided into different classes of shares, the special rights attached to any class may either with the consent in writing of the holders of three-fourths of the issued shares of the class, or with the sanction of an extraordinary resolution passed at a separate general meeting of such holders (but not otherwise) be modified or abrogated . . ."

Article 65 contains provisions as to voting to which I need not refer except to note that they include this proviso:

"Provided that the first preference stock and shares shall not entitle the

holders to receive notice of or attend or vote at any general meeting unless either (a) . . . ”

Then there is provision for the case of the preference dividend being in arrear, which does not arise in this case—

“ . . . (b) the business of the meeting includes the consideration of a resolution directly and prejudicially affecting the special rights attached to the first preference stock or shares.”

A To the meeting of May 19, 1953, there were summoned only the holders of second preference stock and the holders of ordinary stock, the view taken by those responsible for convening the meeting being to the effect that the resolutions proposed to be passed did not involve any modification of rights within art. 6, and, further, did not involve any prejudicial effect on the special rights of the first preference stock under art. 65, so that it was neither necessary to summon the holders of the first preference stock to the meeting nor to hold separate meetings of the two classes of preference stock. Apart from the two special resolutions by which the two earlier reductions of capital were effected, it is not suggested that there was any special right of either class of preference stock which would be in any way affected by the proposed resolutions. These two

C classes rank immediately after each other for repayment of capital in a winding-up with no right to participate in surplus assets, and, accordingly (apart from those two special resolutions), a reduction which provided for paying off the whole of the capital paid up on the first preference stock and the second participating preference stock in that order would have been a reduction in accordance with strict legal rights.

D But it is claimed that the two resolutions by which the two previous reductions of capital were effected did attach special rights to each of these two classes of preference stock, and that those rights were modified or abrogated or prejudicially affected by the third resolution for reduction, inasmuch as it had the effect of extinguishing them altogether, thereby putting an end to the special rights said to have been created by these two special resolutions. The provision relied on

E for that purpose in the first special resolution for reduction (No. 1 of Aug. 22, 1950) follows the provisions dealing with the reduction of the two classes of preference stock by paying back to the holders of each class half of the capital then paid up thereon, and is in these terms:

F “ but so that notwithstanding such reduction of capital the holders of the said first preference stock, second participating preference stock and ordinary stock shall respectively remain entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Coal Industry Nationalisation Act, 1946, if the said reduction of capital had not taken effect.”

G A corresponding provision, in almost exactly the same terms, appears in the second special resolution for reduction (No. 1 of Oct. 16, 1951) with this difference, that, whereas the proviso in the earlier resolution had included a reference to the ordinary stock, the proviso in the later one refers only to “ the said first preference stock and second participating preference stock ”.

H The question, therefore, is whether the provisions to which I have referred, and in particular the provision occurring in the second of the two special resolutions, i.e., the resolution of Oct. 16, 1951, confer special rights on the holders of the first preference stock and second participating preference stock respectively. In my opinion, the provisions in question do have that effect. They declare that the holders of these classes of stock shall respectively remain

“ entitled to claim the same adjustment of their interest as could have been claimed under s. 25 of the Coal Industry Nationalisation Act, 1946, if the said reduction of capital had not taken effect.”

To my mind, the words "shall respectively remain entitled" are clearly words apt to confer a right, and, in my view, that which is conferred by those governing words is plainly capable of subsisting as a right. Moreover, I think the right is conferred as regards each class as a right peculiar to that class of stock, and is, therefore, a special right within the meaning of the articles. Counsel for the company maintained, first, that the provisions in question do not confer any right at all, inasmuch as any adjustment must be effected on the footing of the paid-up capital as it existed on Jan. 1, 1947, the vesting date under the Act. I cannot accept that proposition. It seems to me, with all respect to counsel's argument, quite plain that in any adjustment proceedings, the expectations of the different classes of stock must be measured according to their amounts as then existing. Next it is argued that in any case the provisions in question are only declaratory of an existing statutory right which is common to all classes of stockholders, and subsists, not by virtue of the articles or any special resolution, but by virtue of s. 25 of the Act. Again, I cannot accept that argument. In the first place, in my view, these provisions give contractual effect as between the members to a right which formerly existed purely as a statutory right. Furthermore, it seems to me that, again, by way of contract between the members, they confer by reference to s. 25 of the Act a right which could not exist by the unaided operation of the section itself. In my opinion, a preference stockholder before the passing of the first of these resolutions could accurately have said: "I am entitled, or will in due course be entitled, to claim an adjustment under s. 25 of the Coal Industry Nationalisation Act by virtue of the provisions of that Act." It appears to me that in order to be accurate in stating his position after the special resolution had been passed, he would have had to say: "By virtue of the special resolution passed on" such and such a date "I am entitled to make the same claim under the provisions of s. 25 of the Act as I could have made if the reduction effected on" such and such a date "had not been effected". In other words, it is not an accurate description of his position, after the passing of the resolution, to say that he has no more than the ordinary statutory right. Accordingly, I am of opinion, as regards the first question, that, on the true construction of the two reduction resolutions of 1950 and 1951, a special right of the nature I have endeavoured to describe was attached to these two classes of preference stock. It follows that such special right was modified or abrogated—clearly, the more appropriate word would be the latter—by the third reduction resolution, which purported to extinguish those classes of stock by paying back the whole of the capital paid-up thereon, and, furthermore, that such reduction did directly and prejudicially affect a special right attached to the first preference stock. In order, therefore, validly to carry out this reduction it was necessary to hold a general meeting to which would be summoned not only the holders of the ordinary stock and second participating preference stock, but also the holders of the first preference stock, and, in addition, it was necessary to put the proposals to separate meetings of the holders of those two classes of stock in accordance with art. 6, and to procure the respective approval of those two classes of stockholders to the proposals by the requisite majority.

As SIR RAYMOND EVERSHERD, M.R., has said, the result of that view on the first question is that the second question strictly does not arise, but I will follow his example and add very briefly some observations of my own on the question whether, on the footing that the disputed resolution for reduction was validly passed, the case, is, nevertheless, one of those in which the court, in the exercise of its discretion, should decline to confirm the reduction on the ground that, in all the circumstances of the case, it operates unfairly to the objectors. It is to be observed that from, at least, 1948 until the time when the scheme for the final repayment of the whole of the capital remaining paid up on the two classes of preference stock was mooted, the declared policy of the directors of the company

was consistently to the effect that they would defer consideration of any adjustment scheme under s. 25 of the Act until all questions of compensation had been finally cleared up. In the statement accompanying the accounts for the year ended Dec. 31, 1948, the chairman said:

A “Under s. 25 of the Coal Industry Nationalisation Act, 1946, and the regulations attached thereto, provision is made for the adjustment of interests of different classes of debentures and shares in attachment to distribution of final compensation. Your directors feel that no adjustment scheme can be usefully contemplated until the amount of compensation falling to the company is known.”

B Consistently with that policy, the first of the three reductions was so arranged that any rights which there might be to adjustment under s. 25 should not be disturbed. If I may be excused for reading again the most relevant passages from the circular of July 28, 1950, issued in connection with the reduction of Aug. 22, 1950, in that circular the chairman said:

C “Section 25 of the Coal Industry Nationalisation Act, 1946, provides for the adjustments of rights as between the holders of preference and ordinary stocks. It is your board’s intention that any rights stockholders may have under s. 25 shall be retained until the amount of compensation payable to the company is determined. Whilst the proposal to repay 10s. per £1 of stock to both classes of preference stockholders is not strictly in accord with the rights of first preference stockholders under the company’s articles of association, in that they are entitled to prior repayment of capital, your board draw attention to the fact that if the whole of the first preference stock was repaid these stockholders would be deprived of any rights which they may have under section 25 as the stock would cease to exist . . . Your directors consider that it is in the interests of all classes of stockholders to make the repayment of capital now proposed and recommend the scheme submitted for your consideration and acceptance. Enclosed please find notices calling the various class meetings together with the resolutions to be submitted. These preserve the rights (if any) of preference stockholders under s. 25, cover the necessary alterations in the company’s articles of association regarding capital, preserve the existing balance of voting between classes of shares . . . ”

F It appears to me that this circular, particularly the passages from it which I have read, taken in conjunction with the proviso to the first of the special resolutions of which notice was enclosed, could not fail to convey to any preference stockholder reading it that he was being asked by the directors of the company to suffer a reduction by way of repayment of capital of 10s. in the £ of his holding of stock on the understanding that he would remain entitled to claim in due course, in adjustment proceedings, the same adjustment as he could have claimed if there had been no such reduction. Counsel for the company said that G no such effect can fairly be attributed to the circular because the contemplated retention of any rights of stockholders under s. 25 of the Act until the amount of compensation payable to the company was determined was described as a matter of the board’s intention—“It is your board’s intention that . . .”. Counsel contended that an intention is an intention and nothing more, that a man may genuinely intend one thing one day and another the next, and that the H directors and the company and the ordinary stockholders were not to be handicapped by a mere expression of what may have been the intention of the board at that particular time. For my part, I cannot give the use of the word “intention” in this context the qualifying effect suggested by counsel. In my view, that passage in the circular might, without changing the meaning, have been expressed in these words: “Your board has decided that any rights that stockholders may have . . .”. Of course, the board, having decided one thing

one day, might be able to decide something else the next, but it does not follow that they could alter their decision, or alter their intention (if that word is used) after the decision or intention once expressed had been acted on. The circular which accompanied the notice of meeting and the form of special resolution for the second of the three reductions contains passages to a similar effect, and, in my judgment, the effect of that circular, read as a whole, again was in effect to ask the preference stockholders to submit to a further reduction of their holdings by a repayment of fifty per cent. of the then remaining paid-up capital on the understanding that they were to remain entitled to claim in due course in adjustment proceedings on the basis of the amount of their respective holdings as they stood before the first reduction. The representations in those circulars having been acted on by the two classes of preference stockholders in submitting to the reductions effected in accordance with the two earlier schemes, it was, in my view, impossible, consistently with good faith, for the company then to propose a further reduction which would bring about the total extinction of the capital paid up on the preference stock and by such extinction destroy the right to claim adjustment under s. 25 which had been so jealously preserved down to that point, and which had been, I think, an essential element in all previous proposals. When I say "consistently with good faith", I am not intending to use that expression in any sense which would cast any reflection on the probity of the directors. The directors of the company, I have no doubt, are doing their best in the interests of all the stockholders. They have no particular axe to grind, having only insignificant holdings of stock of the various classes. But it does seem to me, though, no doubt, the directors acted with the best intention throughout this matter, that the third reduction of capital, resolved on by the special resolution of May 19, 1953, would, if given effect to in accordance with its terms, amount to something which I can only describe as a breach of faith. A B C D

Furthermore, in my judgment the circular of Apr. 24, 1953, is open to some criticism in the respects which the Master of the Rolls has indicated. In effect, it told the holders of the first preference stock and second participating preference stock that, after all, the rights of adjustment of which so much had been heard in the past were entirely valueless. It tells them further: E

"The use of an adjustment scheme would only invoke long delay and expense, and in view of the foregoing it is hoped that the preference stockholders will accept the proposed repayment terms."

It tells holders of first preference stock that they are being informed "as a matter of courtesy and for information only", and that "they are not entitled to attend or vote at the extraordinary general meeting". It further states: F

"These proposals have been submitted to and discussed with the Association of Investment Trusts and the British Insurance Association Investment Protection Committee who are recommending their interested members to vote in favour of the resolutions to be proposed at the extraordinary general meeting and to take no part in promoting or supporting any proposal for an adjustment scheme." G

It appears to me that this circular, taken as a whole, is telling these two classes of preference stockholders that their rights in respect of adjustment are, after all, valueless, that there is nothing that they can do about it, that it is no use their proposing or supporting any proposal for adjustment, and that, in effect, they have no alternative but to accept the scheme. The second participating preference stockholders were entitled to vote, although their vote could not, on any view, have been effective. The first preference stockholders did not even have the satisfaction of being able to cast an ineffective vote. In my view, this last circular and the present reduction resolution, considered in the light of what had previously passed, involve a volte face of which these two classes of stockholders can legitimately complain as amounting to a breach of faith, and I H

also think that, unwittingly, no doubt, the circular of Apr. 24, 1953, was couched in language calculated to stifle any question or criticism on the part of the two classes of preference stockholders. Counsel for the company contended that the result at which we have arrived bears hardly on the ordinary stockholders, for, he says, it means that they will be saddled, until nobody knows when, with two classes of high dividend preference stocks dividends in respect of which are not now being fully earned. I am not satisfied that the position is so difficult as counsel

- A would have us believe, for I see no reason why it should not be perfectly possible, while avoiding the disadvantage of paying high preferential dividends on substantial quantities of stock, to preserve the rights of those stockholders by the simple expedient of a scheme of reduction under which the capital paid up on their holdings would be reduced to a purely nominal sum, with a proviso preserving their rights in regard to adjustment as if none of the reductions so far
- B made had been made, thus carrying out to its logical conclusion the policy which was followed on the first two occasions. I will not take up more time in discussing the matter further, but will content myself by saying that for the reasons which SIR RAYMOND EVERSHED, M.R., has given, and those which I have endeavoured to add, I agree that this appeal should be allowed.

- C **MORRIS, L.J.:** I agree. In his speech in *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.* (1), LORD SIMONDS said ([1949] 1 All E.R. 1077) that, important though the task is to see that the procedure by which a reduction is carried through is formally correct, the court has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders. He went on to say that what is fair and equitable must depend on the circumstances of each case. It is conceded here that the procedure
- D of the reduction was not formally correct if there were special rights attached to the preference stocks. Class meetings were not held to comply with art. 6, and the first preference stockholders were not invited to attend the extraordinary general meeting of May 19, 1953. I am clearly of the opinion that the provisos to the special resolutions passed on Aug. 22, 1950, and Oct. 16, 1951, did give to the preference stockholders special rights. I am in full agreement with, and do
- E not repeat, the reasons which my Lords have expressed in support of that view. But, further, while no reflection on the good faith of anyone is implied, it seems to me that it would not be fair and equitable to sanction the proposed reduction, having regard to the terms of the two circulars of July 28, 1950, and Sept. 21, 1951. In my view, they contained a clear invitation to all concerned to act on
- F the basis that a right to take action under s. 25 of the Coal Industry Nationalisation Act, 1946, was being and would be preserved. It does not seem to me that it comes very happily from the company, or from the ordinary stockholders, at a later time to say that there had merely been an empty and valueless preservation, or, indeed, to seek to put the preference stockholders to proof that s. 25 could fruitfully be invoked.

- G Counsel for the company referred to a passage in VISCOUNT MAUGHAM'S speech in the *Scottish Insurance Corpn.* case (1), where he said ([1949] 1 All E.R. 1074):

- H "On the other hand, I think that those who oppose the reduction by founding their argument on the provisions of s. 25 are bound to indicate how the section, or the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, on any reasonable view of probability can operate in this case to give the preference shareholders any rights to share in the assets beyond those they now possess under the articles of association."

It seems to me that the position in the present case differs from the position in the *Scottish Insurance Corpn.* case (1). Here the preference stockholders are opposing the reduction by saying that all concerned were invited to act and to proceed on the basis that the company would not reduce by repaying the whole

of the preference stockholders until the value, if any, of the claim under s. 25 could be ascertained. Counsel for the company also cited a passage from LORD SIMONDS' speech in *Prudential Assurance Co., Ltd. v. Chatterley-Whitfield Collieries, Ltd.* (2). In reference to the facts of that case, LORD SIMONDS said (*ibid.*, 1099):

"It is, therefore, to put it at the lowest, so unlikely that the preference shareholders can get anything more than the full amount of their capital returned to them, that the court should not depart from its well-known and familiar practice in dealing with a petition to confirm a reduction of capital."

In the present case, in the circular of Apr. 24, 1953, there is set out the experience over the period of ten years before the vesting date of the first and second preference stockholders and of the ordinary stockholders. The figures having been set out, referable to the years and to the classes of members, the circular proceeded to say:

"Your directors and their professional advisers are therefore of the definite opinion that no monetary value can be attached to the first preference stock and second participating preference stock as to any right which may exist under s. 25 (1) of the Coal Industry Nationalisation Act, 1946."

I can neither form nor express any sort of opinion with regard to a claim under s. 25, but it seems to me that the recital of the figures set out in the circular does not inevitably, as is rather suggested by the word "therefore", rule out all the prospects of any claim for adjustment that might be made.

Appeal allowed. No order on cross-appeal.

Solicitors: *Hardman, Phillips & Mann* (for the objectors); *Clifford-Turner & Co.*, agents for *Hepworth & Chadwick*, Leeds (for the company).

[Reported by F. GUTTMAN, Esq., *Barrister-at-Law.*]

R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CORPORATION OF LONDON.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), November 25, 26, December 15, 1953.]

Town and Country Planning—Purchase notice—"Owner" of land—Person entitled to receive rackrent—Grant by freeholders of long lease—Confirmation of purchase notice—Town and Country Planning Act, 1947 (c. 51), s. 19 (1), (2), s. 119 (1).

In 1873 freehold premises were leased for eighty years at a rent of £350 per annum. In 1922 a sub-lease of the premises was granted at £1.136 per annum. In 1925 the freeholders leased the premises to the sub-lessees for seventy-five years at a rent of £750 per annum, subject to, but with the benefit of, the lease of 1873. In 1940 the sub-lease of 1922 and the lease of 1925 were transferred to H. & Sons, Ltd. In 1942 H. & Sons, Ltd. acquired the residue of the lease of 1873. During the war of 1939-45, the premises were totally destroyed by enemy action. In 1950 H. & Sons, Ltd., applied to the Corporation of London, as the planning authority, for permission to develop the site by re-building the premises, and, on permission being refused, they served a purchase notice on the corporation under the Town and Country Planning Act, 1947, s. 19 (1), requiring the corporation to purchase their leasehold interest in the site. The Minister confirmed this notice and the leasehold interest of H. & Sons, Ltd. was assigned to the corporation. In 1952 the freeholders applied to the corporation for permission to develop the site, and, on permission being refused, they appealed

to the Minister under s. 16 (1) of the Act. The Minister disallowed the appeal, and the freeholders then served a purchase notice on the corporation under s. 19 (1) of the Act, requiring the corporation to purchase the fee simple. On Dec. 31, 1952, the Minister confirmed this notice. On an appeal by the freeholders from a decision of the Divisional Court quashing the order made by the Minister,

- A HELD: the freeholders were an "owner" of land for the purposes of s. 19 (1) of the Act of 1947, either because the context of s. 19 (1) required that meaning (so as to exclude the definition of "owner" in s. 119 (1) of that Act); or (per DENNING and ROMER, L.J.J.) because, in the circumstances of this case, the words "if [the land] were so let" in s. 119 (1) meant "if it had been so let", and, consequently, the freeholders were persons who would be entitled to receive the rackrent of the land if it "were" let at such a rent, and so were an "owner" as defined by s. 119 (1); and, therefore, the Minister had been right in confirming the purchase notice.

Truman, Hanbury, Buxton & Co. v. Kerslake ([1894] 2 Q.B. 774), considered.

Decision of the DIVISIONAL COURT ([1953] 2 All E.R. 80), reversed.

- B Quaere whether a rent negotiated as less than rackrent can, by change of circumstances, become a rackrent.

Borthwick-Norton v. Collier ([1950] 2 All E.R. 204), considered.

C FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 19 and s. 119, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 517, 635.

Cases referred to:

- D (1) *Truman, Hanbury, Buxton & Co. v. Kerslake*, [1894] 2 Q.B. 774; 63 L.J.M.C. 222; 58 J.P. 766; 30 Digest, Replacement, 507, 1473.
 (2) *Rawlence v. Croydon Corpn.*, [1952] 2 All E.R. 535; [1952] 2 Q.B. 803; 116 J.P. 515; 3rd Digest Supp.
 (3) *Borthwick-Norton v. Collier*, [1950] 2 All E.R. 204; [1950] 2 K.B. 594; 114 J.P. 375; 2nd Digest Supp.

- E APPEAL by freeholders of premises in the city of London from an order of certiorari made by the Divisional Court on Apr. 29, 1953, on the application of the Corporation of London, and reported [1953] 2 All E.R. 80, quashing an order of the Minister of Housing and Local Government which confirmed a purchase notice served by the freeholders on the corporation under the Town and Country Planning Act, 1947, s. 19 (1).

- F *Heathcote-Williams, Q.C.*, and *Lodge* for the freeholders of the premises.
Harold Williams, Q.C., and *D. C. Walker-Smith* for the Corporation of London.
J. P. Ashworth for the Minister of Housing and Local Government.

Cur. adv. vult.

Dec. 15. The following judgments were read.

- G SOMERVELL, L.J.: This is an appeal from a judgment of the Divisional Court quashing an order made by the Minister of Housing and Local Government. The applicants were the Corporation of London. The order of the Minister confirmed, or purported to confirm, a purchase notice served under the Town and Country Planning Act, 1947, s. 19 (1), in respect of the fee simple in No. 69, Ludgate Hill. The present appellants, the owners of the fee simple, opposed the application. Section 19 deals with cases in which, as a result of a refusal of permission to develop, either absolute or conditional, land is incapable of reasonably beneficial use. In such cases it gives any owner the right to serve a purchase notice on the council of the county borough or district. If this is confirmed by the Minister, as here, the council are deemed to be authorised to acquire his interest in the land compulsorily.

The only question before us is whether the appellants, the freeholders of the

premises, are "any owner" within the meaning of s. 19, the relevant parts of which I will now read:

"(1) Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—
 (a) that the land has become incapable of reasonably beneficial use in its existing state . . . he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section. (2) Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in para. (a) to para. (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct . . ."

In 1873 the then freeholders leased the land to T. for eighty years at £350 per annum. This was, we were told, a ground lease. At some date before 1925, the present freeholders acquired the freehold reversion. In 1922, T. having died, T.'s trustees sub-let to W. at £1,136 a year for the remainder of the term less seven days. By a lease of June 23, 1925, between the freeholders and W., the sub-lessee, the premises were let for seventy-five years at £750 a year. This was said to be concurrent with and with the benefit of the original lease which at that date had some twenty-eight years to run. The result was that T.'s trustees paid £350 to their sub-lessee; W. got an extension of his lease and would pay £400 more during the period of the 1873 lease, that is, the sub-rent less £350 plus £750. After 1953 he would pay £750 only. The premises were completely destroyed by enemy action in May, 1941. W. had by this time assigned to Hamptons, who continued to pay the £750 rent. In April, 1942, Hamptons obtained an assignment from T.'s trustees of the original leasehold interest. Thereafter there were two parties only, the freeholders and Hamptons, the lease of 1873 being formally deleted from the register by the Land Registry in 1951. Under the Town and Country Planning Act, 1947, s. 12, permission to develop has to be obtained from the planning authority—in this case the Corporation of London. On Feb. 9, 1950, Hamptons applied for such permission, the development being the re-building of the destroyed premises. On May 2 this was refused, the reason being that under the Corporation's plan for this area the site in question was to be part of a roundabout. Hamptons thereupon served a purchase notice, undated, which was forwarded to the Minister on Aug. 21, 1950. On Sept. 22 the Minister caused a letter to be written to the town clerk of which I will read the second paragraph:

"The Minister is satisfied that the land has become incapable of reasonably beneficial use in its existing state, and, having regard to the fact that it is situated within the boundaries of the City of London declaratory order, and is affected by proposals for the comprehensive re-development of the surrounding area of extensive war damage, including the provision of a roundabout at Ludgate Circus, he does not consider that he would be justified in reversing the Common Council's decision of May 2, 1950, whereby permission to re-build was refused, or in directing that permission should be granted for any other development."

The writer went on to say that, unless any of those entitled wished to be heard, he would confirm the notice, which he did on Nov. 9, 1951. The freeholders had no notice of these various steps. Hamptons' interest was ultimately purchased for £71,000. On Nov. 27, 1951, a notice of retention under the Landlord and Tenant (War Damage) Act, 1939, s. 10, was served by Hamptons on the freeholders. The effect of such a notice under s. 10 is to relieve the tenant of rent and to impose on him a covenant to reinstate. It gives the landlord a right to claim

- A the rent in whole or in part if the tenant fails to reinstate when it is practicable for him to do so. The notice of retention was served, according to the evidence, on the procuration of the Corporation of London. The corporation are, as will be seen, using their statutory powers to make the fulfilment of the covenant illegal. Whether in these circumstances they can maintain the non-payability of rent is not before us. It would seem a remarkable contention. On Mar. 24, 1952, the freeholders asked for planning permission to erect a building similar to that destroyed. This was refused and the freeholders appealed to the Minister against this refusal and the appeal was dismissed. On Sept. 1, 1952, the freeholders served a purchase notice. The corporation, the respondents to this appeal, contended that the freeholders were not owners. The freeholders submitted to the Minister, but do not submit to us, that the Minister was not concerned with the question of ownership. The Minister, one imagines, gratefully accepted this submission and on that basis confirmed the notice.

If the freeholders are "any owner" within s. 19 (1) of the Town and Country Planning Act, 1947, then the confirmation stands. If, as the Divisional Court have held, they are not, it is a nullity. "Owner" is defined, unless the context otherwise requires, in s. 119 (1) of the Act:

- D " 'owner', in relation to any land, means, . . . a person other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let . . . "

- E Section 119 (1) also provides:

" 'land' means any corporeal hereditament, including a building as defined by this section, and in relation to the acquisition of land under Part IV of this Act includes any interest or right in or over land."

It was submitted to the Divisional Court and to this court that the definition of "owner" in s. 119 (1) does not apply to s. 19 (1) because the context otherwise requires. The Divisional Court held that it did apply, and, as I have said, quashed the Minister's order. The definition, or a definition on similar lines, is to be found in other Acts. It has come before the court before. Its obscurity and difficulty is always common ground between the parties inter se and the court. I will give an illustration. A. the freeholder lets to B. at a rent below the full value. B. may be an old servant or an impecunious friend. The lease is a quarterly one and there is no prohibition against sub-letting. In *Truman, Hanbury, Buxton & Co. v. Kerslake* (1), premises were let and sub-let at a rent below the rackrent. The sub-lessee was held to be the owner under a definition similar to that with which we are concerned. KENNEDY, J., said ([1894] 2 Q.B. 778):

- H "The words of the section in our judgment, in the case of there being no one who in fact receives a rackrent from the actual occupier, designate as 'owner' the person who 'rebus sic stantibus', that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rackrent, receive that rackrent."

If that case is right, then in the case I have put B. is the owner and A. is not. The leases in the *Truman* case (1) were longer, but the decision was not based on this, and there is nothing in the definition to indicate that, if actual leases are

to be regarded, their length is material. This case may well not be of general application, but it illustrates the difficulty of construing the definition. If, in the case I have put, there had been a prohibition against sub-letting, counsel for the Corporation of London admitted that on his construction of the definition there would be no owner. In *Truman's* case (1) the owner as defined was for the purpose of serving a notice of nuisance.

In *Rawlence v. Croydon Corpn.* (2), where the subject-matter was similar, *Truman's* case (1) was doubted. I am quite clear that if *Truman's* case (1) is right the definition cannot apply to s. 19 (1). If *Truman's* case (1) is wrong it must be on the basis that one does not ordinarily at any rate consider the de facto lease or chain of leases. In the instance put above, the landlord is the person who would be entitled to receive the rackrent if he had not chosen to let below it. One would, therefore, disregard actual leases, and in the case of ordinary leases there is no difficulty. It is, however, I think, clear that the definition is intended to bring in a ground lessee. The position there is different. The ground lessee has himself created the value, i.e., the house, which is the major ingredient in the rackrent. It is logical, therefore, that he should, for certain purposes at any rate, be treated as owner. He is often so described. Is it possible, however, so to read the definition as to disregard existing leases other than ground leases, but to have regard to ground leases? I think not. On this view, although the formula may be appropriate in certain contexts, I am clear that it is not appropriate for s. 19 (1). That section requires that "any owner" should include the person or persons the value of whose ownership is damaged by the sterilisation. This clearly covers the freehold reversioner, in this case the appellants, whose interest is plainly affected. It may, I think, also cover a ground lessee in certain cases—if, for example, the land was sterilised before the building had been erected. Fire or war damage might also cause him to be affected.

The case was put alternatively on the basis that the £750, whatever its nature in 1925, was now a rackrent, in that it represented the full value of the derelict and sterilised site. If this were right, the land would now be let at a rackrent and the freeholders would be owners under the early part of the definition. It was suggested this was inconsistent with *Borthwick-Norton v. Collier* (3). That case was concerned with a similar definition applicable to an owner as the person entitled to receive compensation for damage to land under requisition. The land had been let in 1934 for a sum held to be a rackrent at that date. When the compensation became payable in 1947, it had, it was said, ceased to be a rackrent owing to a change in value. *HILBERY, J.*, had decided that the relevant date was the date when the lease was negotiated and that was affirmed by this court. It would be absurd if any rise in rental values turned a rackrent lessee into an owner. It is said that the converse follows and that a rent negotiated as below a rackrent cannot by change of circumstances or planning restrictions become a rackrent. I do not find it necessary to decide this point, so I will only say that I do not think the decision in *Borthwick-Norton's* case (3) is fatal to the argument. I look forward to the day when this definition may be replaced in the various Acts which contain it by some more intelligible formula. I would allow the appeal.

DENNING, L.J.: On May 10, 1941, a building near Ludgate Circus was destroyed by the enemy. It was owned by the Jones' trustees who were the freeholders, but it was leased to Hamptons at £750 a year on a long lease expiring in 1999. (There were other interests subsisting in 1941, but they were got in by Hamptons in 1942 and are not now material.) Hamptons for many years did not give a notice of disclaimer or a notice of retention under the Landlord and Tenant (War Damage) Act, 1939. They simply paid the £750 a year to the freeholders and relied on the provisions of the Act exempting them from any obligation to re-build. In 1950 Hamptons applied to the Corporation of London for permission to re-build. The corporation refused because they wanted to throw

the site into the highway so as to make a roundabout at Ludgate Circus. There-upon Hamptons, under statutory authority, called on the corporation to buy their interest in the site. The corporation did so. They bought the remaining forty-seven years of Hamptons' lease for £71,250. This price was fixed on the hypothesis that the premises had been re-built, and, therefore, I presume on the basis that a rent of £750 a year was payable by Hamptons for their lease. (I cannot believe that the corporation would pay Hamptons on the hypothesis that the premises had been re-built without taking into account that a rent of £750 a year was payable for it when re-built.) But the singular thing is that shortly before the purchase was completed steps were taken by Hamptons to avoid payment of the £750. They did this at the instance of the corporation. They served a notice of retention on the freeholders which automatically suspended the rent of £750 a year until the premises were re-built. By serving this notice, Hamptons avoided payment of the rent, but they came under an obligation to re-build as soon as reasonably practicable. Once re-built, the rent would again become payable, but inasmuch as the corporation had decided never to allow any re-building on the site, it would never be reasonably practicable to re-build, and the rent would, it is said, never become payable again, though I am not so sure about this. Anyhow, it looks as if, by this notice of retention, Hamptons—and the corporation as their successors—may have evaded paying the rent of £750 a year for the rest of the term, and yet the corporation paid a price fixed on the footing that the rent was payable. The net result is that the corporation have bought from Hamptons on the footing that £750 a year was payable, but, nevertheless, they can turn round to the freeholders and say that £750 is not payable. The freeholders are unwilling to submit to this state of affairs, and one can hardly be surprised at it. They have countered by saying to the corporation: "You have bought out the interest of Hamptons. You must buy us out also. We also are owners and thus entitled by statute to insist on your purchasing our interest on the footing that the premises have been re-built, that is, on the footing that £750 a year is payable to us". The corporation say to them: "You are not entitled to insist on this because you are not owners within the meaning of the statute."

The rights of an owner in this respect are given by s. 19 of the Act of 1947, and the question is whether the freeholders are owners within that section. The fact that Hamptons are owners does not exclude the possibility of the freeholders being owners also, because that Act contemplates that there may be more than one "owner" of land at one and the same time. That is shown by the phrase "any owner" (not *the* owner) in s. 19 (1) and "*a* person" (not *the* person) in s. 119 (1). Section 119 (1) contains a definition of "owner" which is to be applied except so far as the context otherwise requires. I propose, therefore, to consider first whether the freeholders are owners within s. 119 (1). In some instances there is not much difficulty in applying the definition in s. 119 (1), for instance, when the land itself was originally let at a ground rent and subsequently buildings have been erected on it and the whole is let at a rackrent. The ground lessee is certainly an "owner", for he is a person who is entitled to receive the rackrent. So also when there is a series of leases and sub-leases of the building, each of which was let at a rackrent when it was negotiated. Each person who receives a rackrent would seem in that case to be an "owner". The difficulty arises when we come to cases where the land and buildings are let at more than a ground rent but less than a rackrent; and the difficulty arises from an ambiguity in s. 119 (1). The words "if it were so let" may mean either (i) "if it *were* to be so let", or (ii) "if it *had been* so let". I think that the words should be given either or both of those meanings according to the circumstances of the case. This can best be shown by some illustrations. Take, first, a case where a house is not let at all. The freeholder is certainly an "owner"; and the reason is because he comes within the first meaning. He is a person who would be

entitled to the rackrent if it *were to be* let at a rackrent. Take next a case where there is no ground rent and a house is let by the freeholder, at less than a rackrent, on a short-term tenancy or a periodic tenancy. The freeholder is certainly then an "owner" and the reason is because he comes within the second meaning: he is a person who *would have been* entitled to the rackrent of the land if it *had been* in the past let at a rackrent. Thus, when a freeholder lets a house to a friend or a servant at less than a rackrent, he is an "owner" of it: see *Rawlence v. Croydon Corpn.* (2).

Take now the present case, and it will be found, I think, that both Hamptons and the freeholders are "owners". First, Hamptons. They had a lease with nearly fifty years to run and they were paying £750 a year to the freeholders. That was more than a ground rent, but less than a rackrent. If the premises in 1951 *were to be* let at a rackrent, they would be the persons entitled to it. They come within the first meaning and are "owners" accordingly. Next, the freeholders. They were not in 1952 receiving a rackrent, but that was only because the premises had not been let at a rackrent. The freeholders were the people who *would have been* entitled to the rackrent, if it *had been* let at a rackrent. They come within the second meaning and are "owners" accordingly. I do not see any reason why we should not give the words of s. 119 (1) this twofold meaning. In *Truman, Hanbury, Buxton & Co. v. Kerlake* (1), the court seems to have thought that the words "if it were so let" meant in all cases "if it *were to be* so let". That may have been the proper meaning to adopt in that case, but it is not so in this case. I think that the freeholders here were "owners" within s. 119 (1) and entitled accordingly. If the freeholders are, however, not owners within s. 119, then I agree with SOMERVELL, L.J., that the context of s. 19 "otherwise requires". It requires that the freeholders should be owners for the purposes of s. 19. The section is dealing with land which has been rendered, by executive action, for ever sterile. Parliament must have intended that the freeholders should have the right to insist on being bought out.

I agree, therefore, with my Lord that the appeal should be allowed and the order of the Minister upheld.

ROMER, L.J.: The question for our decision is whether the appellants, the freeholders, were "owners" of No. 69, Ludgate Hill, for the purposes of the Town and Country Planning Act, 1947, s. 19, on Sept. 1, 1952, when they served on the city corporation a purchase notice under that section in respect of the said premises. The freeholders' position on that date was, as it still is, that they were the freeholders of the property subject to a lease which was and is vested in the corporation for a term which will expire on Sept. 29, 1999.

Before considering what the word "owner" in s. 19 means, it is convenient, I think, to consider whether it is referable to only one person in relation to any particular property or whether it may refer to more than one. In my opinion, the section contemplates that there may be more than one owner of land in respect of which development permission is refused. In the first place, the phrase in s. 19 (1) is "any owner" and not "the owner", which appears to me to be in itself almost decisive of the question. But in addition to this the section refers to "the interest in the land" of any owner who serves a purchase notice, and in s. 19 (2) to "the interest of the owner", language which seems to be indicative of the existence of other owners' interests as well. I think, therefore, that the existence of relevant interests other than that of the owner who serves a purchase notice is within the contemplation of the section. It is to be presumed, however, that such other interests are intended to remain unaffected by the service of such a notice, for only the person who serves it is to be notified of subsequent ministerial action. On the assumption, then, that there can be more than one "owner" of land who may be entitled to serve a purchase notice under the section, the next question to resolve is who can qualify under that description? The problem is, to my mind, an exceedingly difficult one, if only for the reason

that according to ordinary conceptions there cannot be two different owners of the same property, unless one separates legal from beneficial interests, which there is no reason to suppose that the legislature had in mind.

- Before turning to the definition of "owner" in s. 119 (1) of the Act, it would be convenient to consider whether any light is thrown on the meaning of the word by other sections in the same Part of the Act. The corporation relied on the fact that in certain sections (for example, s. 21, s. 22, s. 23, s. 24, s. 26, s. 27, A s. 28, s. 29, s. 32 and s. 33) the word "owner" is coupled or contrasted with the occupier, other persons interested in the land, and (in some instances) other persons "affected". This difference in language was noted by the Divisional Court, and the corporation contends that it suggests, as a matter of reasonable inference, that the legislature in s. 19 was dealing with owners of land alone and not with persons who can claim to possess any kind of interest therein. It is B true, I think, that the difference in language does indicate that s. 19 was dealing with a narrower class of persons than that to which the other sections are directed, and that an occupier of land, for example, cannot serve a purchase notice under s. 19 (1) in his capacity *as such*. But the owner of land is none the less the owner because he occupies it himself and the only assistance that I derive from the difference of language in the sections is the negative guidance that a tenant or C other person interested in land (for example, a person who is entitled to a rent charge), cannot proceed under s. 19 (1) unless he is an "owner" of the land as well.

- The next question is whether the definition of "owner" in s. 119 (1) applies to the word as used in s. 19 (1) and (2). In considering this it is necessary, I think, to presume that either it applies universally to the section or it does not D apply at all, for it does not seem to me to be a tenable proposition that it should be held applicable to some ownerships of land in connection with the service of purchase notices, but not to others. If this be right, there is strong ground for the view that the context of s. 19 (1) "otherwise requires" so as to exclude the definition in s. 119 (1). I will give two examples to demonstrate its inapplicability. (i) A., the owner of land in fee simple, lets to B. for a term of three years E in consideration of a premium, but at a low rent. B. sub-lets to C. at a rackrent. If the definition applies, B., and not A., is the owner of the land even when only a week or two remain of the term. (ii) A., the owner as before, lets the land for twenty years to B. at less than a rackrent. B. sub-lets to C. for the residue of the head term less the last day at a rackrent and three more similar sub-leases subsequently follow, each at a rackrent. Under the definition, B., and each of F the other sub-lessors, are "owners", but A. is not; and the only interests in the sterilised land which the local planning authority could be compelled to purchase would be the nominal leasehold reversions. I cannot believe that the definition is applicable to such cases as these, and, if not, it is not, in my judgment, applicable to s. 19 (1) at all. It might be suggested, further, that the definition is only apt in cases where land is in the ownership of one person and not more, and that for G this reason also it is inapplicable to s. 19, which envisages land which has more than one owner. I do not, however, think on the whole that this view is right. It is true that the words "is entitled to receive *the* [not 'a'] rackrent" seem to indicate the payment and receipt of one rackrent and no more, but, on the other hand, it is "*a* person" and not "*the* person" who is in contemplation as receiving rackrent. In my opinion, accordingly, the definition cannot be regarded as ousted H from s. 19 by this consideration alone.

If, then, the definition which is furnished by s. 119 (1) is to be disregarded, it is necessary to ascertain from other sources the meaning which "owner" was intended to have in s. 19. On the views which I have already expressed, (i) there may be one or more "owners" of the same land, and (ii) an occupier, or a person having some other limited interest in the land, is not, as such, an owner for the purposes of s. 19; and, therefore, a tenant is not,

merely by virtue of his tenancy, an owner. Apart from these guides to the legislature's intention in speaking of owners in the section, there is the further consideration that s. 19 is dealing with "sterilised" land. Taking these matters into account, it seems to me that, whoever may or may not be an owner in special circumstances, the person in whom land is vested for an estate in fee simple subject only to a lease is *prima facie* "an" owner of the land. He is, indeed, according to the ordinary signification of the term, "the" owner of the land, for, although a lessee is the owner of a legal interest in the land demised, namely, a term of years, he is not the owner of the land itself. There is nothing surprising in the owner of the freehold of land that has become sterilised being within the purview of the section, for in the general run of cases he is the person primarily affected by a refusal of permission to develop, and he is the only person affected in all cases in which he not only owns the land, but occupies it himself. It may be that in the early days, at all events, of a long lease the lessee is "an owner" of the land demised and entitled as such to serve a purchase notice; but even in such a case the freehold reversioner is still the owner of the land, and I can see no reason why he should be excluded from a provision which exactly describes him merely because the lessee is also given (on the suggested hypothesis) a similar status, and an equivalent right, himself. I am, therefore, of opinion that the freeholders, who were in fact the owners of No. 69, Ludgate Hill, on Sept. 1, 1952, were also "owners" for the purposes of s. 19 of the Act, and were entitled to serve their purchase notice accordingly.

I would add that I think the result would be the same even if one resorted to the definition of owner in s. 119. On the assumption that the land was not let at a rackrent on Sept. 1, 1952, the "owner" as defined by s. 119 (1) would be the person who would be entitled to receive the rackrent of the land if it were let at such a rent. The phrase "if it were so let", if taken by itself, appears to me to be at least as susceptible of meaning "if it had been so let" as "if it were to be so let". In *Truman, Hanbury, Buxton & Co. v. Kerlake* (1), the court adopted the latter construction, but I cannot accept that decision as deciding that it should be adopted in all cases, and I agree with the observations which my brethren have made on that decision in their judgments in the present case, and in *Rawlence v. Croydon Corpn.* (2). In any event, I am of opinion that, in their application to sterilise land, the words "if it were so let" can only reasonably mean "if it had been so let", for a future letting of such land at a rackrent (as ordinarily understood) would obviously be impracticable. If, on the other hand, the words do in fact mean "if it were to be so let" this would afford a further reason for rejecting the definition as being inapplicable to s. 19.

Having regard to the views which I have indicated it is not necessary to arrive at any definite conclusion on the alternative argument of counsel for the freeholders to the effect that the property in question was in fact let at a rackrent on the relevant date. I concur, however, in the views which my Lord has expressed on it. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Boxall & Boxall* (for the freeholders); *Comptroller and City Solicitor* (for the Corporation of London); *Solicitor of the Ministry of Health and Solicitor of the Ministry of Housing and Local Government.*

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

HAWKINS v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), November 26, 27, 30, December 1, 2, 17, 1953.]

Licensee—Negligence—Knowledge by licensor of facts constituting danger—Reasonable appreciation of risk—Accident in dark—Risk not obvious to licensee—Defective steps of requisitioned house—Liability of requisitioning authority.

A

On Oct. 5, 1951, the plaintiff, after visiting an occupier of part of a house which had been requisitioned since 1946 by the defendants, fell and broke her leg while descending the steps from the front door after dark. One of the steps was broken, a fact of which the defendants had knowledge, and the court found that a reasonable man, having that knowledge, would have appreciated the resultant danger. The danger was not obvious to the plaintiff.

B

HELD: if a licensor had actual knowledge of the physical condition of his property and a reasonable man would have realised that it was a danger, the licensor was under a duty to use reasonable care to prevent damage from the danger unless it was obvious, and he could not escape liability by showing that he himself did not appreciate the risk involved; the plaintiff had discharged the burden of proof which was on her, and, therefore, she was entitled to damages against the defendants.

C

Per DENNING and ROMER, L.JJ.: When leaving the house in the dark, the plaintiff was entitled to assume that the steps were suitable for the purpose for which they were provided, and, therefore, the fact that the accident occurred during the hours of darkness was irrelevant.

D

Per DENNING, L.J.: The defendants, being an urban district council, were, of course, not the householder and could not be on the spot to warn visitors of the danger, but that does not rid them of their responsibility. It only means that, being unable to warn, they ought to have mended the step. They cannot shift their responsibility on to the occupants of the house for the simple reason that they retained the possession and control and are responsible in law. They cannot get rid of their responsibility by the plea that they are only a requisitioning authority. They ought to do whatever a reasonable man in their position would do, and that is, mend the step.

E

Per ROMER, L.J.: It is, in my judgment, open to this court to apply the objective test and to hold that, provided that actual knowledge of the source of a danger is brought home to a licensor, it is sufficient then, in order to fix him with liability, to show that a reasonable man would have appreciated the dangerous quality of that source, whether or not the licensor appreciated it himself. The objective test is, I think, preferable for at least two reasons. First, it dispenses with the need of inquiring whether in any given case a licensor did, in fact, know of the potentiality of danger—an inquiry which involves research into both the conscious and the sub-conscious mind. I say this because a man may well be said to "know" something that he has been told, even although he has forgotten it—for example, that an accident of a particular kind had happened on his property before it passed into his ownership. Secondly, the subjective test unduly favours the thoughtless or stupid man and puts an unwarrantable premium on carelessness.

F

G

H

Decision of PEARSON, J. ([1953] 2 All E.R. 364), affirmed.

AS TO OCCUPIER'S DUTIES TO LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 609-612, paras. 859-863; and FOR CASES, see DIGEST, Vol. 36, pp. 45-49, Nos. 282-306, and Digest Supps.

Cases referred to:

- (1) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest 70, 450.
- (2) *Gautret v. Egerton, Jones v. Egerton*, (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; *sub nom. Gantret v. Egerton, Jones v. Egerton*, 16 L.T. 17; 36 Digest 36, 209.
- (3) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- (4) *Corby v. Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 140 E.R. 1209; 36 Digest 49, 304.
- (5) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 1922 S.C. (H.L.) 1; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.
- (6) *Addie, R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 1929 S.C. (H.L.) 51; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (7) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest 15, 59.
- (8) *Lowery v. Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; *revsd. on other grounds* H.L., [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 36 Digest 42, 256.
- (9) *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; Digest Supp.
- (10) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; Digest Supp.
- (11) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; [1950] 2 K.B. 353; 114 J.P. 214; 2nd Digest Supp.
- (12) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd. Ex.Ch.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (13) *Southcote v. Stanley*, (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest 208, 1702.
- (14) *Degg v. Midland Ry. Co.*, (1857), 1 H. & N. 773; 26 L.J.Ex. 171; 28 L.T.O.S. 357; 156 E.R. 1413; 36 Digest 9, 15.
- (15) *Dunske v. Abbott*, (Nov. 13, 1953) (Unreported).
- (16) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (17) *Blakemore v. Bristol & Exeter Ry. Co.*, (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; *sub nom. Blackmore v. Bristol & Exeter Ry. Co.*, 27 L.J.Q.B. 167; 3 Digest 69, 107.
- (18) *MacCarthy v. Young*, (1861), 6 H. & N. 329; 30 L.J.Ex. 227; 3 L.T. 785; 158 E.R. 136; 34 Digest 193, 1575.
- (19) *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439; 87 L.J.K.B. 651; 118 L.T. 562; 82 J.P. 125; 36 Digest 18, 83.
- (20) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, 213.
- (21) *Baker v. Bethnal Green Corpn.*, [1945] 1 All E.R. 135; 109 J.P. 72; 2nd Digest Supp.
- (22) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; *sub nom. Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp.
- (23) *Hayward v. Drury Lane Theatre. Ltd. & Moss' Empires. Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 36 Digest 38, 217.
- (24) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.
- (25) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.
- (26) *Gough v. National Coal Board*, [1953] 2 All E.R. 1283.

(27) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 528; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.

(28) *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; 97 L.J.K.B. 229; 138 L.T. 537; 92 J.P. 37; Digest Supp.

APPEAL by the defendants from an order of PEARSON, J., dated June 4, 1953, and reported [1953] 2 All E.R. 364.

A In August, 1946, a house, 2, Valley Road, Kenley, Surrey, belonging to a Mrs. Reddish, was requisitioned by the defendants, the urban district council of Coulsdon and Purley, under the Defence (General) Regulations, 1939, reg. 51, for housing persons who were inadequately housed, a schedule of condition being prepared by an independent architect on behalf of the defendants, and signed by the defendants' surveyor and by Mrs. Reddish as owner. The schedule referred, inter alia, to the fact that the three stone steps of the front porch were worn and that one of them was broken at the corner. Between 1946 and 1951 the house was re-decorated and minor alterations and repairs were carried out in accordance with standards of repair laid down by the Ministry of Health, but nothing was done to the steps. No complaints were made to the defendants by the occupiers of the house about the condition of the steps. On Oct. 1, 1951, although the property was still requisitioned, the defendants allowed Mrs. Reddish to enter into occupation of the upper floor of the house. On the evening of Oct. 5, 1951, the plaintiff, Mrs. Hawkins, came to visit Mrs. Reddish. She had visited the house before the war, but not since the conclusion of hostilities. She left the house at about 8 p.m., when it was dark. As she was coming down the steps from the front door, she put her foot on the broken step which gave way beneath her and she fell and broke her leg. On the pavement outside the house there was a street lamp, but between the lamp and the front door there was a fir tree and on the night in question it was very dark and misty so that the lamp was not effectively lighting the doorway.

The plaintiff claimed damages from the defendants, contending that by virtue of the requisition they were in occupation and/or control of the porchway steps and approaches to the house; that she used them on the evening in question as the defendants' licensee, being on a visit to the person occupying the upper floor of the house under an agreement with the defendants; that the defendants owed her a duty to take reasonable care to prevent her from suffering damage on the occasion of that visit from any hidden danger or trap in the porchway, steps or approaches of which they were aware; that the porchway and/or steps and/or approaches constituted at all material times a hidden danger or trap; that, as the defendants knew, they were unlit, the surface was worn, and a large portion of the lowermost step had been previously broken off and was missing; and in breach of their duty, and/or negligently, the defendants had failed to take reasonable care to prevent injury to persons using the steps. The defendants denied the allegations and contended that the plaintiff used the steps with full knowledge of their condition, and/or without keeping a proper look-out, and/or without due care for her own safety.

H PEARSON, J., finding that the defect was not obvious to the plaintiff and was not reasonably to be expected by her, held that a licensee moving in the dark did not in all cases take the risk of any danger which in daylight would be obvious. He held further that to entitle the plaintiff to succeed it was enough for her to show that the defendants knew the facts constituting the danger; that a reasonable man, having that knowledge, would have appreciated the risk involved; and that she need not show that the defendants, in fact, appreciated that risk. Holding that the plaintiff had discharged the burden which was on her, he gave judgment in her favour.

Van Oss for the defendants.

F. Whitworth for the plaintiff.

Cur. adv. vult.

Dec. 17. The following judgments were read.

SOMERVELL, L.J., stated the facts, and continued: The plaintiff was a licensee of the defendants, and to succeed she must establish a breach of the duty owed by a licensor to a licensee. Without begging the question of law which arises, the duty of a licensor is to warn licensees of any unusual or concealed danger of which he knows and which would not be obvious to a reasonably careful person. Apart from that, the licensee takes the premises as he finds them. There are, no doubt, cases in which a licensee in the dark will be presumed to be aware of what can be seen by daylight. In other cases, as here, a licensor must contemplate that those whom he is impliedly licensing, e.g., callers on the occupants of No. 2, Valley Road, may come and go in darkness. [His LORDSHIP mentioned the illumination provided by the street light and continued:] The learned judge found that the defect in the stone was a concealed danger to the plaintiff and that she was not careless of her own safety. I will set out three of his findings in paras. (h), (i) and (j) of the judgment ([1953] 2 All E.R. 367):

“(h) The physical facts constituting the danger, namely, the badly broken step and the deficiency of light, were known to the defendants through their officers concerned with the condition of the requisitioned property. (i) A reasonable man, having the defendants’ knowledge of the physical facts, would have appreciated the risk involved. (j) It was not proved, and I do not consider there are sufficient grounds for inferring, that the defendants appreciated the risk involved. If they had, they would, presumably, have incurred the small expense necessary to remove the danger by cementing in the broken pieces.”

The learned judge in earlier findings [paras. (e) and (g)] speaks of the “concealed danger”, but I think in those passages he is using the word “danger” to express the fact that the defective step caused the accident. It proved to be a danger, but would not be a danger within this branch of the law unless a reasonable man, seeing the physical state of the step, would have appreciated the risk. It is at this stage of the argument that I have had the greatest difficulty. The defendants employed a repairing surveyor who had seen the premises, and their rent collector called regularly. There is evidence that complaints made by the occupants were attended to, and no complaint had been made of this defective step as dangerous. It would only have cost a small sum to repair. To take words from LORD MACNAGHTEN’S speech in *Cooke v. Midland Great Western Ry. of Ireland* (1) ([1909] A.C. 234), does not the learned judge’s finding involve that all these people were without common sense and ordinary intelligence? In other words, may he not have applied a higher standard than that of the reasonable man in deciding that there was a concealed danger at all? On the other hand, it may be that in the special circumstances affecting this house each side may, to some extent, have relied on the other. The defendants, in minor matters of this kind, may have left it to the occupants to complain. The occupants may have felt it was for the local authority to do what was necessary and proper to the premises. A better test, perhaps, is to consider a host showing off a guest who had arrived, as the plaintiff did, at dusk and who was leaving in the dark. Having seen photographs, I think that the reasonably careful host would have given a warning that that end of the step was broken, and this may be sufficient to support the finding. I would, however, like to express a warning as to the danger of endowing the reasonably careful man with attributes which properly belong to a person of exceptional perspicuity and foresight.

That being so, the main question of law which was argued before us arises: Can the defendants escape liability by not appreciating the risk involved although a reasonable man would have done so? In the ordinary case of concealed dangers or traps, the danger is obvious to anyone who knows of the physical conditions—

who has seen the trap—and the point cannot arise. There is, however, a borderland in which, for one reason or other, a defendant may be able to satisfy the court that his common sense and intelligence quoad this particular matter is below the average. The alternative tests have been described as subjective and objective, and the terminology is convenient. The learned judge proceeded on the basis that WILLES, J., in his well-known judgment in *Gautret v. Egerton*, *Jones v. Egerton* (2), was saying that the subjective test must in all cases be

A applied. This was the basis of the argument of counsel for the defendants, but I do not accept it. Counsel rightly relied on the statement in the judgment of WILLES, J. (L.R. 2 C.P. 375) that there must be “something like fraud on the part of the giver”. This occurs in that part of the judgment where WILLES, J., is finding an analogy in the law as to gifts. In the same passage he says that the giver must know the gift’s “evil character at the time” and fail to caution the donee. Later he says (*ibid.*):

B “Every man is bound not wilfully to deceive others, or do any act which may place them in danger.”

In the ordinary case where danger exists there would, of course, have been something like fraud and wilful deception. The question is whether in the borderland in which the present argument moves WILLES, J., is intending to lay down the subjective test. I find in the judgment indications that he had in mind the objective test. This can, I think, be gathered from the words (*ibid.*) “or do any act which may place them in danger”. That was, I think, the view of those words taken by SIR BALIOL BRETT, M.R. (11 Q.B.D. 514), in *Heaven v. Pender* (3). WILLES, J., just after the passage which I have quoted, refers to *Corby v. Hill* (4). In that case the plaintiff was a licensee, the defendant being, not the occupier, but there by permission of the occupier. The defendant had placed materials on the ground which caused the accident. Both COCKBURN, C.J., and WILLES, J., deal with the matter on the assumption that the obstruction had been placed there by the owner or occupier. COCKBURN, C.J., says (4 C.B.N.S. 563) that

E “. . . it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury . . .”

WILLES, J., in his judgment clearly applies the objective test as against the defendant. He states (*ibid.*, 567) the form of declaration which he would have drawn in which he uses the words “likely to prove dangerous to persons driving along the road”. As I read it, he would have applied the same test if the

F obstruction had been placed there by the owner.

On the assumption that I am wrong in the view which I take of the judgment of WILLES, J., I agree with PEARSON, J., that the decisions to which he refers in the House of Lords dealing with accidents to children [*viz.*, *Cooke v. Midland Great Western Ry. of Ireland* (1); *Glasgow Corpn. v. Taylor* (5), *R. Addie & Sons (Collieries) v. Dumbreck* (6)] are authorities for applying the objective test

G in this case. Counsel for the defendants sought to distinguish those cases on the ground that they dealt with accidents to young children and had, indeed, been said to be in a class apart. They are, of course, in one sense in a class apart in that, for example, no adult who chose to play with a turntable would be able to recover damages if he injured himself. I agree with what the learned judge says in the following sentences ([1953] 2 All E.R. 371) and do not find it necessary

H to examine these cases in detail:

“It thus appears that in the case of a child licensee the ‘objective test’ is to be applied in deciding whether the licensor had knowledge of the danger. Is there any reason for applying a different test in the case of an adult licensee? There are possible differences between a child licensee and an adult licensee with regard to the inference of leave and licence, the existence of a trap, and the sufficiency of the warning. But I cannot see any reason why

any different test should be applied in deciding whether the licensor had knowledge of the danger. Moreover, there is at least some indication of the 'objective test' applying to the case of an adult licensee in the passage which I have already cited from LORD SUMNER's speech in *Mersey Docks & Harbour Board v. Procter* (7), containing the words ([1923] A.C. 274): 'As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen'."

As I have already said, in most cases the risk is obvious to anyone who sees the place, and the two tests coincide. Undoubtedly, knowledge at any rate of the state of affairs was the basis and this explains the use of words appropriate to the subjective test. For example, counsel for the defendants relied on the way in which BUCKLEY, L.J., dealt with the matter in *Lowery v. Walker* (8) ([1910] 1 K.B. 190). In that case the danger was a vicious horse, and there was a finding of fact of the county court judge that the defendant knew that the horse was dangerous. Counsel further relied on words used in *Coates v. Rautenstall Borough Council* (9), *Ellis v. Fulham Borough Council* (10), and *Pearson v. Lambeth Borough Council* (11). In those cases a somewhat different problem arose. For example, in *Ellis's* case (10) the plaintiff, a small boy, was cut by broken glass while paddling. The defendant, the local authority, did not know of the existence of the actual piece of glass which caused the injury, but, knowing of the possibility of its presence, they were found to have that actual knowledge of the danger which fixes the licensor with liability. That seems to me a different point, and in *Pearson's* case (11), ASQUITH, L.J., referred to the issue which has arisen in this case, but found it unnecessary to decide it. It was not suggested that there was any case which had turned on the applicability of the subjective as against the objective test in the circumstances as set out in the learned judge's judgment. In so far as the matter is to be considered apart from authority, I have no hesitation in adopting the objective test. There is no difficulty in a principle based on a defendant's knowledge of facts as, for example, in fraud. On the other hand, I can see difficulty as to the meaning of the formula "recognising the risk". How great a risk would have to be recognised? I can foresee possibilities of the reasonable man who had been expelled by one door returning in a somewhat different guise by another. For those reasons I would dismiss the appeal.

DENNING, L.J.: It is sometimes said that the duty of an occupier to a licensee is only to warn of dangers *actually known* to the occupier, whereas his duty to an invitee is to warn him, not only of dangers of which the occupier actually knows, but also of those of which he *ought to know*. This distinction is supposed to be found in the judgment of WILLES, J., in *Gautret v. Egerton* (2), as contrasted with his judgment in *Indermaur v. Dames* (12), but I do not believe the distinction is well founded. Take, first, the case where a licensee is injured by the negligent conduct of the occupier or his servants in the course of things which they are doing on the land. Suppose, for instance, that a sightseer is allowed into a private works and, whilst there, he is injured by the negligent driving of a vehicle or the negligent operation of a crane. He clearly has a cause of action today, but he would not have had one twenty years ago. The reason is because he would in the old days have been defeated by the doctrine of common employment, which, strangely enough, was applied, not only to servants, but also to licensees: *Southeate v. Stanley* (13); and volunteers: *Degg v. Midland Ry. Co.* (14). In the nineteenth century it was the fashion to put licensees and volunteers into the same category as servants and to hold that they had agreed to accept the risk of negligence on the part of the servants of the occupier. As recently

as 1929 it was stated in SMITH'S LEADING CASES, 13th ed., vol. 1, p. 863, [in the notes to *Indermaur v. Dames* (12)] that a licensee cannot sue for

"supervening negligent conduct on the part of the servants of the owner of the premises; for danger of injury from such negligence may be considered as bargained for and the risk thereof accepted by the licensee . . ."

A In 1948, however, the doctrine of common employment was abolished [by the Law Reform (Personal Injuries) Act, 1948], and with it must go this peculiar off-shoot in regard to licensees and volunteers. It is impossible to suppose that a licensee, any more than a servant, agrees to accept the risk of negligence. He can always sue for negligence in the course of things being done on the land. His disability, if any, is confined to the static condition of the premises, i.e., to dangers which have been there for some time: see *Dunske v. Abbott* (15).

B Let us consider, however, this question of the static condition of the premises. It is said that the licensee must take the premises as he finds them, but this is far from being correct. Take the case where a licensee is injured by the dangerous condition of the premises, a static condition, if you please, but the danger is due to a negligent *act of commission*, i.e., something done by the occupier or his servants on the land. Suppose, for instance, that the occupier negligently places
C a pile of slates on his private road in such a manner as to be likely to prove dangerous to persons driving along the road, and a visitor at night time drives into them and is injured. There is high authority for saying that the occupier is liable. It is not necessary for the injured person to show that the occupier actually knew the slates were dangerous, but only that he knew that people were likely to pass along the road. Once he has that knowledge he is liable for
D his negligence in placing the slates there. In other words, he is liable for a state of affairs created by him—by an act of commission—which he knew or ought to have known was a danger. That appears distinctly from *Corby v. Hill* (4), decided in 1858, and, particularly, from the form of declaration suggested by WILLES, J. (4 C.B.N.S. 567), as paraphrased and explained by SIR BALIOL BRETT, M.R. (11 Q.B.D. 512), in his famous judgment in *Heaven v. Pender* (3),
E which was approved by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (16). It is in *Corby v. Hill* (4) that we first find mention of a "trap". WILLES, J., said (4 C.B.N.S. 567): "The defendant had no right to set a trap for the plaintiff", meaning thereby simply that the defendant was not, by an act of commission, negligently to create a danger even for a licensee. SIR BALIOL BRETT, M.R., took the matter up in *Heaven v. Pender* (3). He said
F (11 Q.B.D. 509):

"To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention."

G Before leaving *Corby v. Hill* (4), it should be noted that COCKBURN, C.J., emphasised (4 C.B.N.S. 562) that the act complained of was an act of commission.

Turn now to acts of omission. Take a case where a licensee is injured by the dangerous condition of the premises, but the danger is due to a negligent *act of omission* by the occupier or his servants, such as a failure to repair or to light or to warn. Nearly one hundred years ago, when the point first arose for decision, the law said that the licensee was in the same position as a servant and could not
H sue at all. It was assumed without question that a servant could not sue for defects in the premises or plant. Hence a licensee could not sue. Thus in *Southcote v. Stanley* (13), which was decided in 1856, when a visitor was leaving a house, a piece of glass fell out of the door and injured him. It was due to a negligent omission by the occupier to inspect or repair. It was not an act of commission, as BRAMWELL, B., was careful to point out, but an act of omission. The court dismissed the claim on the ground that, as a servant could not sue for

the defect, so a visitor could not. POLLOCK, C.B., said (1 H. & N. 250) that a visitor

“ . . . is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest.”

I need hardly say that that is not the law of master and servant today. A master must now take reasonable care to see that his plant and premises are safe for his servants. Within the short space of ten years, however, the courts, under the guidance of WILLES, J., abandoned the analogy of a servant and adopted the analogy of a gift. The reason is not far to seek. During those ten years the courts of this country had for the first time to consider the question of gifts of chattels which turned out to be defective, and it was said in *Blakemore v. Bristol & Exeter Ry. Co.* (17), which was decided in 1858, and in *MacCarthy v. Young* (18), decided in 1861, that a gratuitous giver or lender of a chattel is liable for its defective state if he actually knows of the defect, but not otherwise. Drawing on that analogy and applying it to acts of omission, WILLES, J., held that the occupier of premises was liable to a licensee if he actually knew of the danger and failed to give warning of it, but that, if the occupier did not actually know of the danger, he was not liable. Thus, in *Gautret v. Egerton* (2), the plaintiff was crossing a bridge in some dock premises when he fell into a cutting and was drowned. The complaint against the owners was for a negligent act of omission. The claim was dismissed. WILLES, J., said (L.R. 2 C.P. 375):

“ . . . a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee.”

But WILLES, J., made it clear that the occupiers would be liable for a negligent act of commission. He quoted *Corby v. Hill* (4) and said that every man is bound *not to do* any act which may put others in danger.

It is as well to pause at this point and consider this analogy of a gift, for you will find that, just as the law of master and servant has changed in the last hundred years, so has the law of gifts. The decision of the House of Lords in *Donoghue v. Stevenson* (16) makes the earlier cases on gifts quite out of date. There can be little doubt that *Blakemore v. Bristol & Exeter Ry. Co.* (17) and *MacCarthy v. Young* (18), on which WILLES, J., relied, would be decided differently today. Let me give some modern instances. Suppose that the manufacturer of a special soap sends out samples by way of gift to members of the public, and owing to negligence in manufacture a user of the soap suffers from dermatitis. Surely there is a cause of action, even though the manufacturer did not actually know of its evil character at the time. Again, supposing that hospital authorities treat a patient negligently, they are liable, even though they give their services gratuitously. If they give him food which through their carelessness has been mixed with some injurious ingredient, are they not also liable even though they did not know of its injurious character? There is no difference in principle between such a case and the case where the driver of a car gives a friend a lift. I propose, therefore, to put the law of gifts on one side and to consider simply the law about licensees, and as to them I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at them. Thus, in *Corby v. Hill* (4), the negligent act was regarded as one of commission in placing slates on the road, but it might just as well have been regarded as an act of omission in failing to give warning of them at night by means of a red lamp. That is, indeed, how SCRUTTON, L.J., regarded it in *Kimber v. Gas Light & Coke Co.* (19). It seems to me that the

real significance of an act of commission is that it means that the occupier must have actual knowledge of the state of affairs he has created. Taking that significant feature and applying it to an act of omission, you will find that liability depends on whether the occupier has actual knowledge of the state of affairs existing on the land, no matter whether he himself or someone else created it. Once he has that knowledge, then if he knows or ought to know that it is a danger, he is under a duty to use reasonable care to prevent damage from that

- A I realise that this means a departure from the principle stated by WILLES, J., in *Gautret v. Egerton* (2), but it is not a departure from the decision itself. The decision can be explained on the footing that the danger was obvious and known to the man who fell into the cutting. At any rate, the declaration did not assert that the danger was unknown to him, and that was a fatal flaw in it. WILLES, J., himself made that plain (L.R. 2 C.P. 373, 374). So did SIR B BALIOL BRETT, M.R., in *Heaven v. Pender* (3) (11 Q.B.D. 514) and LORD SUMNER in *Fairman v. Perpetual Investment Building Society* (20) ([1923] A.C. 94). A licensee can never complain of dangers which are obvious or known to him.

In support of this departure from *Gautret v. Egerton* (2) I would point out that during the last fifty years there have been many cases which show that no distinction is now to be drawn between acts of commission and acts of omission.

- C In the first place there are the cases about children who have been allowed to come on to the land and have meddled with things there. They are licensees. The question in such cases is whether the occupier has actual knowledge of the state of affairs existing on the land and the tendency of children to meddle. Once he has that knowledge, then if he knows or ought to know that it is a danger, or will be a danger if they meddle, he is under a duty to use reasonable care to prevent damage from that danger, and this is so whether it arises from an act of omission or commission. That is, I think, fully established by *Cooke v. Midland Great Western Ry. of Ireland* (1) (failure to lock a turntable), and many cases in this court down to *Pearson v. Lambeth Borough Council* (11) (failure to padlock a grille). In each case the acts complained of were acts of omission. In the words of ASQUITH, L.J., ([1950] 1 All E.R. 687)

- E “ . . . a simple precaution was omitted which would have thwarted or rendered innocuous the possible action of third persons.”

The occupier negligently failed to take that precaution and was held liable. I do not think that there is any difference between a child licensee and an adult licensee except that a child will meddle where an adult will not, and this fact must

- F be taken into account in deciding whether the occupier has been negligent. In the second place there is the decision of the House of Lords in *Fairman's* case (20). The complaint there was of an act of omission. The stairs leading to some flats were worn away. The landlord had a caretaker living there who knew of this state of affairs. The landlord failed to repair the stairs and Miss Fairman, who was a lodger in one of the flats, was injured. The House of Lords held that she was a licensee and that the landlord was under an obligation not to lay a trap for her. They held that there was, in fact, no trap because Miss Fairman had lived in the flats a long time and the danger was obvious to her, but two of their Lordships went on to define what was meant by the obligation “not to lay a trap”. LORD ATKINSON said ([1923] A.C. 86) that the landlord was

- G “ . . . bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known.”

H LORD WRENBURY used words to the like effect (*ibid.*, 96). So did LORD HAILSHAM, L.C., in *Addie v. Dumbreck* (6) ([1929] A.C. 365). It has sometimes been said, that those observations, by introducing the phrase “ought to have known”, were made per incuriam, but an explanation has been put forward which has been described by LORD GREENE, M.R., as “very attractive”: see *Baker v. Bethnal Green Corpn.* (21) ([1945] 1 All E.R. 140). It is this. If the occupier

actually knows the physical condition of the premises, and a reasonable man would have realised that it was a danger, the occupier must be taken in law to have knowledge of the danger, because he ought to have realised it too. He ought to know what a reasonable man would know. I think that explanation is correct. It must be remembered that in *Fairman's* case (20) the landlord through his caretaker actually knew of the condition of the stairs but did not realise they were a danger. When the statements of their lordships are read against that background, it becomes clear that what they mean is this. Once an occupier has actual knowledge of the state of affairs existing on his land, then if he knows or ought to know it is a danger he is under a duty to warn a visitor of it unless, of course, the danger is obvious. A

Thus far I have considered only the authorities, but when we come to consider the matter on principle it is clear that there should be no difference between an act of commission and an act of omission. If an occupier actually knows of a state of affairs on his land which a reasonable man would realise was a danger, he should not be allowed to escape from his responsibilities on the plea that he was not a reasonable man and did not realise it. I ought to add that when I speak of the "actual knowledge" of the occupier of the existing state of affairs, I include also his presumed knowledge of it. As VISCOUNT MAUGHAM said ([1940] 3 All E.R. 353) in *Sedleigh-Denfield v. O'Callaghan* (22): B

"An absentee owner, or an occupier oblivious of what is happening under his eyes, is in no better position than the man who looks after his property" C

That was, it is true, a nuisance case, but in this respect nuisance is an identical twin with negligence. Thus, in *Ellis v. Fulham Borough Council* (10), there was broken glass in the paddling pool. The council did not actually know that the piece of glass was there. They hoped it had all been raked out, but owing to their negligence the rake was ineffective. They could not rely on their own negligence to excuse their want of knowledge. Therefore, knowledge was imputed to them. Similarly, if an occupier has once known of the state of affairs, but has temporarily forgotten it, his forgetfulness would not avail him. Counsel for the defendants said that if we affirm the judge's view of the law—as we do—there will be little difference left between an invitee and a licensee. I think that there is some truth in this, but it is not a matter for regret. It has all come about because the obligation to a licensee—commonly expressed in the phrase "not to lay a trap"—has now been interpreted so as to impose a liability for unusual danger due to the negligence of the occupier whether by an act of commission or omission. Meanwhile, the obligation to an invitee has been expressed in almost identical terms—a duty to use reasonable care to protect the invitee against "traps": see *Hayward v. Drury Lane Theatre, Ltd. & Moss' Empires, Ltd.* (23). per SCRUTTON, L.J. ([1917] 2 K.B. 914), that is, against unusual dangers which are not obvious or known to the invitee: see *London Graving Dock Co., Ltd. v. Horton* (24). LORD SUMNER himself anticipated this confluence when he said ([1923] A.C. 92), in *Fairman's* case (20), where a visitor was lawfully using a recognised way: D

"... it makes no difference to the liability whether she was the defendants' licensee or their invitee. Under the present circumstances the obligation was only not to lay a trap for her, and none was laid." E

In the result, it seems to me that nowadays, in the case of an unusual danger which is not obvious or known to the visitor, it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage. The duty is not to invitees as a class, nor to licensees as a class, but to the very person himself who is lawfully there. What is reasonable care in regard to him depends on all the circumstances of the case. The relevant considerations include all those facts which could affect the conduct of a reasonable H

man and his decision on the precautions to be taken: see *Paris v. Stepney Borough Council* (25), per LORD NORMAND ([1951] 1 All E.R. 48). Much depends, therefore, on the nature of the land, such as whether it is waste land or a private road. Much, too, depends on the position and nature of the danger, such as whether it is an alluring turntable or a heap of stones. Much depends on the knowledge or means of knowledge of the occupier, the age of the visitor, and so forth: see *Gough v. National Coal Board* (26), per SINGLETON, L.J. ([1953] 2 All E.R. 1289). The circumstances vary so infinitely that no specific rules can be laid down. But there is one point I must mention. In *Latham v. R. Johnson & Nephew, Ltd.* (27), HAMILTON, L.J., said of licensees ([1913] 1 K.B. 411):

"In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril."

Again, in *Mersey Docks & Harbour Board v. Procter* (7), LORD SUMNER said of a licensee ([1923] A.C. 274):

"If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements."

That may be generally true of waste land or open ground, but it is not, I think, true of roads, footpaths and steps. People who lawfully use a recognised way, whether as invitees or licensees, are entitled to be warned of any unusual danger which is not obvious or known to them, but of which the occupier knows or ought to know: see *Fairman's case* (20), per LORD ATKINSON and LORD WRENBURY ([1923] A.C. 86, 96).

This brings me at last to the facts of the case. This broken step was, I think, an unusual danger which was unknown to the plaintiff. It was not obvious in the dark. The danger was not, in fact, known to the defendants, but they ought to have known of it. They knew that the step was broken, and a reasonable man in their place would have realised that it was a danger. They were, therefore, under a duty to her to use reasonable care to prevent damage from it. The question is: Did they use reasonable care? Test the position by supposing that the defendants in this case, instead of being a council, had been a householder occupying this house. Would he have mended the step? I am not sure that he would have done so. But I am quite sure that, if he had invited a lady guest to the house and was seeing her out at night, he would have warned her about the broken step and told her to keep to the safe side of it. The defendants, being an urban district council, were, of course, not the householder and could not be on the spot to warn visitors of the danger, but that does not rid them of their responsibility. It only means that, being unable to warn, they ought to have mended the step. They cannot shift their responsibility on to the occupants of the house for the simple reason that they retained the possession and control and are responsible in law. They cannot get rid of their responsibility by the plea that they are only a requisitioning authority. They ought to do whatever a reasonable man in their position would do, and that is, mend the step. It seems to me, therefore, that the defendants did not use reasonable care. At any rate, it is a case where we ought not to interfere with the view of the trial judge unless we were clearly of opinion that he was wrong, and I am certainly not prepared to say that. I agree that the appeal should be dismissed.

ROMER, L.J.: PEARSON, J., in his helpful review of the authorities,

said ([1953] 2 All E.R. 369):

"WILLES, J., in his judgment in *Gautret v. Egerton*. *Jones v. Egerton* (2) and also in the earlier judgment delivered by him on behalf of the court in *Indermaur v. Dames* (12) was plainly using 'the subjective test' and considered that it was necessary to apply 'the subjective test'."

In this I agree with the learned judge, and, having regard to the language in which WILLES, J., in each of those two cases, applied to licensees what he

conceived to be the law relating to gifts, I find it difficult to arrive at any other conclusion. It appears to me, further, that this subjective approach receives support from decisions that are far more recent. For example, in *Hayward v. Drury Lane Theatre, Ltd. & Moss' Empires, Ltd.* (23), SCRUTTON, L.J. said ([1917] 2 K.B. 913):

"A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally sets them for the licensee, but must not create new traps without taking precautions to protect licensees against them."

These observations were not only approved but accepted as a guide by ATKIN, L.J. ([1928] 1 K.B. 792) in *Coleshill v. Manchester Corpn.* (28). It is not easy to perceive how a licensor can "intentionally" set a trap for a licensee if he does not know that the state of affairs which he has brought about, or which exists, is dangerous. Intention can only derive from what the licensor himself knows, not from what a wiser or more thoughtful man than he would know. As against these considerations it is, I think, true that in *Heaven v. Pender* (3) SIR BALIOL BRETT, M.R., approached the relationship of licensor and licensee from an objective angle with regard to potentiality of injury, as also did WILLES, J., himself in *Corby v. Hill* (4). Further, the objective test has, undoubtedly, been applied by the House of Lords in the "children cases" from at least *Cooke's* case (1) onwards, and in *Mersey Docks & Harbour Board v. Procter* (7), in which the licensee was an adult, LORD SUMNER said ([1923] A.C. 274), with reference to licensors and licensees generally:

"As usual in cases of duties of care, the reasonable man is the standard on both sides."

Finally, there are the much discussed observations of LORD ATKINSON in *Fairman's* case (20) ([1923] A.C. 86, 89), of LORD WRENBURY in the same case (*ibid.*, 96), and of LORD HAILSHAM, L.C., in *R. Addie & Sons (Collieries) v. Dumbreck* (6) ([1929] A.C. 365).

In these circumstances, and in the welter of other authority which was brought to our attention during the argument, it is, in my judgment, open to this court to apply the objective test and to hold that, provided that actual knowledge of the source of a danger is brought home to a licensor, it is sufficient then, in order to fix him with liability, to show that a reasonable man would have appreciated the dangerous quality of that source, whether or not the licensor appreciated it himself. If so, then, in my opinion, we should in fact so hold. The objective test is, I think, preferable for at least two reasons. First, it dispenses with the need of inquiring whether in any given case a licensor did, in fact, know of the potentiality of danger—an inquiry which involves, I suppose, research into both the conscious and the sub-conscious mind. I say this because a man may well be said to "know" something that he has been told, even although he has forgotten it: for example, that an accident of a particular kind had happened on his property before it passed into his ownership. Secondly, the subjective test unduly favours the thoughtless or stupid man and puts an unwarrantable premium on carelessness.

The next point to consider is whether the fact that the accident occurred in the darkness affords a defence to the plaintiff's claim. There are judicial observations on this subject which, if taken at their face value, would indicate that this question should receive an affirmative answer. In *Latham's* case (27) HAMILTON, L.J., said ([1913] 1 K.B. 411) with regard to licensees:

"In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril."

This observation of HAMILTON, L.J., was approved by VISCOUNT DUNEDIN ([1929] A.C. 371) in the *Addie* case (6). PEARSON, J., in his judgment said ([1953] 2 All E.R. 367) that

“ . . . there is no absolute rule of law that in all cases a licensee moving in the dark takes the risk of any danger which in daylight would be obvious.”

A This statement is clearly correct and counsel for the defendants did not contend to the contrary. It seems to me that the question must depend on the circumstances of each particular case. As was pointed out by LORD WRENBURY ([1923] A.C. 96) in *Fairman's* case (20), there are some things which a licensee is entitled to assume, because they are things which every reasonable man would be entitled to assume and could not be regarded as negligent for assuming. So, in the present case the plaintiff, who had observed nothing unusual about the steps when she entered the house, was entitled to assume, when leaving in the dark, that they were unbroken and, therefore, suitable for the purpose for which they were provided, for such is the usual and common characteristic of doorsteps.

B In my judgment, accordingly, the fact that the accident occurred during the hours of darkness is irrelevant to the plaintiff's claim. There remains the question whether the defendants, who knew, on the judge's finding, of the defective condition of the step, ought reasonably to have foreseen that it was calculated to endanger licensees who used it for the purpose of entering or leaving the house. This question has caused me much difficulty, if only for the reason that several people did know of the defect in the step and yet took no measures to remedy it or to provide any kind of warning with regard to it, and, if the defendants are to be held liable, all these people must be regarded as falling short of the standard of the reasonable man. In cases such as the present there is a very real danger of being “wise after the event”, or (which comes to much the same thing) of endowing the ordinary reasonable man with the prophetic vision of a clairvoyant. If the learned judge had decided this issue in favour of the defendants, I for one should have been by no means surprised and his decision could not have been successfully challenged in this court. He decided it, however, in favour of the plaintiff and it cannot be said that there was no evidence to support his view. Moreover, I cannot but think that a man of ordinary prudence, who owned the house and was leaving it in the hours of darkness, would do so warily, knowing the “evil character” of the thing below, and, accordingly (as my brethren have pointed out), that he would be singularly failing in the duties of a host if he left an unsuspecting guest departing into the night to find the defect for himself by stepping into it. I, therefore, agree that the judge's conclusion on this point ought not to be disturbed. In the result, I am in agreement with my brethren that the appeal should be dismissed.

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Appeal dismissed.

Solicitors: *Speechly, Mumford & Craig* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re WHEATCROFT BROTHERS, LTD.

[CHANCERY DIVISION (Lloyd-Jacob, J.), November 24, 25, 26, 27, December 16, 1953.]

Trade Mark—Registration—Distinctiveness—Deception—Mark registered for roses—Intended user as variety name—Trade Marks Act, 1938 (c. 22), s. 9 (1) (d), s. 11.

In 1948 a rose registration scheme was introduced which was accepted by the rose growing and rose selling trade. A society keeping the register compiled a list containing one identifying name in respect of each known variety, and undertook to register any new variety submitted for that purpose. The respondents, a firm of rose growers, registered eleven new varieties of roses with the society which they supplied to the public and other growers either in the form of trees or bushes or of buds for propagation, and they registered the designation of each variety as a trade mark. Each trade mark so registered consisted of a word which, *prima facie*, had no direct reference to the character or quality of the roses.

HELD: (i) the name by which each rose was designated signified a variety and was not capable of distinguishing between examples of the same variety coming from different trade sources; the trade marks did not consist of a word or words having no direct reference to the character of the goods; and, therefore, under s. 9 (1) (d) of the Trade Marks Act, 1938, they were not registrable.

(ii) to persons acquainted with the rose registration scheme, the use of any name entered on the rose register as importing a reference to trade origin would inevitably cause confusion, and leaving the marks on the register of trade marks would impede the effort of other traders and embarrass them and their customers; and, therefore, by virtue of s. 11 of the Act of 1938, the marks were not lawfully registered and they must be expunged from the register under s. 32 (1).

FOR THE TRADE MARKS ACT, 1938, s. 9 (1) (d), and s. 11, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 1187, 1189.

MOTION by the Wisbech Plant Co., Ltd. under the Trade Marks Act, 1938, s. 32, for rectification of the trade marks register by the removal of eleven trade marks registered by the respondents, Wheatcroft Brothers, Ltd., on the ground that, having regard to trade usage, the trade marks were not distinctive under s. 9 (1) (d) of the Act, and their registration was prohibited by s. 11 of the Act as being deceptive and otherwise not entitled to protection in a court of justice.

Drewe, Q.C., and *Blanco White* for the applicants.

Toohey, Q.C., and *P. J. S. Bevan* for the respondents.

Cur. adv. vult.

Dec. 16. LLOYD-JACOB, J., read the following judgment. By this motion, the applicants, Wisbech Plant Co., Ltd., seek the rectification of the trade mark register by the removal therefrom of eleven trade marks standing in the name of the respondents, Wheatcroft Brothers, Ltd., all of which were registered without proof of distinctiveness, five of which are entered on the register in respect of "roses, rose cuttings and rose trees" and the remaining six in respect of "rose plants". As the evidence disclosed, this variation in the classification of goods has no genuine significance in relation to the points for consideration, and it calls for no further mention. The *locus standi* of the applicants was admitted, and evidence and argument were directed to the issues of the propriety of the original admission of these marks to the register and of the continuance of the marks thereon since registration.

The applicants' statement of case, by para. 6, asserted a ground of objection under the Trade Marks Act, 1938, s. 15 (1) (a), but this objection, although

retained by the applicants for future consideration should an opportunity arise on appeal, was not developed in argument, nor was I invited to deal with it. One other preliminary matter requires to be stated. The respondents did not attempt to support by evidence the contention particularised in para. 3 of their statement of defence that certain combinations of letters and figures, as therein set out, had come to be identified in the public mind with certain varieties of roses. This contention will not, therefore, qualify for further notice.

- A** By the Trade Marks Act, 1938, s. 49, the tribunal in a proceeding relating to a trade mark is required to admit evidence of the usages of the trade concerned. It will be convenient to summarise this evidence by way of introduction. There has existed, since 1876, an organisation called the National Rose Society, with a present membership exceeding twenty-five thousand, one purpose of the existence of which is to encourage and develop the cultivation of roses in this country.
- B** Certain of the members of this society, being professional rose growers, are also members of the Association of British Rose Producers, and for convenience of reference these two organisations can be respectively termed the "Society" and the "Association". A new rose variety is developed as a consequence of experimentation by a "rose raiser" in the cross-fertilisation of existing varieties, and it would appear that only a very small percentage of the seedlings so produced are found to be sufficiently outstanding to justify introduction to the market.
- C** When one such is developed and a sufficient stock of rose trees created therefrom by budding, the raiser, or an associate to whom he has entrusted the task of introducing the variety to the market, called the "introducer", will seek to procure publicity for the variety, in order that the purchasing public may be encouraged to buy and plant examples of it. For this purpose, an acceptable
- D** designation of the variety is essential. The raiser or introducer may himself offer for sale and sell the new variety in the form of trees or bushes ready for planting, or he may dispose of buds of the new variety to professional rose growers for them to use in the development of trees and bushes. The designation chosen is referred to as the name of the rose, and it is the usual practice for rose growers to publish catalogues wherein the roses they offer for sale are
- E** identified by name, and to guarantee that goods supplied in response to orders will be found to be true to name. They can secure supplies of a variety introduced by some other grower by direct purchase from him of trees and bushes or of buds for implantation into stock of their own choosing, or indirectly by acquisition of trees or bushes of the required variety from persons in possession of the same, which trees and bushes may provide a quantity of buds or grafts with which to
- F** propagate further supplies. So this propagation may be effected so rapidly that by the time the merits of a new introduction and the publicity efforts of its introducer have operated to create a substantial public demand, rose growers other than the introducer will be possessed of supplies with which to satisfy the requirements of the public, and this even though the introducer, by refraining from supplying his competitors directly with either trees or bushes or buds, had
- G** sought to maintain his exclusive dealing.

The evidence established that the identification of a variety of rose was in practice secured by examination of the blooms, and as these are produced from the budded or grafted portion of the tree or bush, the nature and origin of the root stock are of no particular significance for such identification, although they may vitally affect—as will the skill and effectiveness of the budding—the

H habit and strength of the tree or bush.

Difficulty in a number of instances appears to have been experienced prior to 1948 due to the use of a plurality of designations in respect of examples of a single variety of rose, and in that year the society introduced what was termed the rose registration scheme, whereby a list was compiled containing one identifying name in respect of each known variety, and the society accepted the responsibility of registering for the benefit of all concerned with roses the identification name

attached by the introducer to any new variety of rose submitted for the purpose. The registration scheme secured the approbation of the association, which recommended its members not to use in their trade catalogues any identification name not recognised by the society. Amongst their other activities, the society maintains a trial ground, wherein rose trees submitted by members are planted and tended, and their habit and quality tested and noted. On the results of these trials certificates are granted for meritorious introductions, but only when an identifying name for the variety has been entered on the society's register. A

The rose registration regulations and the application form, the completion of which is an essential preliminary to the registration, are in evidence. In completing the application form, the introducer asserts the variety to be new and in this country previously unnamed, and must propose for registration the name he suggests for its future designation. The regulations include a provision that exhibition of a variety under a name other than the name registered shall render the exhibit liable to disqualification in any competition to which the powers of the society extend. Speaking generally, it is by exhibition at flower shows sponsored by the society and by the receipt of certificates, medals and the like awards given by the society, that an introducer may expect to bring his variety to the notice of the interested public. It is, I think, a fair conclusion on the evidence that at the present time an introducer could not expect to popularise a new variety without meeting the requirements of the society in respect of registration, and, if a member also of the association, it would be possible for him to commence to market supplies of it in the ordinary way of business under a name not registered with the society only by disregarding the association's specific recommendation. Indeed, as the respondents fairly acknowledged in evidence, it would be wholly impracticable to designate a rose in the course of trade by a name other than that under which the variety was registered with the Society, and they further acknowledged that, should this be attempted, chaotic conditions would result. B C D

It is against this background of trade usage that the particulars of the registrations in suit fall to be considered. The respondents, having accepted the task of introducing into the market in this country new varieties raised abroad, sought to carry out that task in such a way as to ensure, first, the availability of only satisfactory examples, and, secondly, a reasonable financial return to the raiser and his associates. In pursuance of these purposes, the respondents agreed with their principals abroad to follow a particular course of action, whereby the designation selected for a new variety was to be registered with the society, and as soon as reasonably possible thereafter registered as a trade mark. With two exceptions (registered trade marks No. 701, 611 ("Concerto") and No. 709,608 ("Festival")) this procedure was followed in respect of the trade marks in suit, and the exceptions in no way indicate any desire to modify the procedure in principle. In this way, it was hoped that the designation would, by reason of its registration with the society, become the means whereby the variety could alone be identified, and, further, by reason of its registration as a trade mark, be available to indicate a connection in the course of trade between articles so designated and the proprietors and registered users of the registered trade mark, so as to preclude unauthorised growers from offering supplies. E F G

The present proceedings are based on the provisions of s. 32 of the Act, which, shortly stated, permit the removal from the trade marks register of entries therein made without sufficient cause or which wrongly remain therein. So far as concerns each original entry, the applicants seek to establish that the statutory requirements contained in s. 9 of the Act were not complied with, and, so far as concerns each original registration and its continuing presence on the register, they contend that the provisions of s. 11 render both unlawful. H

The prerequisite for registration in Part A of the register as set out in s. 9 is distinctiveness, "distinctive" being defined in sub-s. (2) as meaning

“ adapted . . . to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists . . . ”

A Such distinctiveness may be established in the case of certain categories specified in the section merely by inference, and in other cases by affirmative evidence. All the registrations in suit were accepted as inferentially distinctive, on the ground that each consisted of a word having no direct reference to the character or quality of the goods. Seeing that the classification of goods in respect of which registration was sought was expressed broadly to cover all varieties of rose, there was, of course, no reason for the registrar to suspect that the averment that the mark was proposed to be used, as contained in the application form, was true only in relation to one particular variety of rose, and still less reason for him to be put on inquiry as to the characteristics or qualities possessed by such variety, so as to permit him to determine the absence of any direct reference in the mark propounded for registration.

B In the light of the evidence before me, it is clear that at the respective dates of application for each of these marks, the respondents intended only to use each mark in relation to one variety of rose, which variety, as they well knew and intended, either was or would be characterised by the same name recorded in the register of the society. Had the application form accurately reflected these intentions the registrar could not have regarded the mark proposed as inferentially distinctive. An intention to use the mark as the name of a variety appears to be wholly inconsistent with a bona fide intention to use it as signifying a connection in the course of trade with the supplier, for which purpose it must necessarily be capable of differentiating between examples of the same variety coming from differing trade sources. If the question be posed: Was the name intended for use to distinguish rose trees of the respondents' growing from rose trees of the same variety grown by others, or was it intended for use to distinguish one variety introduced by the respondents from the generality of roses, there can be only one answer, for the inevitable consequence of registration with the society was to give the name a variety status. The evidence which establishes this is not questioned, and the desire of the respondents to prevent other rose growers from offering supplies of any of these new varieties save under specific authorisation, even if successful, would not affect the intention as to use as such, but would merely condition the circumstances in which roses so named were dealt with in commerce. Once the respondents decided to invite the society to accept any particular name as an identification of the variety to which it was applied, they put it out of their power to intend the name only to identify such instances of the variety as they themselves had raised. If they can contrive some manner of monopolising the production of a particular variety, it is true that the variety name will not fall to be used save on their products. This possibility, although it might conceivably permit the respondents to create and acquire a secondary meaning for the original variety name, would certainly not justify a registration granted without evidence of distinctiveness.

G Now that the propriety of these registrations is called in question, I am satisfied that the court is entitled, and, indeed, bound, to examine the s. 9 objection in the light of all the evidence adduced. So examined, registrations Nos. 700,985 “Cocorico”, 701,614 “Pigalle”, 709,607 “Coppelia”, 709,605 “Magali”, 709,609 “Moulin Rouge”, 701,613 “Mascotte”, 700,984 “Tzigane” and 709,606 “Mahina” do not qualify under s. 9 (1) (d), and were, therefore, entered on the register without sufficient cause.

H Similar reasoning as to lack of distinctiveness likewise condemns registration No. B701,612 “Confidence”. With regard to Nos. 701,611 “Concerto” and 709,608 “Festival”, these marks were registered before any application had been made to the society for their entry as variety names. The precise reason for this inversion of the designed procedure was not specified in respect of No.

701,611 "Concerto", and was due, so far as concerned "Festival", to the circumstance that the originally designed name for the variety, "Cannes Festival", was in fact registered with the society as a preliminary to registration as a trade mark, but the requirements of the Trade Mark Registry caused the geographical reference in the name to be dropped at the application stage. As I am satisfied that in neither instance was any departure from the intended use proposed, these registrations are equally vulnerable with the others for the same reasons. A

Turning now to the s. 11 objection, the evidence satisfies me that, to the thousands of persons acquainted with the rose registration scheme of the society, the use of any name entered on that register as importing a reference to trade origin would inevitably cause confusion. Moreover, save on the footing that sellers other than the respondents will have no opportunity of meeting demands for these varieties when expressed in the only manner open to the buyer for the identification of his requirements, the inevitable result of leaving these marks on the register of trade marks would be to impede the efforts of such other traders and to embarrass both them and their customers. B

The evidence affords no grounds for assuming either a future inability on the part of growers to produce any of the varieties to which the marks in suit are assigned, or the absence of any public demand for their products under their variety names. It is, of course, true that production of such varieties will require for its inception the receipt of some supply of stock from the respondents' growing, but neither procurement of supplies nor production of stock therefrom need involve any unlawful act as the law now stands. If, therefore, it be right to postulate a state of affairs wherein willing sellers and willing buyers are minded to deal in these commodities, the imposition of a clog on their means of identifying the subject-matter of their dealing must operate in restraint of trade. In my judgment, s. 11 of the Act requires this court to safeguard the free operation of normal trade channels from such interference so far as it proceeds under the protection of trade mark registration. For this reason, the entries in respect of all the marks the subject of this motion wrongly remain on the register and must be expunged therefrom. C D E

It was strongly urged on me by counsel for the respondents that, having regard to the provisions of s. 15 of the Act, the objection that a trade mark is invalid because it is the descriptive name of an article falls to be determined according to the terms of that section, and not under s. 9 and s. 11. This submission must be rejected. With the exception of s. 15 (3) (which relates to chemical substances, and is, therefore, not in point) this section is concerned with what has developed after the date of registration. It cannot, therefore, operate to restrict or avoid the investigation into distinctiveness which by s. 9 is imposed on the registrar at the application stage, and the use of the expression "by reason only" in s. 15 (1) shows that no substitute for the s. 11 investigation was intended. If the legislature had intended to permit the continued registration of marks which in use were causing deception and confusion, much plainer direction would have been found in the statute. If the argument with regard to s. 15 be put somewhat differently and it be submitted that the section should be taken as a guide to the proper decision in cases where concurrent use as a trade mark and as a description was to be anticipated, the respondents would fare no better. If the whole of s. 15 be closely examined, it will be found that it contains a positive direction to deem as wrongly registered any mark which by reason of concurrent use in a descriptive sense could occasion deception or confusion, and this irrespective of the intentions of the registered proprietor as to its use. Where, as here, the respondents themselves promote and adopt the descriptive use, they cannot complain of the consequential effect on the validity of the trade mark. Having had the advantage of seeing and hearing Mr. Harry Wheatercroft in the witness box, it is only right to add that the F G H

respondents appear to have intended no impropriety. Being convinced, as he was, that the welfare and prestige of British rose growers required the establishment of some control over the marketing of new varieties, this gentleman appears to have been assured that the registration of variety names as trade marks would create an opportunity, and the introduction into trade mark law of the registered user provisions would enable the respondents to authorise, under properly controlled conditions, the supply of their new varieties to the public by suitably qualified growers. I accept from him that the respondents desired to protect the public from obtaining poor examples of new varieties, and were wishful only to secure fair and equitable terms on which the industry could collaborate with them.

Although the respondents must bear the consequences of having failed to disclose to the registrar the correspondence they intended between variety name and trade mark (but for which failure the marks would never have been registered nor these proceedings been possible) I have no ground for attributing to them any personal knowledge of this default. What they were really seeking was a means or method of preventing the use of stock of their growing for the propagation of rose trees and bushes by unauthorised professional rose growers, such as is provided by the domestic patent law in some other countries. In so doing, they adhered to an earlier understanding in relation to the tenth commandment, and overlooked the modern gloss which A. H. CLOUGH felicitously expressed in "THE MODERN DECALOGUE" as "Thou shalt not covet, but tradition approves all forms of competition".

For the purpose the respondents had in mind I am satisfied that the registration of the trade marks in suit was of no avail, for they were not validly registered, nor can they properly remain on the register. Accordingly, I must direct the rectification of the register as prayed.

Order for removal of the trade marks from register.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the applicants); *Smith & Hudson*, agents for *Day, Johnson & Boot*, Nottingham (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PHILLIPS-HIGGINS v. HARPER.

[QUEEN'S BENCH DIVISION (Pearson, J.), November 23, 24, 25, 26, 27, 30, December 1, 2, 3, 4, 7, 10, 1953.]

Account—Action for—Defence—Account agreed and settled—Oral agreement as to final figure.

Limitation of Action—Postponement of limitation period—Action for relief from mistake—Claim for account—Underpayment of money due under contract—Limitation Act, 1939 (c. 21), s. 26 (c).

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From 1938, when she was admitted a solicitor, until 1950, the plaintiff was in the defendant's service as his assistant under an oral agreement by which she received a basic minimum salary plus a yearly sum based on the annual net profit of the practice. In 1951 a dispute arose over the amounts which the plaintiff had been paid, and on Oct. 1, 1951, she issued a writ claiming an account from Apr. 1, 1938, to Mar. 31, 1950. At the end of each of those accounting years the defendant had orally informed her of the amount due to her, and she was then paid that amount. The defendant contended, *inter alia*, that for each of the years in question, the account between them had been agreed and settled, and he pleaded the Limitation Act, 1939, which the plaintiff contended did not apply by reason of, *inter alia*, s. 26 (c) of that Act, which provides that the periods of limitation prescribed by the Act shall not begin to run in a case where the action is for relief from the consequences of a mistake until the plaintiff has discovered the mistake.

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HELD: (i) a settled and agreed account might be constituted by the parties orally agreeing a final figure for the account as distinct from agreeing a written account, but on the facts of the present case there was no agreement, oral or in writing, of an account, and, therefore, no settled and agreed account.

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(ii) section 26 (c) of the Limitation Act, 1939, applied only where the mistake was an essential ingredient of the cause of action, as, e.g., where money had been paid or a contract entered into in consequence of a mistake and appropriate relief was sought; the present action was for an account to ascertain the amount still due to the plaintiff and was not an action for relief from the consequences of a mistake within the meaning of s. 26 (c); and, therefore, the Limitation Act, 1939, s. 2 (2), applied to bar any account in respect of any year before 1945-46.

AS TO POSTPONEMENT OF LIMITATION PERIOD DUE TO MISTAKE, see HALSBURY, Hailsham Edn., Vol. 20, p. 764, para. 1049; and FOR CASES, see DIGEST, Vol. 32, p. 518, Nos. 1758-1761.

Cases referred to:

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- (1) *Brooksbank v. Smith*, (1836), 2 Y. & C. Ex. 58 (160 E.R. 311); Donnelly, 11 (47 E.R. 193); 6 L.J.Ex. Eq. 34; 32 Digest 518, 1758.
- (2) *Denys v. Shuckburgh*, (1840), 4 Y. & C. Ex. 42; 160 E.R. 912; 32 Digest 518, 1759.
- (3) *Baker v. Courage & Co.*, [1910] 1 K.B. 56; 79 L.J.K.B. 313; 101 L.T. 854; 32 Digest 337, 206.
- (4) *Re Robinson*, [1911] 1 Ch. 502; 80 L.J.Ch. 381; 104 L.T. 331; 32 Digest 518, 1761.
- (5) *Re Diplock's Estate*, [1948] 2 All E.R. 318; *sub nom. Re Diplock*, [1948] Ch. 465; [1948] L.J.R. 1670; *affd.* H.L. *sub nom. Ministry of Health v. Simpson*, [1950] 2 All E.R. 1137; [1951] A.C. 251; 2nd Digest Supp.

ACTION for an account.

In 1923 the plaintiff was employed by the defendant, a solicitor, as a short-hand-typist. In 1934 she entered into articles of clerkship with him and in 1938 she was admitted a solicitor and became his assistant. At this time the

parties came to an oral agreement as to the plaintiff's salary whereby she was to receive a basic minimum salary, plus an additional yearly sum based on the annual net profit of the practice. This was varied in 1948, and remained in force until the end of March, 1950, when the plaintiff became the defendant's salaried partner. She remained as such until 1951, when the partnership came to an end and the present dispute arose over the amounts which had been paid to her.

- A On Oct. 1, 1951, the plaintiff issued a writ claiming from the defendant an account in respect of the alleged under-payment of her salary by him from Apr. 1, 1938, to Mar. 31, 1950. The defendant pleaded, *inter alia*, that, for each of the years in question, the plaintiff, with knowledge of the defendant's accounts and of the net profit as so determined, agreed with the defendant's accountant, Mr. Catchpole, the amount payable to her and received payment of such amount in full satisfaction, and thereby each year the account between the plaintiff and the defendant was agreed and settled. The plaintiff denied this, and contended that, even if it were so, there was no consideration for the alleged agreements, and that, if there were such agreements, they were entered into under a mutual mistake of fact as to the true indebtedness of the defendant to her since the accounts contained serious errors as to the amount of the net profit and the proportion thereof payable to her. Further, the defendant pleaded the Limitation Act, 1939. The plaintiff contended that that Act did not apply by reason of s. 19 (1), s. 23 (4), or s. 26 of the Act.

R. M. Wilson, Q.C., and Comyn for the plaintiff.

Platts-Mills for the defendant.

Curr. adv. vult.

- D Dec. 10. PEARSON, J.: The question whether there were agreed and settled accounts here can be dealt with fairly shortly. One possible answer is that, to constitute a settled account, you must have an account in the sense of a written document in which figures are set down, and that written account has to be agreed between the parties, and here there is no such settled account, E no document in writing. Regarding this matter certain passages were read to me from DANIELL'S CHANCERY PRACTICE, 8th ed., at p. 418, and BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS, 10th ed., p. 510, footnote. I do not, however, propose to rely on that point because it seems to me that it would theoretically be possible for parties, without making any settled account in that sense, to arrive at an oral agreement which might have much the same F effect. If they were uncertain about a figure or did not wish to incur the expense of further investigations, they might meet and agree orally that a certain figure be deemed to be the right figure for the purpose, and the person to whom it was owing would not ask for any more and the person by whom it was owed would not seek to pay any less. That seems to me to be a perfectly possible oral agreement—an agreement of accord and satisfaction rather than by way G of settled accounts.

- The real point here, to my mind, is that there was no agreement. The evidence seems to be reasonably plain that the plaintiff, when the defendant and Mr. Catchpole had made their assessment of what was due to her, would be told either by Mr. Catchpole or the defendant: "This is what is owing to you, £100"—or £168, or whatever it was. They simply informed her that H that was owing to her. She was not asked to agree that it was right; she was not shown how it was arrived at; she was not asked to inspect the books or even Mr. Catchpole's working papers. She was simply informed that that was the sum which was due to her. She believed what she was told, and, in pursuance of that, she would normally draw the necessary cheque for signature by the defendant. But that was, in the minds of both parties, simply giving effect to what had gone before. It was not the making of any new agreement by the plaintiff, and to constitute a settled account there must be an agreed and settled account, and

the ordinary principle of contract law applies that, unless there is an intention to agree, there is no contract. I hold that here there was no intention to agree, and, therefore, no contract, and no agreed and settled account. If that is not the right view on that question and if there was an agreed and settled account, I would hold without hesitation that there were very serious errors here which would make it necessary for such accounts as may exist to be re-opened.

I come now to the question which arises under the Limitation Act, 1939. In that Act, *prima facie*, s. 2 (2) and (7) apply here. If those sub-sections apply, I hold that they bar any account in respect of the years prior to the year 1945-46, but they do not bar an account in respect of that year 1945-46 because the liability to pay the supplemental salary and to furnish an account of the net profit and of the resulting total salary did not arise until after Mar. 31, 1946, and, therefore, did arise within six years before the issue of the writ in October, 1951. It was, however, contended on behalf of the plaintiff that the limitation was excluded or the period was extended by s. 19, s. 23 or s. 26 of the Act. Section 19 (1) provides:

"No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."

But I hold, in the view which I take of the relevant salary agreement made between the parties in 1938, that there was no trust and no trust property and no fiduciary relationship.

Section 23 (4) provides:

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."

There the opening words are:

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim."

The claim must be a claim for a debt or other liquidated pecuniary sum and the acknowledgment must be an acknowledgment of that claim. I find that the defendant did not, by anything said in this case in the course of the correspondence or any other documents, acknowledge the plaintiff's right to recover any debt or other liquidated claim, nor did he (if this could be material in any way) acknowledge any liability to account to the plaintiff.

There is, however, s. 26, which is concerned with the postponing of the limitation period in the case of fraud or mistake. It is right in construing this provision to consider the pre-existing law, and a number of previously decided cases were referred to, including *Brooksbank v. Smith* (1), *Denys v. Shuckburgh* (2), *Baker v. Courage & Co.* (3), and *Re Robinson* (4). Reference was also made to a passage in the judgment of the Court of Appeal in *Re Diplock's Estate* (5) ([1948] 2 All E.R. 343, 344). In the end it seemed to me that the previous law did not afford much help. The Act is not a mere consolidating Act, but (as appears from its title)

"An Act to consolidate with amendments certain enactments relating to the limitation of actions and arbitrations."

Section 26 (c), which is the material provision, effects at least one amendment because it overrides the decision in *Baker v. Courage & Co.* (3).

In construing the section it is to be observed that fraud and mistake are dealt with quite differently. The words of the section are, so far as material:

A "Where, in the case of any action for which a period of limitation is prescribed by this Act, either—(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid, or (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it."

B In regard to fraud, there is provision (a) dealing with an action which is based on fraud—for instance, if an action is to recover damages for fraudulent misrepresentation, or (b), that very wide provision, dealing with where the right of action (which may be wholly independent of fraud) is concealed by the fraud of "any such person as aforesaid", that is to say, the defendant and people claiming through him, and so on. But there is not, in respect of mistake, any provision similar to (b). The section does not apply to the case of a right of action which is concealed from the plaintiff by a mistake. What, then, is the meaning of provision (c)?

C The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of action where a mistake has been made and has had certain consequences and the plaintiff is seeking to be relieved from those consequences. Familiar mistakes are, (i) money paid in consequence of a mistake—the mistake is made, in consequence of the mistake the money is paid, and the action

D is to recover that money back; (ii) there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission, or, in some cases, the rectification, of the contract; (iii) there may be an account settled in consequence of mistakes, and, if the mistakes are sufficiently serious, there can be a re-opening of the account.

E In my opinion, the mere operation of the Limitation Act, unless excluded by this section, is not a relevant consequence for the purpose of this section. If it were, then any concealment of a right of action from the plaintiff by a mistake would be intended to be covered by this section, and the provision (b), in respect of fraud, should have been applied to mistake also. Moreover, I think it is right to say that if there would be no consequence except the operation of the Limitation Act and the operation of the Limitation Act is excluded, then

F there is no consequence at all. In this case the mistake, in my judgment, has had no relevant consequence for the purposes of this section. As the statement of claim shows, the plaintiff's claim is to recover moneys due to her under a contract, and the cause of action is the same as if she had sued for each unpaid balance on its due date. By reason of the mistake she failed to realise that the balance was due to her, and by that mistake the right of action was concealed from her. But that is not sufficient. Probably provision (c) applies only

G where the mistake is an essential ingredient of the cause of action, where the statement of claim sets out the mistake and its consequences and prays for relief from the consequences. In the present case the statement of claim sets out that sums became due and only a smaller amount was paid, and the prayer is for an account to ascertain the sum still due and for payment of them when so ascertained. This action is not for relief from the consequences of a mistake

H within the meaning of s. 26 (c).

No doubt there are certain anomalies which result. As counsel for the plaintiff pointed out, it is odd that a person who has by mistake paid too much can take advantage of the section, whereas a person who has by mistake received too little and made no protest cannot take advantage of the section. Also it is odd that a person who has by mistake merely received too little and made no protest should be in a worse position than a person who has by mistake taken

the further step of agreeing and settling an account. But, in my judgment, the carefully chosen wording of provision (c) must have its proper effect notwithstanding those resulting anomalies. No doubt it was intended to be a narrow provision because any wider provision would have opened too wide a door of escape from the general principle of limitation by six years' lapse of time, which is, of course, a reasonable and normally salutary principle, as counsel for the defendant demonstrated by reference to this case where the parties' memories have grown dim as to long past events, and, possibly, some documents which might have been material have, in the course of time, perished.

Declaration in plaintiff's favour.

Solicitors: *Walters & Hart* (for the plaintiff); *Edwin Coe & Calder Woods* (for the defendant).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

NOTE.

LOVE v. PHARAOH AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), December 17, 1953.]

Practice—Chancery Division—Affidavit—Dates and sums of money to be in figures and not in words—Infringement of practice direction—Authority to masters to order affidavit to be taken off file on preliminary hearing—Costs of re-swearing and re-filing to be borne by solicitor.

ADJOURNED SUMMONS.

On Dec. 2, 1953, the summons came before WYNN-PARRY, J. As figures in the affidavit filed on behalf of the plaintiff were set out in words, instead of in figures as required by the direction in the ANNUAL PRACTICE, 1953, p. 683, in a note to R.S.C., Ord. 38, r. 7, WYNN-PARRY, J., refused to hear the summons and adjourned it for the affidavit to be re-sworn and re-filed in proper form.

On Dec. 17 the summons came before HARMAN, J. Before dealing with the questions raised by the summons, HIS LORDSHIP said: There is a direction in the ANNUAL PRACTICE, 1953, p. 683, that dates and sums in affidavits should be expressed, not in words, but in figures. My predecessor, P. O. LAWRENCE, J., used to make solicitors pay personally the costs of any affidavits not complying with that direction. WYNN-PARRY, J., I gather, did not deal with any costs. Although I am informed by counsel of their understanding that the costs of the adjournment should be paid by the plaintiff, that does not preclude me from carrying out what I understand to be the learned judge's intention, namely, that the solicitors personally should pay. Be it known that hereafter the masters, on the preliminary hearing of adjourned summonses, will have authority to visit any substantial infraction of this direction by ordering that the affidavit be taken off the file and re-sworn at the expense of the solicitor who files it. In the present case, those costs will be the costs of and occasioned by the adjournment and of re-filing the affidavit. But I hope that in future the masters will deal with the matter at an earlier stage, so that it will not cause any delay.

R.D.H.O.

JOHNSON v. CROGGON & CO., LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pilcher, J.), December 3, 4, 14, 1953.]

Negligence—Breach of statutory duty—Plaintiff in charge of steel erection—Duty to select gear delegated to plaintiff—Selection of defective ladder—Plaintiff injured in fall from ladder—Liability of employers and owners of ladder—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 29 (1), (8).

The plaintiff, who was employed by the first defendants as a steel erector, was in charge of work of erecting a steel roof on a refrigerated fruit store on the farm premises of the second defendants. The plaintiff had been told to obtain all the heavy gear (including ladders) needed for the work from P. & Co., who were the main contractors for the erection of the fruit store. He obtained certain equipment from them, but, having seen a number of fruit picking ladders on the premises, he obtained permission to use them and did not obtain building ladders from P. & Co. When the work was almost completed, the plaintiff was descending from the roof after clearing a fouled wire and he stepped on to the top rung of one of the fruit picking ladders which broke into three parts, and he fell to the ground and was injured. In an action for negligence and/or breach of statutory duty,

HELD: (i) the uprights of the ladder were not of "adequate strength" within the Building (Safety, Health and Welfare) Regulations, 1948, reg. 29 (1), and the first defendants were in breach of the obligation imposed by that provision; but those defendants had acted reasonably and in accordance with the practice in the trade in delegating (as they were entitled to do) to the plaintiff their statutory duty, and the accident was due wholly to the negligence and breach of statutory duty (under reg. 29 (8) of the regulations of 1948) of the plaintiff; and, therefore, applying the maxim *ex turpi causa non oritur actio*, he was not entitled to recover against the first defendants.

Smith v. Baveystock ([1945] 1 All E.R. 531), applied.

(ii) the plaintiff was not entitled to recover from the second defendants on the ground that he was an invitee on their ladder, because they merely gave a general permission to use the ladders, without any guarantee or representation that the ladders were suitable, the selection being within the competence of the plaintiff alone, and, in selecting the defective ladder, he was solely to blame.

Dictum of LORD GREENE, M.R., in *Marshall v. Cellactite & British Uralite, Ltd.* (1947) (63 T.L.R. 457), applied.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 29, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 222.

G Cases referred to:

- (1) *Smith v. Baveystock*, [1945] 1 All E.R. 531; 2nd Digest Supp.
- (2) *Gallagher v. Dorman, Long & Co., Ltd.*, [1947] 2 All E.R. 38; 177 L.T. 143; 2nd Digest Supp.
- (3) *Barcock v. Brighton Corpn.*, [1949] 1 All E.R. 251; [1949] 1 K.B. 339; 2nd Digest Supp.
- (4) *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; [1948] L.J.R. 361; 177 L.T. 92; 2nd Digest Supp.
- (5) *Vincent v. Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; Digest Supp.
- (6) *Marshall v. Cellactite & British Uralite, Ltd.*, (1947), 63 T.L.R. 456; 2nd Digest Supp.

ACTION for negligence and/or breach of statutory duty.

The plaintiff was a steel erector employed by the first defendants, Croggon &

Co., Ltd. The second defendants, Macey & Sons, Ltd., were fruit farmers of Sutton Valence, Kent, and were the owners and occupiers of the building on which the plaintiff was working at the material time. The second defendants employed Paddy & Co. to construct for them a refrigerated fruit store. Paddy & Co. sub-contracted the erection of the steelwork of the building (mainly consisting of a steel roof) to the first defendants. On Nov. 17, 1950, Paddy & Co. having erected the walls of the building, the plaintiff was sent to the second defendants' premises to erect the necessary steelwork, with an assistant, Bannister. It was known that the plaintiff would require heavy gear, such as derrick poles, blocks, tackles and ladders, for the erection, and it had been arranged by the first defendants that the gear should be provided by Paddy & Co. The plaintiff found on arrival that there was no heavy gear available and on instructions from the first defendants telephoned to Paddy & Co. asking them to supply the necessary gear, but he did not ask for any ladders. HIS LORDSHIP found as a fact that, before he telephoned to Paddy & Co., the plaintiff had seen and roughly tested a number of fruit picking ladders belonging to the second defendants and had been given permission by the second defendants to use them if he thought they would serve his purpose. The plaintiff had made up his mind to use these ladders.

On Nov. 24, 1950, when the work of erection was almost finished, the plaintiff ascended one of the fruit picking ladders to clear a wire which had become caught. On descending, he put both feet on the top rung of the ladder and the ladder snapped into three pieces, the plaintiff fell fourteen feet to the ground, and was injured. HIS LORDSHIP found that the ladder although, perhaps, suitable for fruit picking, was unsuitable and unsafe for building operations owing to the light nature of its construction; that the plaintiff was an experienced steel erector and competent to decide whether any ladder would be suitable for a particular purpose; that it was the custom of the trade to delegate to the foreman on a particular job the duty of selecting the right gear for the job; that in the case in question this duty had been delegated to the plaintiff and that he understood the position; that it was within the scope of the plaintiff's authority to obtain builder's ladders from Paddy & Co.; that no indication was given to the first defendants that fruit picking ladders were being used; and that in cases where steel erectors were sent to distant and remote places (the work was being done seventy miles from the first defendants' place of business) it was reasonable that choice of gear should be left to the foreman of the job, who would normally acquire it locally.

Pensotti for the plaintiff.

J. W. Russell for the first defendants.

M. J. Morris for the second defendants.

Cur. adv. vult.

Dec. 14. **PILCHER, J.**, read a judgment in which he stated the facts and continued: *Smith v. Baveystock* (1) shows quite clearly that in an appropriate case an employer may delegate his statutory duty to a competent employee. In *Smith v. Baveystock* (1) the employer was held entitled to delegate his duty to fence or adjust the guard on a circular saw under the Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 21. LORD GODDARD, who was presiding in the Court of Appeal, said ([1945] 1 All E.R. 532):

"It is, of course, perfectly clear that an employer can delegate the duty of seeing that machines are properly fenced or adjusted to proper employees, that is to say, to employees who have the necessary knowledge and experience for them to see that the machine is fenced as securely as it is possible to do. If an employer delegates that work to a competent man and the competent man does not carry it out, it follows from that, of course, that the employer's duty has not been discharged. In this particular case impliedly the duty of seeing that the fence is properly adjusted is delegated

to the man who works the machine, who is an experienced person in relation to that particular job. It is very difficult indeed to see how it could be otherwise done. One has to try to interpret these rules and obligations in the light of a certain degree of common sense and also in such a way as to enable the machines to be used. Parliament obviously has approved of the use of circular saws and recognises that circular saws may be used in industry at the present time. Then one has to consider how, in the ordinary and normal working of a factory, this business can go on of adjusting the guard. It would be quite impracticable, I suppose, for a foreman to go round every five minutes to see whether a workman had got his machine adjusted exactly to the last degree of safety. It must be left to the experience and common sense of the man to see that it is adjusted in that way as is most safe."

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In *Smith v. Baveystock* (1) the employee to whom the duty was delegated was himself injured because he failed properly to carry out the duty delegated to him. LORD GODDARD found that, in the circumstances of that case, there had been no negligence or breach of statutory duty by the employers. DU PARCQ, L.J., after considering the situation which might have obtained if the employers had been prosecuted for a breach of the regulations, said (*ibid.*, 535):

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"... when it comes to proceedings in a civil court for damages. I think they [the employers] are entitled to say: 'The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you, who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages to you'."

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In *Gallagher v. Dorman, Long & Co., Ltd.* (2) employers failed in their submission that they had delegated to the workman a statutory duty not to overload a crane. WROTTESELY, L.J., who delivered the judgment of the court, said ([1947] 2 All E.R. 41):

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"The word 'delegation' when used in connection with the statutory duty of the employer does not mean the same thing as 'employment'. An employer does not, merely by employing his servant to work a crane, delegate to him the statutory duty of seeing that the crane is not overloaded. The theory of delegation of a statutory duty is intelligible where the duty is a positive duty such as to keep the guard of a power saw in adjustment. In the case of a negative duty such as not to overload a crane, the conception of delegation presents considerable difficulty."

F

I was also referred to *Barcock v. Brighton Corpn.* (3) where the question of delegation of his duty by the employer was discussed. In that case the plaintiff, to whom certain duties had been delegated, succeeded on the ground that the defendants had not instituted and maintained a safe system of work. I do not think that the case helps me, and, accordingly, I say no more about it.

G

I now come to consider the claim of the plaintiff in this case in so far as it is based on an alleged breach of the first defendants' statutory duty. The work on which the plaintiff was engaged was work to which the Building (Safety, Health and Welfare) Regulations, 1948, apply. The plaintiff relies on breaches by his employers of reg. 4 and reg. 29 (1) of those regulations. Regulation 4 provides:

H

"It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with . . . reg. 5 to reg. 30."

The regulation also provides that it shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance

of an act by him and to co-operate in carrying out Part II of the regulations. Regulation 29 is in Part II, and, so far as relevant, it is in the following terms:

"(1) Every ladder and step-ladder shall be of good construction, sound material and adequate strength for the purpose for which it is used . . .

(8) No wooden ladder shall be used unless it is constructed with—(a) uprights of adequate strength . . ."

On my findings of fact, the ladder which broke was not of adequate strength for the purpose for which it was used, and in particular its uprights were not of adequate strength. The first defendants were thus, as it seems to me, in technical breach of their absolute obligation to provide a ladder of adequate strength for the purpose for which it was in fact used by the plaintiff. The plaintiff himself having a duty to co-operate, quite apart from any question of delegation, was in breach of reg. 29 (8) in that he used a wooden ladder with uprights of insufficient strength. It is clear, moreover, from the cases to which I have referred, that an employer is entitled in appropriate circumstances to delegate his statutory duty to an experienced employee. I find that the plaintiff was such an employee, and that the circumstances in which the first defendants carried on their business were such that it was eminently reasonable, if not commercially necessary, that they should delegate to their foreman on the spot the selection and approval of the heavy gear, including ladders, required for that particular job. The defendants did so delegate this duty to the plaintiff, and the plaintiff recognised and understood that they had done so. The plaintiff, in my view, should have appreciated that the ladder in question was unsuitable and unsafe for the reasons which I have given. If the plaintiff's mate, Bannister, had been injured by the collapse of the ladder, the first defendants could not, of course, have escaped liability. The situation, however, is obviously different where it is the person to whom the duty to select and approve the ladder had been properly delegated who is himself injured by reason of the insufficiency of the ladder.

On my findings, the plaintiff's case against the first defendants seems to be covered by the decision of the Court of Appeal in *Smith v. Baveystock* (1), subject only to this, that that case was decided before the passing of the Law Reform (Contributory Negligence) Act, 1945. Whether the present case is regarded as one in which there has been a technical breach of statutory duty by the first defendants who have properly delegated the performance of that duty to a foreman, or as a case in which the first defendants have committed no breach of statutory duty, the result, in my view, is the same. I am inclined to think that it would be difficult to argue in this case that the first defendants were not in at any rate technical breach of their statutory duty. The common sense of the matter, however, is that the plaintiff acting within the scope of his delegated authority, and negligently selecting an unsafe ladder, was the sole author of his own misfortune. I can see no good reason why the well-known principle *ex turpi causa non oritur actio* should not apply in this case.

In *Cakebread v. Hopping Bros. (Whetstone), Ltd.* (4) the plaintiff was injured in the course of working a circular saw. The guard with which the saw was fitted was incapable of proper adjustment and, consequently, did not comply with the Woodworking Machinery Regulations, 1922. The plaintiff himself failed to make the necessary adjustments to the guard which was provided. The case was decided after the passing of the Law Reform (Contributory Negligence) Act, 1945. HILBERY, J., held that the plaintiff failed. His decision was varied by the Court of Appeal, who came to the conclusion that it was a case in which the defendants, having been throughout and continuously in breach of their statutory duty in that they had failed to provide a guard which complied with the regulations, were themselves to blame, but that the plaintiff's negligence had contributed to the extent of fifty per cent. towards the accident and his consequent injuries. TUCKER, L.J., after reviewing the authorities and referring

to the situation which had obtained in the earlier cases such as *Vincent v. Southern Ry. Co.* (5), said ([1947] 1 All E.R. 394):

A "In that case [*Vincent v. Southern Ry. Co.* (5)] it was not necessary for the House of Lords, any more than it was necessary for LORD GODDARD in *Smith v. Baveystock* (1), to express a view of what the position would have been under the Act of 1945, and I do not read any of the observations of their Lordships as compelling me to hold that the workman in the present case is entirely out of court by reason of his negligence. I think he was negligent and that that negligence contributed to the accident, as did the breach of statutory duty and common law negligence on the part of the employers. I, therefore, think that this is a case under the new Act for apportioning the damages. I agree with the figure proposed by my Lord, and I will only say that I can quite conceive in a *Smith v. Baveystock* (1) type of case where a competent skilled man is left in charge of a properly constructed machine and there is proper delegation to him under reg. 23 and adequate supervision in the factory, if he is injured, I can imagine that some courts might take the view that somewhere in the neighbourhood of ninety per cent. might possibly fall on the workman. This case on its facts is to be distinguished altogether from a case of that kind."

D There is, perhaps, some ground for saying that this is a case of the kind to which TUCKER, L.J., was referring in that passage, where there has been at least a technical breach by the employer of his statutory duty to provide a safe and suitable ladder. Accordingly, I have had to consider that matter. I have already stated the facts, and I have found that the employers were acting in accordance with the usual practice of the trade, they were acting reasonably in entrusting to their experienced employee the choice of suitable heavy gear, and, in the popular sense, the only fault which can be attributed to anyone in this case is the fault of the plaintiff, who was well experienced in regard to ladders, in choosing a completely unsuitable ladder.

E The Law Reform (Contributory Negligence) Act, 1945, s. 1, is in the following terms:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated . . ."

F Looking at this matter from the common-sense point of view—and I venture to think that that is the proper aspect from which to view this case—there was no fault in the employers. If they were entitled, and, indeed, as I find, almost bound, to delegate to the plaintiff the duty of selecting and approving gear, they could do no more. I doubt, therefore, whether it can properly be said that the defendants here were in fault under s. 1. That being so, I think it would be driving matters too far to hold that, in a case of this kind where the defendants are, in my view, completely free from blame, I am compelled to find them at fault and then to allocate some very large proportion of the blame—possibly ninety-nine per cent.—to the plaintiff. That situation ought not to arise, and I do not propose to decide the case on that ground.

H I am satisfied that the only person who was to blame in this matter was the plaintiff. He was negligent and also in breach of the statutory duty imposed on him under the Building (Safety, Health and Welfare) Regulations, 1948, and it was his own negligence and breach of duty which immediately caused the accident and resulting injury. The defendants were not at fault in the popular sense. I see no reason why, on the facts of this case, the maxim *ex turpi causa non oritur actio* should not apply, and, accordingly, I find that the plaintiff's claim fails. If I should be wrong about this, and if it had been necessary for me to decide the case on what I may, perhaps, call the contributory basis, I should without hesitation have found that while the defendants were in technical breach

of the regulations to which I have referred, the amount recoverable by the plaintiff should be reduced by ninety-nine per cent. for the reasons I have given, the result of which would be that he would recover virtually nothing. Feeling as I do, and taking the view which I have expressed, the result is that the plaintiff's claim against the first defendants based on the alleged breach of their statutory duty fails. The selection and approval of the heavy gear having been properly left under a proper system of work to the plaintiff, and the plaintiff having made this unfortunate and bad selection, it is impossible to say that the defendants have been negligent or have failed to institute and supervise a proper system of work. For the reasons which I have given on the facts which I have found, I am quite satisfied that the plaintiff's common law claim against the first defendants must also fail.

That leaves the question of the second defendants. The plaintiff's claim against them can be dealt with quite shortly. The plaintiff alleges against the second defendants that he was in substance an invitee on the ladder. That is a contention which is, in my view, ill founded, and, if authority is needed to support my opinion, I need only refer to *Marshall v. Cellactite & British Uralite, Ltd.* (6). In that case, the factory owners gave permission to contractors working on their premises to borrow plant required for the work, and one of the contractors' employees was injured by falling from a defective ladder. It was held that the contractors, the second defendants, were alone to blame since they had themselves selected the ladder for this particular work. In the course of his judgment, LORD GREENE, M.R., said (63 T.L.R. 457):

"Because Cellactite [who were the factory owners] had given Adlon [the employers of the workman] a general permission to use any plant it was said that it was just as if Cellactite had put the ladder in place, with their own hands. That argument is fallacious, because the permission was not a permission relative to any particular piece of plant, but a general permission to use plant, and no guarantee was given or representation made to anyone as to the safety of any particular piece of plant or its suitability for any particular work."

Those words seem to me amply to cover the circumstances and the facts which I have found in regard to the way in which the second defendants told the plaintiff that he could use any of their ladders if he thought they would serve his purpose. They did not in any sense of the word press the plaintiff to use the ladders or guarantee that the ladders were suitable for the job. That was a matter which lay within the competence of the plaintiff and within his competence alone. I think that that case, which, of course, is binding on me, affords a short answer to the plaintiff's claim against the second defendants. Accordingly, the plaintiff's claim fails both against the first and against the second defendants.

Judgment for the defendants.

Solicitors: *Sprinz & Sons*, agents for *J. P. Nolan & Janes*, Southend-on-Sea (for the plaintiff); *Carpenters* (for the first defendants); *Isadore Goldman & Son*, agents for *E. A. Morling*, Maidstone (for the second defendants).

[Reported by MICHAEL MALONEY, Esq. Barrister-at-Law.]

Re TOUT AND FINCH, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), December 14, 15, 1953.]

Building Contract—Contractor a limited company—R.I.B.A. conditions of contract—N.F.B.T.E. and F.A.S.S. sub-contract—Voluntary liquidation of contractor after practical completion of work, and before issue of architect's final certificate—Sum due to sub-contractor under interim certificate not paid—Right of building owner to pay sub-contractor and deduct sum paid from amount due to contractor—Retention money—Equitable assignment—Contractor trustee for sub-contractor.

- A By a building contract, dated Jan. 15, 1951, a company, which carried on the business of a building contractor (and which is referred to hereinafter as "the contractor"), agreed to build some flats for a borough council.
- B The current edition of the Royal Institute of British Architects form of conditions of contract applicable where quantities formed part of the contract, adapted for the use of the council, applied to the contract. Clause 21 (a) of the conditions provided that sums referred to therein were to be expended in favour of such persons as the architect should direct, referred to as
- C nominated sub-contractors, and by cl. 21 (b) the sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract was to be paid by the contractor within fourteen days of receiving the architect's certificate, less only any retention money which the contractor might be entitled to deduct and a cash discount.
- D By cl. 21 (c), "Before any such certificate is issued to the contractor he shall, if requested by the architect, furnish to him reasonable proof that all nominated sub-contractors' accounts included in previous certificates have been duly discharged, in default whereof the employer [i.e., the council] may pay such accounts upon a certificate of the architect and deduct the amount so paid from any sums otherwise payable to the contractor".
- E Clause 24 (a) dealt with the issue of interim certificates by the architect stating the amount due to the contractor from the council, and by cl. 24 (b): "The amount so due shall, subject to cl. 21 (c) of these conditions . . . be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the said certificate . . ." By
- F cl. 24 (f) the architect was to issue a final certificate of the value of the works executed by the contractor on expiration of the defects liability period, which was six months from practical completion of the works. On Apr. 23, 1951, the contractor entered into a sub-contract with a sub-contractor
- G nominated by the architect. The sub-contract was in the form approved by the National Federation of Building Trades Employers and the Federation of Associations of Specialists and Sub-Contractors. By cl. 11 (a) the contractor, in accordance with the main contract, was to apply to the architect for certificates of payment and for the inclusion therein of the amount representing the value at the time of the sub-contract works. By cl. 11 (b) within fourteen days of receiving a certificate from the architect the contractor was to pay to the sub-contractor the amount certified therein, less retention money and a cash discount, "retention money" being defined in
- H the sub-clause as "the proportion attributable to the sub-contract works of the amount retained by the employer [i.e., the council] in accordance with the main contract". By cl. 11 (h): "If and to the extent that the amount retained by the employer in accordance with the main contract includes any retention money the contractor's interest in such money is fiduciary as trustee for the sub-contractor and if the contractor attempts or purports to mortgage or otherwise charge such interest or his interest in the whole of the amount retained as aforesaid (otherwise than by floating charge if the

contractor is a limited company), the contractor shall thereupon immediately set aside and become a trustee for the sub-contractor of a sum equivalent to the retention money and shall pay the same to the sub-contractor on demand; provided that upon payment of the same to the sub-contractor the amount due to the sub-contractor upon final payment under this sub-contract shall be reduced accordingly by the amount so paid". On Sept. 19, 1952, the architect issued the nineteenth certificate, which covered the whole of the work up to that date. The practical completion of the work was on Oct. 25, 1952. In December, 1952, the contractor went into voluntary liquidation, but the council did not take over the completion of the contract. The end of the defects liability period being Apr. 25, 1953, the architect was then in a position to issue his final certificate, but he had not done so owing to a dispute between the contractor and the sub-contractor, the contractor not having paid to the sub-contractor a sum directed to be paid by a certificate of the architect issued on July 16, 1952. The sub-contractor claimed (i) that, in accordance with cl. 21 (c) of the main contract, the council were entitled to pay to the sub-contractor the balance remaining unpaid of amounts included in previous certificates given in favour of the sub-contractor, and (ii) that the contractor was trustee of any "retention money", as defined in cl. 11 (b) of the sub-contract, and that either the retention money, when it became payable, should be paid direct to the sub-contractor, or, if it came into the liquidator's hands, he was bound to pay it over to the sub-contractor. The sub-contractor's claim was opposed by other creditors of the contractor, who contended, inter alia, (i) that cl. 21 (c) of the main contract referred only to interim certificates and not to a final certificate, and (ii) (a) that cl. 11 (h) of the sub-contract did not create a trust, but merely provided for a running account, and (b) that the contractor had no such interest in the retention money as could form the subject of a trust.

HELD: (i) clause 21 (c) of the main contract applied, not only to interim certificates, but also to the final certificate; notwithstanding the liquidation of the contractor, the sub-clause remained in effect; and, therefore, in accordance with its provisions, the council were entitled to pay to the sub-contractor the balance remaining unpaid of amounts included in previous certificates given in favour of the sub-contractor.

Re Wilkinson, Ex p. Fowler ([1905] 2 K.B. 713), applied.

(ii) the words used in cl. 11 (h) of the sub-contract were apt to create a trust which would operate by way of an equitable assignment of assets described as the contractor's interest in the "retention money", the main contract provided for the retention of "retention money", which represented money already earned but not yet payable, the contractor had, under the main contract, an interest in that money which could be the subject of a valid equitable assignment; on the facts, the contractor had effectively made such an assignment, within cl. 11 (h) of the sub-contract; and, therefore, the contractor's interest in the retention money as defined in cl. 11 (b) of the sub-contract, being part of the moneys retained by the council under the main contract, was fiduciary, the contractor was a trustee for the sub-contractor, in accordance with cl. 11 (h) of the sub-contract, and, on receipt of the money by the liquidator from the council, the contractor and the liquidator were bound to preserve it entire, in accordance with cl. 11 (h), and to pay it to the sub-contractor, less only the cash discount provided for by the sub-contract.

Drew & Co. v. Josolyne (1887) (18 Q.B.D. 590), applied.

Wilmut v. Alton ([1897] 1 Q.B. 17), distinguished.

Cases referred to:

- (1) *Re Wilkinson, Ex p. Fowler*, [1905] 2 K.B. 713; 74 L.J.K.B. 969; 5 Digest 667, 5923.
- (2) *Wilmut v. Alton*, [1897] 1 Q.B. 17; 66 L.J.Q.B. 42; 75 L.T. 447; 5 Digest 696, 6126.
- (3) *Ex p. Nichols, Re Jones*, (1883), 22 Ch.D. 782; 52 L.J.Ch. 635; 48 L.T. 492; 5 Digest 697, 6129.
- (4) *Drew & Co. v. Josolyne*, (1887), 18 Q.B.D. 590; 56 L.J.Q.B. 490; 57 L.T. 5; 5 Digest 696, 6124.

ADJOURNED SUMMONS in the voluntary winding-up of a company.

The company, which carried on the business of a building contractor, entered into a contract, dated Jan. 15, 1951, with Ilford Borough Council to build a number of flats, and the applicants, Helical Bar and Engineering Co., Ltd., were sub-contractors nominated by the architect and were employed by the company under a sub-contract, dated Apr. 23, 1951. The current edition of the Royal Institute of British Architects form of conditions of contract applicable where quantities form part of the contract, adapted for the use of the council, applied to the contract, and the sub-contract was in the form approved by the National Federation of Building Trades Employers and the Federation of Associations of Specialists and Sub-Contractors. The date of the practical completion of the works was Oct. 25, 1952, and the end of the defects liability period, after which the architect's final certificate was to be given, was Apr. 25, 1953. In December, 1952, the company went into voluntary liquidation. Because of the dispute between the company and the applicants the architect had not yet issued his final certificate.

By the summons the applicants asked (a) for a declaration that the interest of the company in a sum of £787 now retained by the council as part of the retention moneys under the contract was fiduciary and as trustee for the applicants in accordance with cl. 11 (h) of the sub-contract; (b) for a declaration that the company and its liquidator were bound in accordance with cl. 11 (h) of the sub-contract to preserve entire the sum of £787 on receipt thereof by the liquidator from the council and to pay the same to the applicants, less a cash discount provided for by the sub-contract; (c) for a declaration that, in accordance with cl. 21 (c) of the contract, the council were entitled (i) on a certificate of their architect to pay to the applicants the sum of £600 which was directed to be paid to the applicants in a certificate issued by the architect to the company on July 16, 1952, but had not been paid, and (ii) to deduct the sum of £600, after having paid that amount to the applicants, from sums otherwise payable to the company under the contract; and (d) that, for the purposes of the application, the respondents, B. Finch and Co., Ltd., be appointed to represent all the creditors of the company other than the applicants and the London Electricity Board.

Raymond Jennings, Q.C., and *J. S. Daniel* for the applicants.

J. Montgomerie for the liquidator.

Stewart-Brown for the council.

Edwards, Q.C., and *D. Lloyd* for B. Finch & Co., creditors of the company.

WYNN-PARRY, J.: This is a summons taken out in the voluntary liquidation of the company asking for the determination of two matters. The company carried on the business of building contractors, and went into voluntary liquidation on Dec. 19, 1952. The company is insolvent.

On Jan. 15, 1951, the company entered into a building contract expressed to be made between the company, who were called the contractors, of the first part, Union Assurance Society, Ltd., as sureties, of the second part, and the mayor, aldermen and burgesses of the borough of Ilford, to whom I will refer for convenience as "the council", of the third part. The object of the contract

was the erection by the company for the council of fifty-seven flats on a particular site within the borough of Ilford. The contract price was £66,125 9s., and it was provided that the current edition of the Royal Institute of British Architects form of conditions of contract, applicable where quantities form part of the contract, adapted for the use of the council, should apply. Those conditions are in evidence before me. For the purpose of this judgment I only find it necessary to refer to a few of those conditions. Clause 21 provides:

"Where prime cost or provisional sums are included in the bills of quantities for persons to be nominated or selected by the architect to supply and fix materials or to execute work on the site, (a) such sums shall be deemed to include $2\frac{1}{2}$ per cent. cash discount and shall be expended in favour of such persons as the architect shall direct, and all specialists or others who have been nominated or selected by the architect are hereby declared to be sub-contractors employed by the contractor and are referred to in these conditions as 'nominated sub-contractors'. . . (b) The sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days of receiving from the architect a certificate including the value of such work, materials or goods less only (i) any retention money which the contractor may be entitled to deduct, and (ii) a cash discount of $2\frac{1}{2}$ per cent. (c) Before any such certificate is issued to the contractor he shall, if requested by the architect, furnish to him reasonable proof that all nominated sub-contractors' accounts included in previous certificates have been duly discharged, in default whereof the employer may pay such accounts upon a certificate of the architect and deduct the amount so paid from any sums otherwise payable to the contractor . . . (e) Neither the existence nor the exercise of the foregoing powers nor anything else contained in these conditions shall render the employer in any way liable to pay any nominated sub-contractor."

Clause 24 deals with certificates and payments. By cl. 24 (a) and (b) it is provided:

"(a) At the period of interim certificates named in the appendix to these conditions interim valuations shall be made whenever the architect considers them necessary, and, subject to cl. 21 of these conditions, the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall be entitled to payment therefor within the period named in the appendix. (b) The amount so due shall, subject to cl. 21 (c) of these conditions and to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the said certificate, less the amount to be retained by the employer (as hereinafter provided) and less any instalments previously paid under this clause."

Clause 24 (c) provides for the amount which may be retained by the employer in virtue of the clause and which in the particular case was ten per cent. Then cl. 24 (d) provides:

"The amounts retained in virtue of this clause shall be dealt with in the following manner: On practical completion of the works, and subject to cl. 17 of these conditions, the architect shall issue a certificate for one moiety of the total amounts so retained and the other moiety shall be paid to the contractor upon the issue of the architect's final certificate."

By cl. 24 (f) it is provided:

"Upon expiration of the defects liability period stated in the appendix to these conditions or upon completion of making good defects under cl. 12

of these conditions, whichever is the later, the architect shall issue a final certificate of the value of the works executed by the contractor and such final certificate, save in cases of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any matter dealt with in the certificate and save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said works and materials."

A

One of the nominated sub-contractors was the applicants, and they were nominated by the architect, so that the company had no choice in their selection, but in accordance with the usual practice there was brought into existence between the company and the applicants a sub-contract, dated Apr. 23, 1951, in the form approved by the National Federation of Building Trades Employers and the Federation of Associations of Specialists and Sub-Contractors. That sub-contract provides in the usual way for the execution by the sub-contractor of the sub-contract works, which are described as:

B

"Construction 'Helicon' hollow tile and reinforced concrete fire resisting floors and roofs, reinforced concrete landings and staircases, etc., for fifty-seven flats . . ."

C

On the sub-contract there is, I think, very little to which I need refer. By cl. 10 provision is made for the price of the sub-contract works, on which nothing really relevant turns. By cl. 11 it is provided:

D

"(a) The contractor shall subject to and in accordance with the main contract from time to time make application . . . to the architect for certificates of payment and for the inclusion therein of the amount which at the date thereof fairly represents the value of the sub-contract works and of any variations authorised under this sub-contract then executed and of the materials and goods delivered upon the site for use in the sub-contract works . . . (b) Within fourteen days of the receipt by the contractor of any certificate from the architect the contractor shall notify and pay to the sub-contractor the amount certified therein to be due in respect of the sub-contract works and any authorised variations thereof, less retention money, that is to say, the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract, and less a cash discount of 2½ per cent., if payment is made within fourteen days as aforesaid."

E

F

I can now pass on to cl. 11 (h), observing in passing that cl. 11 (g) links up with cl. 21 of the main contract. Clause 11 (h) reads:

G

H

"If and to the extent that the amount retained by the employer in accordance with the main contract includes any retention money the contractor's interest in such money is fiduciary as trustee for the sub-contractor and if the contractor attempts or purports to mortgage or otherwise charge such interest or his interest in the whole of the amount retained as aforesaid (otherwise than by floating charge if the contractor is a limited company), the contractor shall thereupon immediately set aside and become a trustee for the sub-contractor of a sum equivalent to the retention money and shall pay the same to the sub-contractor on demand; provided that upon payment of the same to the sub-contractor the amount due to the sub-contractor upon final payment under this sub-contract shall be reduced accordingly by the amount so paid."

By cl. 13:

"The contractor shall notwithstanding anything in this sub-contract contained be entitled to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum

or sums which the sub-contractor is liable to pay to the contractor under this sub-contract."

On Sept. 19, 1952, the nineteenth certificate report was given, and it is necessary that I should refer shortly to that. Under the heading "Builder's Work", the certificate sets out "Estimated value of builder's work, £45,156," to which is added, "Estimated value of unfixed materials, £25," giving a total, in round figures of £45,181, which shows that the certificate covers the whole of the work up to that date, Sept. 19. Then there is set out a list of the nominated sub-contractors, the second of which is the applicants. Their type of work is described as "reinforced concrete floors, etc.," and the amount against their name is £7,876. A comparison with the previous certificate shows that at the date of the previous certificate the amount in their case was £7,276, so that they had earned another £600 in the interim. Then there follows a list of nominated suppliers, and a total of £67,355, from which is deducted retention money at the rate of ten per cent., £6,735, leaving £60,620. Then there is the legend:

"Add retention released on completed blocks and increased costs of nominated suppliers, £2,660."

There follows a note which says:

"Payments on account have not been deducted. A copy of this report has been forwarded to the contractor. All nominated sub-contractors and nominated suppliers have been notified of the amounts due to them in respect of this report."

According to the evidence before me, the date of the practical completion of the works was about Oct. 25, 1952, so that on that basis the end of the defects liability period, six months after the date of practical completion, would be Apr. 25, 1953. It is clear from the evidence that the work has been completed, and that, notwithstanding the liquidation of the company, the council did not take over the completion of the contract as they would have been entitled to do under the conditions, and the architect is now in a position to issue his final certificate, but has held up taking that course because of the present dispute. What has happened is that the applicants have raised two points. (i) They say that they are entitled to a declaration that in accordance with cl. 21 (c) of the main contract, i.e., the contract between the company and the council, the council are entitled to pay to the applicants the balance remaining unpaid of amounts included in previous certificates given in favour of the applicants. (ii) They ask for a declaration to the effect that the company is trustee of any retention money, i.e., as defined in cl. 11 (b) of the sub-contract, where the phrase has a narrower meaning, and that, in effect, either the retention money, when it becomes payable, should be paid direct to the applicants, or that, if it comes into the liquidator's hands, he is bound at once to pay it over to the applicants.

Primarily, both questions turn on the construction of these two documents. The first question that I am going to deal with appears to me to turn entirely, so far as construction is concerned, on cl. 21 of the main contract. It appears from what I have read of the clause that the scheme is that the sums referred to in para. (a) are to be expended in favour of such persons as the architect shall direct, including nominated sub-contractors. In order to carry that out, there is set up the machinery which starts in para. (b), where it is provided that the sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days. In para. (c) the reference to "such certificate" is clearly back to the certificate referred to in the latter part of para. (b), i.e., a certificate including the value of such work, materials or goods, namely, the work, materials or goods referred to in the earlier part of para. (b).

less only any retention money which the contractor may be entitled to deduct and the cash discount. On that basis para. (c) proceeds to provide that the architect has the right, before he issues the certificate, to ascertain from the company whether the company has duly discharged the amounts due to the nominated sub-contractors under previous certificates, with the consequence that, if the architect makes the inquiry and finds that the company has not made those payments, then the council has a right—and the matter is entirely one for the council—to pay such accounts on a certificate being duly given by the architect, and, as mere necessary machinery, to deduct the amount so paid from any sums otherwise payable to the company. The point which has been made by counsel for other creditors, on behalf of the general body of creditors, is that the certificate there referred to can only be an interim certificate and cannot be a final certificate, and he seeks to establish that point by the interpretation which he places on cl. 24. For the purpose of establishing the point, he has to satisfy me that each certificate deals only with work done and money earned since the date of the last certificate, but, in my judgment, there are two points against that. First, it appears to me that the language of cl. 24 (b) is directly against that construction because it says that:

A “The amount so due [i.e., the amount of the certificate] shall . . . be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the certificate.”

B Secondly, when one considers the form of certificate, to which I have already sufficiently fully referred, it appears clear that the certificate does not proceed on that basis, but on the basis indicated by the language in cl. 24 (b) which I have just read. It, therefore, seems to me as a matter of construction that cl. 21 (c) is apt to cover, not only interim certificates, but a final certificate.

C On that basis it appears to me that this case is covered by the decision of BIGHAM, J., in *Re Wilkinson. Ex parte Fowler* (1). In that case, in September, 1903, A. signed a contract with a local authority to construct sewage works at a price to be paid to him by monthly instalments, less ten per cent., on the certificate of the engineer of the local authority, the ten per cent. to be retained and paid to A. six months after completion of the works. The contract also provided that certain machinery for the works was to be supplied to A. by specified firms, and cl. 54 provided:

D “If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power if he thinks fit to order direct payment to them . . .”

E Pausing there, it will be seen that for all practical purposes that clause corresponds to cl. 21 (c) of the main contract in the present case. In October, 1904, G A. was adjudicated bankrupt on his own petition. At that date the contract was substantially completed, and there was then due under it the sum of £1,574 15s. 10d. only, of which £1,349 17s. 8d. was retention money and £224 18s. 2d. was a sum payable on the engineer's next certificate, and these two sums were claimed by the trustee in bankruptcy. At that date A. owed £836 8s. 9d. in various amounts to the specified firms for machinery supplied H to him for the works, and subsequently the engineer made two orders under cl. 54 directing payment of the £836 8s. 9d. out of the £1,574 15s. 10d. to the firms in settlement of their accounts. It was held (so far as material) that the power conferred by cl. 54 on the engineer was not annulled or revoked by the bankruptcy, and that the firms, by virtue of the two orders of the engineer, were entitled to be paid the £836 8s. 9d. out of the £1,574 15s. 10d. in priority to the claim of the trustee. It will be seen from that paraphrase of the headnote in *Re Wilkinson. Ex parte Fowler* (1) that it would be difficult

to imagine a case which could more completely cover the present one. I think it is desirable to refer to a passage from the judgment of BIGHAM, J., because of the importance of the policy which underlies such a clause as this. BIGHAM, J., said ([1905] 2 K.B. 719):

"Now the contract contains a provision on which, in my judgment, the whole question turns. It is cl. 54 . . . That clause, in my opinion, is inserted in the contract for the benefit, not only of the people who supply the machinery, but also of the council itself. It is very much to the interest of the council to see that contracts of this kind for public works into which they enter are carried out in a manner satisfactory to all persons who are concerned in the performance of them. The council certainly may, and no doubt frequently do, make contracts of this kind, and they make them much more advantageously when the people who supply the machinery or other goods which are to be used by the contractor in the performance of the contract know that there is a reasonable probability that they will be paid. The council are enabled, by inserting a clause of this kind in their contract, to give a certain amount of confidence to people who supply goods to the contractor, and in that way they are placed in a better position when they come to make contracts again than they otherwise would be; and, therefore, I say that the clause is inserted, not only in the interests of the persons who supply goods to the contractor, but also in the interests of the council themselves."

BIGHAM, J., then proceeded to construe the clause, and he held that, notwithstanding the supervision of the bankruptcy, the clause remained in effect and that the two orders of the engineer were valid and effective orders. That case, as I say, covers this case. The council in this case have taken up what, in my view, is a very proper attitude, that is, they made it quite plain before the case came into this court that, if permitted to do so by the form of the judgment of the court, they would desire to exercise the power under cl. 21 (c) in respect of nominated sub-contractors. It so happens in this case that the figures show that there will be sufficient—so far as one can see, more than sufficient—to deal with all the claims of the nominated sub-contractors, without there being any necessity for abatement or apportionment. For those reasons, I propose, under para. (c) of the summons, to make the declaration for which the applicants ask in the modified form which I have indicated earlier in this judgment.

I now pass to a consideration of the other question, which turns on the sub-contract. That involves the construction of cl. 11, and particularly paras. (b) and (h). The first thing to do is to construe the clause so far as is necessary. Clause 11 (b) defines "retention money" as

"the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract, and less a cash discount of $2\frac{1}{2}$ per cent., if payment is made within fourteen days . . ."

Bearing in mind that definition of retention money, I turn to cl. 11 (h). On the face of it there are clear words used which are apt to create a trust which will operate by way of an equitable assignment of assets described as the contractor's interest in the retention money. It is said, first, that on a true construction of the document, which, of course, must be read as a whole, there is no trust, and nothing more than a running account. In support of that argument there is prayed in aid, for instance, cl. 13 of the sub-contract, which provides that the contractor shall be entitled to make certain deductions or set-offs from any sums, including any retention money, which he may be liable to pay to the sub-contractor. But such a clause as that appears to me not to affect the matter one way or another. It cannot, in the least, be decisive, because it appears to me to be a perfectly normal and sensible provision to

make, namely, that, against what the company may owe to the applicants as trustee, the company may set off moneys which may be owing by the applicants to the company. Then it is said that what is made the subject of the alleged trust is the contractor's interest in the money, but that he has no such interest in that money as can form the subject of a trust, and for that purpose great reliance was placed by counsel for the other creditors on *Wilmot v. Alton* (2).

A In that case, a trader, who carried on the business of a theatrical costumier, contracted with a company to supply dresses for a ballet and to keep them in repair for the sum of £40 a week for twelve weeks commencing from a certain date. She subsequently charged her right and interest under the contract in favour of the plaintiff as security for an advance made by him. The dresses were duly supplied to the company under the contract, but before any moneys became payable under it the trader became bankrupt. It was held by the B Court of Appeal, affirming the judgment of LORD RUSSELL OF KILLOWEN, C.J., that the charge in favour of the plaintiff gave no title as against the defendants, the trustees in bankruptcy, to moneys which might become due under the contract after the bankruptcy. In the course of his judgment, LORD ESHER, M.R., said ([1897] 1 Q.B. 20):

C "During the period contemplated by the contract she [the trader] became bankrupt. The effect of that was that she could no longer fulfil the contract. The trustee in bankruptcy in such a case may, if he thinks it for the benefit of the estate, carry on the business and the contract; but he is not obliged to do so. He would have a right to say that he would not have anything to do with the contract. If the trustee in this case had D done so, no moneys not already accrued due under the contract could after that become payable to any one under it. After the bankruptcy therefore no money would have become payable under the contract, unless the trustee had elected to go on with it, and to perform the conditions which by the terms of it were to be performed by the bankrupt. If he did go on with the contract, then in consideration of his doing so week by week the E sums of money payable under the contract would become due. Therefore the case stands thus. At the moment of the bankruptcy, there is, as regards sums to become payable in futuro under the contract, no debt due. There are amounts which may or may not become due according as the conditions of the contract are or are not fulfilled. In order to earn those amounts, the conditions of the contract must be fulfilled, and their fulfilment depends F upon the question whether the trustee in bankruptcy will go on with the contract or not."

That appears to me quite clearly to be a case illustrative of the established principle of bankruptcy law that it is impossible to assign the profits of a business earned after the bankruptcy. The reference in the later part of the G judgment of LORD ESHER, M.R., to *Ex parte Nichols. Re Jones* (3) confirms this. That is not this case, because here I have a contract where there is a provision for the retention of retention moneys. They represent moneys already earned, though not yet payable. That situation appears to me to be conclusively covered by the decision of the Court of Appeal in *Drew & Co. v. Josolyne* (4). In that case a building contract provided for payments to be H made as the work proceeded and subject to the retention of twenty per cent. of the value of the work shown in each certificate. The contractors assigned a portion of the retention moneys to secure a debt, and notice of the assignment was given to the building owners. After making the assignment the contractors filed a petition for liquidation, the works then remaining incomplete. In the liquidation a trustee and committee of inspection were appointed. The trustee, in pursuance of the resolution of the committee of inspection, completed the work, himself advancing moneys for the purpose, of which an amount exceeding

that of the retention moneys which had been assigned was still unpaid. There was no other asset from which he could be recouped. The trustee and the mortgagees both claimed the amount of the retention moneys which had been assigned, and on the interpleader issue to try the title to the moneys it was held, so far as is relevant for my purposes, that the assignment of the retention moneys held good as against the trustee, and that the mortgagees were, therefore, entitled to succeed. It may, I think, properly be said that that was a very strong case, because, as will be seen from the summary of the facts which I have given, the trustee himself advanced moneys for the purpose of completing the contract, yet he was not allowed in respect of those moneys to compete with the equitable assignee. LORD ESHER, M.R. (who gave the leading judgment in *Wilmot v. Alton* (2)) said (18 Q.B.D. 595): "This appears to me a very plain case." He then set out the facts quite shortly, and proceeded (*ibid.*):

"What then was the position of the trustee in liquidation? He was not obliged to carry out the contract. He might have said that he would have nothing to do with it. The trustee, however, had an option to go on with the contract. There could be no new contract without the building owners' consent. It would be a perversion of language to say that the law by giving power to the trustee to carry on the contract means that he may make a new contract. If he elects to go on with the work, he goes on under the old contract as the trustee of the liquidating debtors' estate and will take their rights under the contract subject to any valid assignment which they may have made of such rights. When the building owners refrained from taking the work out of the contractors' hands and the trustee elected to go on with it, the old contract, as it seems to me, continued in effect. The contract work went on and was completed, and the architect certified accordingly, under the old contract, and, thereupon, if there had been no question of any assignment, the building owners would have been bound to pay the retention moneys over to the trustee. But there had been an equitable assignment of a portion of those moneys by the contractors before the liquidation, of which the building owners had notice; and in consequence they are bound to pay such portion of them to the assignees."

BOWEN, L.J., said (*ibid.*, 597):

"The truth is that the trustee simply carried on the contract of the liquidating debtors. It may be that the trustee or his firm found the money which enabled the contract to be carried on and completed, without which the retention moneys would not have become payable, but that was his own affair, and could not give him any priority over the equitable assignees of the retention moneys; nor do I see that anything else took place to give him such priority. The old contract continued to subsist and the assignment by the contractors of the retention moneys to become due under it still held good."

Finally, I refer to the observations of FRY, L.J., towards the beginning of his judgment (*ibid.*, 598):

"Here there was a building contract under which the contract price was to be paid in the usual way, viz., by payments on account upon the certificates of an architect and payment of the balance after completion of the work. The builders mortgaged a portion of the retention moneys to become payable to them. These moneys were the price of work already done, which however would not become payable till the whole of the work was completed. The mortgagors of those moneys could not set up a title to be recouped the moneys expended in completing the contract in priority to their own assigns, nor could any person claiming under them. The trustee comes in under the mortgagors as trustee of their estate, and the committee of inspection request him to carry on the contract upon which

the liquidating debtors were engaged at the time of the liquidation. If this contract was so carried on, then the trustee so carrying it on claims under the mortgagors and could not claim anything expended in completing the contract against their mortgagees of the retention moneys."

A Those passages appear to me completely to cover the case before me on this question. They show, to my mind beyond doubt, that the company, under the main contract, had, in the retention moneys, an interest which it could make the subject of a valid equitable assignment, and that, in my view, it has effectively done by the language of cl. 11 (h) of the sub-contract. Therefore, for those reasons, I shall propose to make a declaration under paras. (a) and (b) of the summons to the effect of this judgment, but not quite in the form asked because some question remains as to the exact figures. I think that probably
B the first declaration might take the form suggested by counsel for the applicants, namely, a declaration that the interest of the company in the retention money as defined in cl. 11 (b) of the sub-contract, being part of the moneys retained by the council in accordance with the main contract, is fiduciary, and that the company are trustees for the applicants in accordance with cl. 11 (h) of the sub-contract. The exact form can be a matter for agreement between counsel.
C Then, under para. (b), I will make a declaration that the company and the liquidator are bound in accordance with the said cl. 11 (h) of the sub-contract to preserve entire the retention money on receipt thereof by the liquidator from the council and to pay the same to the applicants, less only the cash discount of $2\frac{1}{2}$ per cent. provided for by the sub-contract. Finally, as I have decided against the interest of the general body of creditors, I will make the
D representation order asked for under para. (d) of the summons.

Order accordingly.

Solicitors: *Braby & Waller* (for the applicants); *Preston & Naylor* (for the liquidator and creditors); *K. F. B. Nicholls*, town clerk, Ilford (for the council).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

E

R. v. MISKELL.

[COURTS-MARTIAL APPEAL COURT (Hilbery, Sellers and Barry, JJ.), December 14, 15, 18, 1953.]

Court-Martial—Gross indecency—Attempt to procure—Relation to offence of acts charged.

F

The appellant was convicted of an attempt to procure an act of gross indecency with a male person after evidence had been given that he had spoken to a boy aged fourteen in the street, given him beer and ice cream in a café, and then gone into a park with him, and, while sitting there alone with him, had put his arm round the boy and said and done things which
G manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. He asked the boy to meet him the next night promising him a reward of money if he did so. The next night he met the boy at the suggested meeting place and invited him to go for a walk. The appellant was then arrested. The court took the view that the conduct of the appellant immediately before and at the time of the invitation
H manifested his purpose in inviting the boy to meet him the next night and go for a walk. The walk which had already taken place had been used for making indecent suggestions and overtures and such conduct made it manifest that the purpose of the invitation was that the boy and the appellant should act indecently together.

HELD: the invitation and the meeting were overt acts, and when they were considered in the light of the circumstances in which the invitation was issued and the meeting took place those acts were capable of being

attempts to procure the boy to commit an act of gross indecency with the appellant.

R. v. Cope (1921) (86 J.P. 78), applied.

AS TO OVERT ACTS IMMEDIATELY CONNECTED WITH COMMISSION OF CRIMINAL OFFENCE and ATTEMPTS TO COMMIT CRIMES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 40-43, paras. 41, 42; and FOR CASES, see DIGEST, Vol. 14, pp. 102-106, Nos. 750-770.

Cases referred to:

- (1) *R. v. Eagleton*, (1855), 24 L.J.M.C. 158; 26 L.T.O.S. 7; 19 J.P. 546; 14 Digest 102, 750.
- (2) *R. v. Robinson*, [1915] 2 K.B. 342; 84 L.J.K.B. 1149; 113 L.T. 379; 79 J.P. 303; 14 Digest 104, 756.
- (3) *R. v. Woods*, (1930), 143 L.T. 311; 22 Cr. App. Rep. 41; Digest Supp.
- (4) *R. v. Cope*, (1921), 86 J.P. 78; 16 Cr. App. Rep. 77; 14 Digest 109, 799.

APPEAL by leave of the court from the decision of a district court-martial at Hamburg by which the appellant, Corporal William John Victor Miskell, Army Catering Corps, was found guilty of attempting to procure an act of gross indecency with a male person and was sentenced to fifty-six days' detention and to be reduced to the ranks.

Ian McLean for the appellant.

E. Garth Moore for the Crown.

Cur. adv. vult.

Dec. 18. **HILBERY, J.**, read the following judgment of the court. The appellant was found guilty by district court-martial at Hamburg of attempted gross indecency with a male person and was sentenced to fifty-six days' detention and to be reduced to the ranks, and he appeals against that conviction by leave of the court.

The facts can be shortly stated. On the afternoon of May 16 a German boy was walking along a street in Hamburg when the appellant spoke to him. The appellant asked him to show him the way to the park. He then asked about a café and they went together to a café where the appellant gave the boy some beer and an ice cream. They then went to the park, and when in the park they sat on one of the seats for a few minutes. The appellant put his arm round the boy's shoulder, and with his hand dangling down his front, pointed at his private parts. The appellant then asked if he had a little one down there and said he had a big one. He also asked whether the boy had ever had sexual intercourse before, using the German word "gefickt". The appellant suggested that they might meet at some time at the station, and suggested the next day at seven o'clock, and that they might sleep out together in the park or forest at some time. The boy said he slept at home, but he agreed to meet the appellant, saying he would ask his father. The next day the appellant kept the appointment which had thus been arranged, and when he met the boy looked at his watch and said: "It is too late to go to the cinema; we'll take a walk". The police then arrested the appellant. All those facts were unchallenged by the appellant, and no evidence was offered by him or on his behalf. It was submitted that the evidence only amounted at the most to evidence of acts of preparation for procuring the commission of the offence and did not amount to evidence of an attempt to procure the commission. The same contention has been argued as the ground of appeal. No criticism of the summing-up by the judge-advocate was advanced by the appellant.

The sole question on which this appeal depends is whether the act or acts of the appellant could constitute as a matter of law an attempt to procure the boy to commit an act of gross indecency with the accused. It has long been established that whether an act or acts can amount to an attempt to commit a crime is a question of law. Once it is decided by the court that what an accused person has done can be an attempt to commit the crime, it is a question of fact

for the jury whether what was done should be decided to have been an attempt. Not all acts which are steps towards the commission of a crime can be regarded as attempts. Some may be too far removed from the commission of the crime to be regarded as attempts to commit the crime, but just where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it is often a difficult and nice question. This case, indeed, affords an example of the difficulty.

The principle to be applied by the court in deciding the question was stated by PARKE, B., in *R. v. Eagleton* (1). That statement of the principle was approved and followed in *R. v. Robinson* (2) and in *R. v. Woods* (3) in the following words (143 L.T. 312):

“The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.”

The difficulty lies in the application of the principle to the facts: per LORD READING, C.J., in *R. v. Robinson* (2) ([1915] 2 K.B. 348). In *R. v. Cope* (4) where, as in this case, the charge was one of attempting to procure the commission of an act of gross indecency, LORD TREVETHIN, C.J., in the considered written judgment of the court, after pointing out that the letters in question which were said to be the acts constituting the attempt to procure did not contain an undisguised invitation to commit the offence, laid it down that in order to see whether the letters did contain such terms that Price (the addressee) would see in them an invitation to commit an act of gross indecency with the appellant, the surrounding circumstances might and should be examined.

The circumstances here were that the appellant had spoken to this boy in the street, had taken the boy to a café and given him beer and an ice cream, had then gone into a park with the boy, and there when sitting with him alone had said and done things which manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. After putting an arm round the boy and pointing to the boy's genital organ and asking if the boy had a little one there and saying he had a big one, he had followed this by suggesting that they should sleep out together in a park or the woods and had asked the boy in coarse terms whether he had ever had sexual intercourse. He had then asked the boy to meet him the next night, promising him a reward of ten marks if he did so, saying they could then go to a cinema or for a walk. The next night he went to the suggested meeting place and met the boy, and then, making the excuse that it was too late to go to a cinema, invited the boy to go with him for a walk. It is important to bear in mind that the question is not whether this invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question is whether these acts of the appellant were acts to procure the commission of that offence. Applying the principle as stated, was there on these facts an act sufficiently proximate to procuring the boy to commit the offence to amount to an attempt to procure? It is a question, not whether there was an act of procuring, but whether there was an act which was an attempt to procure.

The conduct of the appellant immediately before and at the time of the invitation, in our view, manifested the purpose of the appellant in inviting the boy to meet him the next evening and in meeting him and inviting him to go for a walk. The walk which had already taken place had been used for making indecent overtures and suggestions. That conduct made manifest the purpose of the invitation and the meeting and the suggestion of another walk. That the appellant by his conduct and talk had intended to suggest to the boy that they

should act indecently together can scarcely be doubted in view of the fact that the appellant himself said to the police after he was arrested:

"Well, what the boy said about Saturday night is all true, but I only met him tonight in order to put him off. I had no intention of doing what I suggested."

The law, however, punishes a man, not for a guilty intention, but for the overt act done as part of the carrying out of that intention. The intention of the appellant here was, undoubtedly, to procure an act of gross indecency with the boy. The invitation and the meeting were overt acts. When that invitation and meeting are considered in the light of the circumstances in which the invitation was issued and the meeting took place, it appears to us that those acts cannot be said to be incapable of being attempts to procure the boy to commit an act of gross indecency with the appellant. Once it is decided that they could be so regarded as a matter of law, then the question whether they were an attempt or not becomes one of fact for a jury, or, as in this case, for the court-martial.

In *R. v. Cope* (4) LORD TREVETHIN, C.J., said (86 J.P. 79):

"The letters in the present case obviously do not contain an undisguised invitation, nor is a code suggested, but it is said that they do contain terms which would have conveyed the invitation to the mind of their intended recipient as unmistakably as if it had been set out in express terms and that the jury have by convicting found that this is so."

He follows that observation by the passage which I have already quoted. Later on, he said (*ibid.*):

"We think that there was enough [in the letter] to entitle the jury to find that Price would have read into it an invitation to repeat with the appellant the offence which he had committed with Riley, and therefore that the sending of the letters was an attempt to procure Price . . ."

That invitation in that letter was no less remote from the procuring than the invitation given by the appellant in this case and the meeting in fulfilment of that invitation, coupled, as it was, with a further invitation to another walk. Here, as in *R. v. Cope* (4), in the circumstances which had occurred, the invitation in question was understood to be an invitation to an act of gross indecency, and the boy's father and the police were informed, and it is not contended that an invitation, however veiled, which in the circumstances is an invitation to commit an act of gross indecency, is not an attempt to procure such an act. For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[Reported by T. J. KELLY, ESQ., Barrister-at-Law.]

WATT v. HERTFORDSHIRE COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Barry, J.), December 15, 16, 1953.]

Fire Brigade—Injury to fireman—Liability of fire authority—Injury by jack insecurely fixed in vehicle.

A The plaintiff, a fireman employed by the defendants, the county fire authority, was travelling in the back of a lorry to the scene of an accident. In the lorry there was a jack weighing between two and three hundred-weight. It was not possible to fix the jack in any way as the lorry was not fitted for it, the usual vehicle for carrying the jack not being available. The driver of the lorry was forced to apply his brakes suddenly which caused the jack to move forward and strike and injure the plaintiff.

B HELD: apart from statutory requirements, an employer was bound to exercise reasonable care to avoid exposing his employees to unnecessary risks, but what was "reasonable" depended on the circumstances and nature of the employment; a fireman voluntarily engaged himself in a type of employment involving much greater risks than did other types of employment, and fire authorities were entitled to require firemen to undertake far greater risks than those encountered in other employments; in C the circumstances the defendants were justified in using the lorry, and, speed being an essential requirement of the fire service, the plaintiff must have been prepared to take risks which other persons travelling in motor vehicles would not be required to take; and, accordingly, the plaintiff had not established that the accident was due to the defendants' negligence, and D his claim must fail.

ACTION for damages for negligence.

The plaintiff, William Frederick Watt, joined the fire service in 1939, and was employed by the defendants, the fire authority for Hertfordshire, as a fireman at Watford fire station. On July 27, 1951, while he was on duty at the fire station, an emergency call was received that a woman was trapped under a heavy E vehicle between two hundred and three hundred yards from the station. The officer in charge, Sub-officer Richards, left with one team of firemen for the scene of the accident, but, before doing so, he instructed the second team, of which the plaintiff was a member, to load the heavy lifting tackle, consisting of a large jack weighing between two and three hundredweights, on the flat floor of a Fordson lorry, the vehicle equipped for the carriage of the jack not being avail- F able. The jack, one end of which stood on four small castor wheels, was lifted on the floor towards the front of the lorry, and it was not possible to fix it in any way. The plaintiff and two other firemen got into the back of the vehicle, the two other firemen holding the jack in position. On the journey to the scene of the accident, the driver of the lorry was forced suddenly to apply the brakes, which threw the plaintiff and the other two firemen in the back off their balance G and caused the end of the jack which was supported by the castor wheels to move forward, striking the plaintiff's ankle and causing him injury.

H. B. Grant for the plaintiff.

Viscount Hailsham, Q.C., and *Roland Brown* for the defendants.

H BARRY, J., stated the facts and continued: The principal question which I have to decide is whether the plaintiff has established that this accident was due to the negligence of his employers. It is conceded by counsel for the defendants that, if the peculiar considerations associated with the fire service were to be eliminated and the case treated as an ordinary one of master and servant in some commercial enterprise, the defendants would have failed to have taken reasonable care to secure the safety of their workman. It is unnecessary to say much as to this aspect. This lorry has a plain, flat floor with drop-down sides, and a tail-board about one foot, six inches deep. There is on the lorry

floor and on the side or tail-boards nothing to which any ropes or wires could be attached, and, in these circumstances, it seems impracticable to have lashed this heavy jack to the floor of the lorry in any effective manner. The jack being highly mobile—particularly at the end supported by the castors—any careful employer must have foreseen that, if the jack were carried on the back of the lorry and merely steadied by the hands of two men, there was very considerable danger of its shifting on some sudden movement of the lorry, such as a violent swerve or a violent application of the brakes, and, if it did shift, having regard to its weight, it would not be difficult to foresee that it was liable to cause considerable injury to anyone who happened to be on the lorry floor. Those matters are conceded, but I have to look at the special circumstances of the case.

The question which I have to answer is whether in the circumstances the defendants were negligent in requiring the plaintiff to travel on the floor of this lorry while this jack was being carried, unsupported by any platform and with its movement unchecked by any chocks on the floor or by any system of strapping or lashing. On the whole I have come to the conclusion that the plaintiff has failed to establish negligence on the part of his employers. As counsel for the defendants pointed out, and as counsel for the plaintiff conceded, an employer's obligations to his servants are not absolute obligations in the absence of some statutory requirement which may impose absolute obligations on him. The employer is bound to exercise reasonable care to avoid exposing those employed by him to unnecessary risks. As part of his duty it is also obvious that an employer must take reasonable care to provide his workmen with proper equipment for the work which they have to undertake. What is "reasonable", however, must depend on the circumstances and on the nature of the employment in which any particular servant may be engaged.

The plaintiff joined the fire service in 1939 and, in joining that service, it seems to me he voluntarily engaged himself in a type of employment which he knew involved very much greater risk than many other types of employment which he could have chosen. In fighting fires fire authorities are entitled to require their firemen to undertake, and their firemen gladly undertake, risks far greater than those which would be encountered in employments of a different kind. An employee is entitled to expect his employer to subject the scaffolding which he uses to minute scrutiny in order to ascertain that it is in every way safe for its purpose. Also he is entitled to require his employers to provide hand rails and other safety precautions which will reduce the risk of any accident to any man. Similar considerations do not apply to men engaged in fighting fires. It is inherent in their employment that they take risks in and about a building which a bricklayer or a builder's labourer would never be called on to undertake. In my judgment, someone in the plaintiff's position who joins the fire service must also be aware that, not only in actually fighting the fire, but in being transported to the place where the fire is taking place, he will be called on to take risks which other persons travelling in motor vehicles would not be required to undertake. The primary object of the whole service, of which the plaintiff, I am sure, is a most worthy member, is to save human life and property, and, to carry out those objects, speed is a most essential requirement.

I think counsel for the defendants is right when he says that no negligence has been established against Sub-officer Richards, or any of the other men who were working with the plaintiff at the fire station on the afternoon of this accident. Richards was faced with an emergency. I think that even vis-à-vis the plaintiff he was entitled to use his initiative and to do what he reasonably could to bring the necessary assistance to this injured woman in the shortest possible space of time. I think that in this emergency when there was a vehicle available he was entitled to use it even though he knew, or certainly ought to have known, that it was not ideally adapted for the use to which he proposed to put it. It has

been suggested by counsel for the plaintiff that he might have detailed one or two of the firemen to drag this jack to the scene of the accident by hand. I do not know whether Sub-officer Richards had any exact information as to the distance between the scene of the accident and the station, but, even if he had, it seems to me it would clearly take longer to drag a heavy implement of this kind along the street or along the pavement than it would to transport it by lorry. This suggestion was not put to Sub-officer Richards, and for all I know there may be other reasons why he decided to utilise the lorry. Speed being the essential element, it seems to me that he was justified in making that decision. If, in fact, this woman had died as a result of some delay in bringing necessary equipment to the scene of her accident, her death would have weighed very heavily on Sub-officer Richards' conscience, and I think the same would apply to any of the others engaged at the Watford station. It is very forcibly argued by counsel for the plaintiff that, even though Sub-officer Richards might be under a duty to this injured woman as a member of the public to bring aid to her as soon as possible, that does not mean that, vis-à-vis the plaintiff and the other members of the brigade, he was entitled to use this lorry and to answer this call. He submitted that the defendants were not entitled to disregard the safety of their servants in an effort to save other people's lives or property. Counsel for the defendants agreed—and everyone must agree—that fire authorities are not entitled to subject their employees to unnecessary risk. The question here is: Was this risk unnecessary? In my judgment, it was not. This risk was an ordinary incident of the hazardous employment of a fireman. I think, in all the circumstances, it was a necessary risk and that Sub-officer Richards was entitled to call on the plaintiff and on the remainder of the plaintiff's team to travel in this lorry although it was carrying this jack which was quite clearly inadequately secured. The distance was a short one. The jack was being held in place by two firemen and, as I said, Richards was entitled to call on his men to undertake such risk as was involved in that with the object of bringing assistance to this injured woman in the shortest possible time. It is not said that there was anything improper in the way in which this jack was loaded on the lorry. It was agreed it could hardly have been loaded in any other way. Two firemen held it, and it is not suggested that they did not do their best to hold it secure, but, unfortunately, they, like the plaintiff, were thrown off their balance when the lorry brakes were suddenly applied.

It is also necessary to consider whether, even in the absence of any negligence on the part of Sub-officer Richards and the other men employed at the Watford station, the defendants, as a fire authority, were in breach of their duty to the plaintiff. It is said that the defendants ought to have foreseen that the Austin towing vehicle, which was properly equipped for carrying this jack, might be engaged on other work when the emergency call requiring the use of a jack was received. In these circumstances it is said that some other vehicle at the station should have been so equipped as to enable it to carry a heavy jack of this kind in safety or, failing any other vehicle being equipped with means of carrying this jack, counsel for the plaintiff suggests that the lorry which was temporarily in use at the fire station should have been fitted with some temporary device, such as chocks or clips, to enable the jack to be adequately secured to its floor. I have the evidence of Mr. Bottin, who is an assistant chief officer in the London Fire Brigade and a gentleman with vast experience. He tells me that in the London stations there is normally only one vehicle equipped for the transport of a jack of this kind. If that vehicle is away from the station, or is for any other reason unavailable for an emergency call, other steps have to be taken, or the assistance of some other adjoining or neighbouring station sought. I have indicated that emergency calls of this kind requiring the transport of a jack are extremely rare and I do not think that I could properly find negligence on the part of the defendants in failing to equip, as, possibly, they could have equipped, their pump-

escape or their water tender with some clips or chocks for carrying the heavy lifting gear. Counsel for the defendants pointed out that examples of this kind can always be carried to absurd lengths. If two vehicles had been equipped for carrying this jack and both happened to be out of commission or unavailable, it could then be said that the fire authority was negligent in not having provided a third, and so on. I do not think that I can find negligence on the part of the defendants in having only one vehicle equipped for this purpose. In the ordinary course of events if that vehicle happened to be away from the station when an emergency call requiring the use of heavy lifting equipment arrived, as I have indicated, the normal course to take would be to invoke the assistance of some other station, but on this particular occasion an alternative course was open to Richards. There happened to be this lorry available, and he thought it right to use it in an endeavour to help this woman with the least possible delay. I think I would be doing a great disservice to the fire service as a whole if I were to hold that, in those circumstances the defendants were negligent or in breach of their duty to the members of the fire brigade.

I do not think that this is a case in which the defence of *volenti non fit injuria* has any real relevance. Counsel for the defendants preferred to put his case on the basis that the plaintiff had failed to prove, in the circumstances, any negligence on the part of his employers. I think that is how this case must be put and I think that the plaintiff has so failed.

I need hardly say that everyone must have the very greatest sympathy with the plaintiff in this disaster which has befallen him. I think it right to say, in the circumstances, that, in my considered opinion, this action was properly brought. I say that because I think, in the circumstances, it should not be held against the plaintiff that he has sought to make his employers liable for the injuries which he sustained. A difficult legal question arises and one which I think the plaintiff was perfectly entitled to have ventilated in the courts. In the circumstances I hope that his having done so will not prejudice his future employment with the defendants. However, I feel bound to say that his claim has failed and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Denis Hayes*, agent for *F. S. Ellis & Co.*, Watford (for the plaintiff); *Berrymans* (for the defendants).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

FOUAD BISHARA JABBOUR AND ANOTHER v. CUSTODIAN
OF ABSENTEE'S PROPERTY OF STATE OF ISRAEL.

[QUEEN'S BENCH DIVISION (Pearson, J.), October 19, 20, 21, 22, 23, 26,
November 27, 1953.]

- A *Conflict of Laws—Insurance—Fire and riot—Nature of claim under policy—
Situation of chose in action—Policy issued in Palestine by sub-agents of
English company—Company ceasing to accept business in Palestine—
Alteration of title to chose in action—Proper law of policy.*

In 1929 Y. Co., an insurance company having its head office in England,
constituted M., Ltd., their agents in Palestine under a power of attorney,

- B giving M., Ltd., wide powers to carry on the business of Y. Co. in Palestine
and to contract and to issue, within certain limits, new policies without
reference to the company in London. Under an insurance policy taken
out in 1947 and issued in Palestine by the Haifa agency, who were sub-
agents of Y. Co. properly appointed by M., Ltd., Y. Co. agreed to indemnify
the plaintiffs against loss or damage caused through fire or riot up to £P.6,000

- C in respect of a garage and its contents owned by the plaintiffs and situated
in Haifa, Palestine (later the State of Israel). On Jan. 18, 1948, the
plaintiffs' premises were mined and blown up, and on Mar. 26, 1948, the
plaintiffs left Haifa for Egypt and thereafter resided there. On Dec. 31,
1949, Y. Co. ceased to accept new business in Israel. Y. Co. admitted
liability under the policy, but claimed that by virtue of Israeli emergency
regulations of December, 1948, concerning the property of absentees, and

- D by virtue of the Israeli Absentees' Property Law, which came into force
on Mar. 31, 1950, the sum due had vested in the Custodian of Absentee
Property of the State of Israel. On Nov. 17, 1950, the plaintiffs issued a
writ against Y. Co., who paid into court the sum due under the policy.
By an interpleader order of Jan. 11, 1952, the insured were made plaintiffs
and the Custodian the defendant. On trial of the issue,

- E **HELD:** (i) the plaintiffs' claim against Y. Co. was for unliquidated
damages, and constituted a chose in action which was situated where the
damages were recoverable, i.e., where Y. Co. resided.

(ii) on the facts, having regard especially to the authority of the Haifa
agency to enter into contracts on behalf of Y. Co. without submitting
them to Y. Co. for approval, Y. Co. had a residence in Haifa up to Dec. 31,

- F 1949; Y. Co. resided in more than one country, but, on the terms of the
policy and in view of the surrounding facts, the amount recoverable was
primarily payable in Palestine; and, therefore, up to Dec. 31, 1949, the
chose in action was situated in Palestine.

- G (iii) the proper law of the policy was *lex loci contractus* or *lex loci solu-*
tionis, i.e., the law of the Mandated Territory of Palestine up to the date
of the termination of the mandate, and, thereafter, the law of Israel.

Re Chesterman's Trusts ([1923] 2 Ch. 466) and *Banco de Bilbao v. Sancha*,
Banco de Bilbao v. Rey ([1938] 2 All E.R. 253), considered.

(iv) it was proper, with the approval of both parties, for the court to
construe the Israeli regulations of 1948 and the Law of 1950 without
expert evidence being given; the Israeli rules of construction would be

- H assumed to be the same as the English rules; on construction, the
chose in action consisting of the plaintiffs' claim was movable property
within the terms of the regulations and became vested in the Custodian
thereunder, and it remained vested in the Custodian under the Law of
1950; and, therefore, the Custodian was entitled to the money due under
the policy.

Re Cohn ([1945] Ch. 5), applied.

Cases referred to :

- (1) *McQuaker v. Goddard*, [1940] 1 All E.R. 471 ; [1940] 1 K.B. 687; 109 L.J.K.B. 673; 162 L.T. 232; 2nd Digest Supp.
- (2) *Grant v. Royal Exchange Assurance Co.*, (1816), 5 M. & S. 439; 105 E.R. 1111; 40 Digest 379, 107.
- (3) *Hardcastle v. Netherwood*, (1821), 5 B. & Ald. 93; 106 E.R. 1127; 6 Digest 329, 2181.
- (4) *Castelli v. Boddington*, (1852), 1 E. & B. 66; 22 L.J.Q.B. 5; 20 L.T.O.S. 64; 118 E.R. 361; *affd.* Ex.Ch. *sub nom.* *Boddington v. Castelli*, (1853), 1 E. & B. 879; 118 E.R. 665; 40 Digest 380, 112. A
- (5) *Luckie v. Bushby*, (1853), 13 C.B. 864; 22 L.J.C.P. 220; 21 L.T.O.S. 186; 138 E.R. 1443; 29 Digest 76, 353.
- (6) *Lloyd v. Fleming*, *Lloyd v. Spence*, (1872), L.R. 7 Q.B. 299; 41 L.J.Q.B. 93; *sub nom.* *Loyd v. Fleming*, *Loyd v. Spence*, 25 L.T. 824; 29 Digest 91, 488. B
- (7) *Pellas v. Neptune Marine Insurance Co.*, (1879), 5 C.P.D. 34; 49 L.J.Q.B. 153; 42 L.T. 35; 40 Digest 415, 368.
- (8) *Swan & Cleland's Graving Dock & Slipway Co. v. Maritime Insurance Co. & Croshaw*, [1907] 1 K.B. 116; 76 L.J.K.B. 160; 96 L.T. 839; 41 Digest 177, 177. C
- (9) *Baker v. Adam*, (1910), 102 L.T. 248; 15 Com. Cas. 227; 40 Digest 388, 188.
- (10) *Pickersgill (William) & Sons, Ltd. v. London & Provincial Marine & General Insurance Co., Ltd.*, [1912] 3 K.B. 614; 82 L.J.K.B. 130; 107 L.T. 305; 29 Digest 91, 490.
- (11) *Randall v. Lithgow*, (1884), 12 Q.B.D. 525; 53 L.J.Q.B. 518; 50 L.T. 587; 21 Digest 626, 2120. D
- (12) *Israelson v. Dawson*, [1933] 1 K.B. 301; 102 L.J.K.B. 387; 148 L.T. 420 ; Digest Supp.
- (13) *Green v. Brand*, (1884), Cab. & El. 410; 1 T.L.R. 79; 25 Digest 155, 56.
- (14) *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q.B. 700; 62 L.J.Q.B. 136; 67 L.T. 406; 10 Digest 758, 4738. E
- (15) *Bank of Toronto v. St. Lawrence Fire Insurance Co.*, [1903] A.C. 59; 72 L.J.P.C. 14; 87 L.T. 462.
- (16) *A.S. Tallina v. Estonian State Steamship Line*, (1949), 80 Lloyd's Rep. 99.
- (17) *Stamps Comr. v. Hope*, [1891] A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268; 12 Digest, Replacement, 581, 4481. F
- (18) *Re Maudslay, Sons & Field*, [1900] 1 Ch. 602; 69 L.J.Ch. 347; 82 L.T. 378; 11 Digest, Replacement, 379, 424.
- (19) *R. v. Lovitt*, [1912] A.C. 212; 81 L.J.P.C. 140; 105 L.T. 650; 8 Digest 423, 25.
- (20) *Favorke v. Steinkopff*, [1922] 1 Ch. 174; *sub nom.* *Re Steinkopff*, 91 L.J.Ch. 165; 126 L.T. 597; Digest Supp. G
- (21) *Swiss Bank Corpn. v. Boehmische Industriale Bank*, [1923] 1 K.B. 673; 92 L.J.K.B. 600; 128 L.T. 809; 21 Digest 637, 2170.
- (22) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; Digest Supp.
- (23) *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd*, [1926] 1 K.B. 1; 95 L.J.K.B. 7; 133 L.T. 808; *affd.* H.L., 136 L.T. 72; *sub nom.* *Employers' Liability Assurance Corpn. v. Sedgwick Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; Digest Supp. H
- (24) *English, Scottish & Australian Bank, Ltd. v. Inland Revenue Comrs.*, [1932] A.C. 238; 101 L.J.K.B. 193; 146 L.T. 330; Digest Supp.
- (25) *Sutherland v. German Property Administrator*, [1934] 1 K.B. 423; 103 L.J.K.B. 244; 150 L.T. 247; Digest Supp.

- (26) *Re Banque des Marchands de Moscou (Koupetschesky)*, [1952] 1 All E.R. 1269; 3rd Digest Supp.
- (27) *Saccharin Corp., Ltd. v. Chemische Fabrik von Heyden Akt.*, [1911] 2 K.B. 516; 80 L.J.K.B. 1117; 104 L.T. 886; 13 Digest 430, 1534.
- (28) *Okura & Co., Ltd. v. Forsbacka Jernverks Akt.*, [1914] 1 K.B. 715; 83 L.J.K.B. 561; 110 L.T. 464; 13 Digest 430, 1536.
- A (29) *Thames & Mersey Marine Insurance Co. v. Societa di Navigazione A Vapore Del Lloyd Austria Co.*, (1914), 111 L.T. 97; 13 Digest 430, 1531.
- (30) *Concha v. Murrieta, De Mora v. Concha*, (1889), 40 Ch.D. 543; 60 L.T. 798; *varied, on another point, H.L., sub nom. Concha v. Concha*, [1892] A.C. 670; 6 Digest 436, 2812.
- B (31) *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630; 92 L.J.K.B. 1053; 129 L.T. 706; *on appeal H.L.*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 21 Digest 137, 10.
- (32) *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; Digest Supp.
- (33) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; Digest Supp.
- C (34) *De Beeche v. South American Stores, Ltd., & Chilian Stores, Ltd.*, [1935] A.C. 148; 104 L.J.K.B. 101; 152 L.T. 309; Digest Supp.
- (35) *Re Cohn*, [1945] Ch. 5; 114 L.J.Ch. 97; 171 L.T. 377; 2nd Digest Supp.
- D (36) *Bank Voor Handel en Scheepvaart N.V. v. Slatford*, [1951] 2 All E.R. 779; [1953] 1 Q.B. 248; 3rd Digest Supp.
- (37) *A.-G. v. Campbell*, (1872), L.R. 5 H.L. 524; 41 L.J.Ch. 611; 21 Digest 99, 719.
- (38) *Colquhoun v. Brooks*, (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 2 Tax Cas. 490; 28 Digest 79, 433.
- (39) *R. v. Jameson*, [1896] 2 Q.B. 425; 65 L.J.M.C. 218; 75 L.T. 77; 60 J.P. 662; 42 Digest 688, 1035.
- E (40) *Tomalin v. Pearson (S.) & Son, Ltd.*, [1909] 2 K.B. 61; 78 L.J.K.B. 863; 100 L.T. 685; 2 B.W.C.C. 1; 34 Digest 258, 2208.
- (41) *Potter v. Brown*, (1804), 5 East, 124; 102 E.R. 1016; 4 Digest 597, 5452.
- (42) *Ellis v. M'Henry*, (1871), L.R. 6 C.P. 228; 40 L.J.C.P. 109; 23 L.T. 861; 11 Digest, Replacement, 447, 861.
- F (43) *Burrows v. Jemino*, (1726), 2 Stra. 733 (93 E.R. 815); Mos. 1 (25 E.R. 235); Dick 48 (21 E.R. 185); 2 Eq. Cas. Abr. 524, pl. 7 (22 E.R. 443); 6 Digest 435, 2802.
- (44) *Ballantine v. Golding*, (1784), 1 Cooke's Bankrupt Laws, 8th ed., p. 487; 4 Digest 595, 5435.
- G (45) *Odrwin v. Forbes*, (1817), Buck, 57; 4 Digest 594, 5429.
- (46) *Quelin v. Moisson*, (1828), 1 Knapp, 265; 12 E.R. 320; 5 Digest 1006, 8208.
- (47) *Gardiner v. Houghton*, (1862), 2 B. & S. 743; 121 E.R. 1247; 4 Digest 596, 5448.
- (48) *Phillips v. Eyre*, (1870), L.R. 6 Q.B. 1; 40 L.J.Q.B. 28; 22 L.T. 869; 11 Digest, Replacement, 449, 880.
- H (49) *Lloyd v. Guibert*, (1865), L.R. 1 Q.B. 115; 35 L.J.Q.B. 74; 13 L.T. 602; 11 Digest, Replacement, 422, 722.
- (50) *Perry v. Equitable Life Assurance Society of U.S.A.*, (1929), 45 T.L.R. 468; Digest Supp.
- (51) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; [1937] A.C. 500; 106 L.J.K.B. 236; 156 L.T. 352; Digest Supp.

- (52) *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621; [1950] A.C. 24; [1949] L.J.R. 1687; 2nd Digest Supp.
- (53) *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202; 111 L.J.K.B. 327; 167 L.T. 363; 2nd Digest Supp.
- (54) *Lecouturier v. Rey*, [1910] A.C. 262; 79 L.J.Ch. 394; 102 L.T. 293; 11 Digest, Replacement, 386, 467.
- (55) *Re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp. A
- (56) *The El Condado*, (1939), 63 Lloyd's Rep. 83, 330.
- (57) *A.G. Der Manufacturen I.A. Woronin Leutschig and Cheshire v. Frederick Hutts & Co.*, (1928), 79 Lloyd's Rep. 262.
- (58) *Re Fried Krupp Act.*, [1917] 2 Ch. 188; 86 L.J.Ch. 689; 117 L.T. 21; 11 Digest, Replacement, 448, 866.
- (59) *Re Chesterman's Trusts*, [1923] 2 Ch. 466; 17 Digest 161, 618. B
- (60) *Banco de Bilbao v. Sancha, Banco de Bilbao v. Rey*, [1938] 2 All E.R. 253; [1938] 2 K.B. 176; 107 L.J.K.B. 681; 159 L.T. 369; Digest Supp.
- (61) *Re Munster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; 28 Digest 95, 1914.
- (62) *Re Hoyles*, [1911] 1 Ch. 179; 80 L.J.Ch. 274; 103 L.T. 817; 11 Digest, Replacement, 364, 327. C
- (63) *R. v. James*, [1902] 1 K.B. 540; 71 L.J.K.B. 211; 86 L.T. 202; 66 J.P. 217; 42 Digest 733, 1560.
- (64) *R. v. Oliver*, [1943] 2 All E.R. 800; [1944] K.B. 68; 113 L.J.K.B. 119; 170 L.T. 110; 108 J.P. 30; 2nd Digest Supp.

INTERPLEADER ISSUE.

On Nov. 21, 1947, the Yorkshire Insurance Co., Ltd., issued at their "Haifa agency" a policy of insurance which covered a garage and its contents belonging to the plaintiffs at 130 Jaffa Road, Haifa, against damage or loss caused by fire and riot up to £P.6,000. The policy was on the ordinary fire policy form of the insurance company with certain additions, suitable for use in Great Britain and elsewhere. On Jan. 18, 1948, the plaintiffs' garage and workshops were mined and blown up, and the contents to which the policy related were destroyed. On Mar. 26, 1948, the plaintiffs left Haifa for Egypt and thereafter resided and carried on business in Cairo. After some correspondence between the plaintiffs' solicitors and the insurance company, the company eventually admitted liability under the policy for £5,039 4s., but contended that they were unable to pay the money to the plaintiffs except in Israeli currency and were bound to pay it to the Custodian of Absentee's Property of the State of Israel by virtue of Israeli emergency regulations of December, 1948, concerning the properties of absentees, and the Absentee Property Law of Israel which came into force on Mar. 31, 1950. The plaintiffs insisted that the company should withhold payment until the situation had been clarified and that on no account should payment be made in Haifa. On Nov. 17, 1950, the plaintiffs issued a writ against the company, and by an interpleader order made on Jan. 11, 1952, the insured were constituted as plaintiffs in the issue and the Custodian of Absentee's Property of the State of Israel as defendant. The sum paid into court by the company, after deduction of its costs, amounted to £4,962 19s. 9d. D

For the purpose of determining the effect of the Israeli Law and regulations, HIS LORDSHIP stated in detail the position of the company with regard to their agents in Israel. On Nov. 12, 1929, the company gave a power of attorney (which remained in force at all material times) to Messrs. Mulford & Co. of Jerusalem, Palestine. By that power of attorney the company constituted Messrs. Mulford & Co. E

"to be the true and lawful attorneys of the company in Jerusalem, Palestine, for and in the name and on behalf of the said company and for F

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the several intents and purposes following, that is to say, carry on, conduct and manage the business of the fire, marine and all classes of accident, including workmen's compensation, insurance, in Palestine, and Trans-jordania, upon such conditions and at such rates of annual or other premiums and according to such regulations and directions in all respects as shall for the time being be prescribed and directed by the official letters of instruction now or from time to time hereafter to be sent to the said attorneys signed by the general manager for the time being or other official duly appointed by the board of directors of the said company."

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Messrs. Mulford & Co. were also given power

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"to receive and collect moneys payable for premiums and otherwise, to sue for sums due, to adjust, settle questions and claims upon policies and to give receipts for them, to compound in respect of debts or sums of money, claims or demands, to effect, sign and execute all such policies of insurance issued on behalf of the said company as to the said attorneys shall seem meet such policies being always according to the forms provided by the said company, and from time to time to appoint a substitute or substitutes for all or any of the purposes aforesaid."

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By virtue of the power of substitution, Messrs. Mulford & Co. ("Mulford's") appointed sub-agents with whom the insurance company had no direct contact. One of the sub-agents was called "Near East Insurance Offices" which His LORDSHIP found was the "Haifa agency" at which the policy in question had been issued. Mulford's had authority by themselves and their sub-agents to give interim cover and to renew policies and within certain limitations to issue new policies of the insurance company without referring the matter to the company in London. Payment was normally made in the place where the issuing sub-agent transacted his business. It was proved in evidence that up to certain amounts and for certain risks Mulford's had power to transact business on the company's behalf as if the company was actually present in Palestine. The company had assets in Palestine and a deposit was held in

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Barclays Bank, London, to the order of the Accountant-General of the Palestine government. It was also proved that Mulford's carried on business at addresses in Jerusalem and Haifa which were now part of the State of Israel. After Dec. 31, 1949, the company ceased to accept new business in the State of Israel and after that date Mulford's continued to act as agents for settling old claims and generally for the purpose of winding-up the company's business in Israel. There was no evidence to prove whether or not after Dec. 31, 1949, Mulford's had authority to conclude settlements of claims without referring them to the company. On behalf of the company it was admitted that the policy was effective in a part of Palestine which became part of the State of Israel, and was issued by a branch or agents of the company in Palestine, later Israel.

E

The survey report of the damage to the plaintiffs' property was forwarded to the company in England and correspondence as to payment of the money claimed under the policy was conducted by the plaintiffs (from Egypt) with the company's head office in London, and the company finally admitted liability in the sum of £5,039 4s. On behalf of the plaintiffs it was contended that the defendant, the Custodian, falsely claimed that the sum due under the policy was money payable to him. On behalf of the defendant it was contended that the local situation of any debt payable by the insurers under the policy was in Israel and that by virtue of the Israeli regulations of 1948 and the Law of 1950 the sum in question had vested in the defendant and that it would be illegal for the company to pay it to anyone but the defendant as the plaintiffs were resident in Egypt and "absentees" within the meaning of the regulations.

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H

His LORDSHIP decided that the burden of proof lay on the defendant and also held that the strained relations between Israel and the Arab States at the

appropriate times could be judicially noticed, although evidence would be required, if necessary, to establish the dates of the commencement and cessation of hostilities between Israel and the Arab States and their exact legal and diplomatic relationship. HIS LORDSHIP referred to *McQuaker v. Goddard* (1).

Megaw, Q.C., and *I. C. Baillieu* for the plaintiffs.

Leonard Caplan for the defendant.

Cur. adv. vult. A

Nov. 27. **PEARSON, J.**, read a judgment in which he stated the facts and continued: As questions will arise under the regulations and the Law whether the plaintiffs' claim against the insurance company, which, according to the defendant's contention, became vested in him, was "property" within the meaning of the relevant provisions, and whether it was a "mere right to claim damages", it is necessary to consider the legal nature of the claim and what, if any, situation it had at the material times. B

It is established by many decided cases that such a claim as this is a claim for unliquidated damages: *Grant v. Royal Exchange Assurance Co.* (2); *Hardcastle v. Netherwood* (3); *Castelli v. Boddington* (4) (assumption on a valued policy of marine insurance; averment of partial loss by perils of the sea; breach; non-payment thereof.); *Luckie v. Bushby* (5); *Lloyd v. Fleming*, *Lloyd v. Spence* (6); *Pellas v. Neptune Marine Insurance Co.* (7); *Swan & Cleland's Graving Dock & Slipway Co. v. Maritime Insurance Co. & Croshaw* (8); *Baker v. Adam* (9); *William Pickersgill & Sons, Ltd. v. London & Provincial Marine & General Insurance Co., Ltd.* (10). Such a claim is unliquidated because the plaintiff has to prove the amount, and even after an adjustment of the amount the plaintiff (unless he chooses to sue on an account stated) must still prove the amount, using the adjustment as evidence because it involves an admission by the insurer, but such evidence might be rebutted, for instance, by proof of a mistake: *Luckie v. Bushby* (5). But the word "damages" is puzzling and seems to be used in a rather unusual sense, because the right to indemnity arises, not by reason of any wrongful act or omission on the part of the insurer (who did not promise that the loss would not happen or that he would prevent it) but only under his promise to indemnify the insured in the event of a loss. The usual meaning of the word "damages" is as stated in **HALSBURY'S LAWS OF ENGLAND**, Hailsham ed., vol. 10, p. 82, para. 100, where it is said: C D

"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him." E F

On the other hand, there is an interesting footnote on p. 1 of **MAYNE ON DAMAGES**, 11th ed. The first sentence of the text is: G

"Damages are the pecuniary satisfaction obtainable by success in an action."

The footnote is:

"MAYNE's definition was intentionally wide to bring within the scope of his work actions for the price of goods, amounts payable under policies of insurance, dividends in bankruptcy and other cases where money is recovered otherwise than as compensation for a wrong. Lawyers generally distinguish, however, between debt and damages. Where under a contract, instrument or statute a person is entitled to a sum certain, either ascertained or capable of being ascertained, the sum constitutes a debt and can be recovered as such; but failure to pay a debt when due is a wrong and an action may be framed either for the debt or for damages." H

The explanation of the use of the expression "unliquidated damages" to describe a claim for an indemnity under an insurance policy may be wholly or partly afforded by the old form of pleading in assumpsit, alleging a breach by non-payment, as in *Castelli v. Boddington* (4). But, as the only wrong admitted by the insurer is his failure to pay a sum due under a contract, the amount of which has to be ascertained, he seems to be in much the same position as the person who owes and has failed to pay a reasonable price for goods sold and delivered or a reasonable remuneration for work done or services rendered. The claim is for unliquidated damages, but the word "damages" is used in a somewhat unusual sense.

The claim for indemnity under an insurance policy after a loss has occurred is not a proper subject for a garnishee order: *Randall v. Lithgow* (11); *Israelson v. Dawson* (12), where SCRUTTON, L.J., said ([1933] 1 K.B. 304):

"I have come to the conclusion that as between assured and underwriter there is no debt. There may be a breach of contract or an obligation to indemnify, but there is nothing which can be called a debt or an indebtedness within the meaning of Ord. 45, r. 1."

But such a claim for indemnity is a chose in action which can be assigned: *Lloyd v. Fleming* (6) and *Swan's* case (8); *Green v. Brand* (13); *English & Scottish Mercantile Investment Co. v. Brunton* (14); *Bank of Toronto v. St. Lawrence Fire Insurance Co.* (15); *A.S. Tallina v. Estonian State Steamship Line* (16); HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 18, p. 495, note (g).

Reference was made to condition No. 14 of the policy, giving the insurance company an option to reinstate, and to condition No. 11, requiring the insured to give due notice of his claim with proper particulars, and afterwards to give all such further particulars and documents and information as might be reasonably required by or on behalf of the insurance company, and, providing that

"no claim under this policy shall be possible unless the terms of this condition have been complied with."

But the correspondence in this case from July 7, 1948, to Dec. 22, 1949, shows (i) that the insurance company never suggested that they wished to exercise their option to reinstate the property, and they impliedly elected not to do so; (ii) that the plaintiffs reported the loss to the insurance company's Haifa agent on the day of the loss, and a survey report was prepared after their expert had visited the site and was forwarded to head office in England, and the insurance company never asked for any further particulars or documents or information, and the amount of the indemnity was agreed between the plaintiffs and the insurance company by letters of Mar. 29, Oct. 18, and Nov. 11, 1949. Under condition No. 11 the right to be indemnified by a payment of money must accrue at some time and, in my judgment, it had accrued at any rate by Nov. 11, 1949, if not by some earlier date.

Next to be considered is the situation of the chose in action. It is established by the decided cases that not only debts, but also other choses in action, are for legal purposes localised and are situated where they are properly recoverable and are properly recoverable where the debtor resides: *Stamps Comr. v. Hope* (17) ([1891] A.C. 481, 482); *Re Maudslay, Sons & Field* (18) ([1900] 1 Ch. 609); *R. v. Lovitt* (19) ([1912] A.C. 218, 219); *Favorke v. Steinkopff* (20) ([1922] 1 Ch. 178); *Swiss Bank Corp'n. v. Boehmische Industriale Bank* (21) ([1923] 1 K.B. 678, et seq.); *New York Life Insurance Co. v. Public Trustee* (22); *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd* (23) ([1926] 1 K.B. 15); *England, Scottish & Australian Bank, Ltd. v. Inland Revenue Comrs.* (24) ([1932] A.C. 243, et seq.); *Sutherland v. German Property Administrator* (25) (where the claim was against English shipowners for damages for breach of contract

or in tort, and it was held to be a chose in action situated in England); the *Tallina* case (16) (where the claim was for payment under an English policy of marine insurance and was considered to be a chose in action situated in England); *Re Banque des Marchands de Moscou (Koupetschesky)* (26).

A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval: *Saccharin Corpn., Ltd. v. Chemische Fabrik von Heyden Akt.* (27) ([1911] 2 K.B. 522, et seq.); *Okura & Co., Ltd. v. Forsbacka Jernverks Akt.* (28) ([1914] 1 K.B. 724); *Thames & Mersey Marine Insurance Co. v. Societa di Navigazione A Vapore Del Lloyd Austria Co.* (29). On the facts set out above I hold that the insurance company is proved to have had a residence in Haifa up to Dec. 31, 1949, but is not proved either to have had or not to have had a residence there after that date.

Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and, therefore, situated, in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid by an express or implied provision of the contract, or, if there is no such provision, where it would be paid according to the ordinary course of business: *R. v. Lovitt* (19); *New York Life Insurance Co. v. Public Trustee* (22). On the evidence in this case, the insurance policy was issued in Palestine at the Haifa agency and was in respect of property situated in Haifa. There was an option for the insurance company to reinstate the property and the sum to be paid was not to exceed a sum stated in Palestine currency, and any claim under such a policy would, according to the insurance company's ordinary course of business, have been settled by a payment at the Haifa agency. When all these facts are taken into account, it may be that there should be read into the policy an implied term that payment should be made in Palestine currency as currency and, therefore, in Palestine, being the only country in which that currency is legal tender. If there is no such term of the policy, still the natural and primary place of payment according to the ordinary course of business and the inferred expectations of the parties when the policy was issued is Haifa. I hold that the chose in action was properly recoverable, and, therefore, situated in Haifa up to Dec. 31, 1949, but its situation after that date is uncertain.

The defendant relies on the regulations of December, 1948, and the Law of March, 1950. The defendant's notice to admit facts, dated Oct. 3, 1952, set out *inter alia*, the following facts:

"(1) That the document entitled the Law and Administration Ordinance 5708-1948 Emergency Regulations Concerning Properties of Absentees, attached to this notice with annexed copy certificate by Haim Herman Cohn, then Attorney-General of Israel, and dated Oct. 18, 1950, is a true and accurate translation from the Hebrew language of a law passed by the competent legislative authority of Israel. (2) That the said law was a valid and effectual part of the law of Israel from Dec. 2, 1948, until Mar. 31, 1950. (3) That the document entitled the Absentees' Property Law 5710-1950, attached to this notice with annexed copy certificate by Haim Herman Cohn, then Attorney-General of Israel, and dated Dec. 13, 1950, is a true and accurate translation from the Hebrew language, of a law passed by the competent legislative authority of Israel. (4) That the said law is and has been a valid effectual part of the law of Israel since Mar. 31, 1950."

It was assumed and expressly or impliedly agreed by counsel for both parties at the hearing, and should be taken as established, that all the facts Nos. 1 to 4

are admitted, and, therefore, that the regulations were a valid and effectual part of the law of Israel from Dec. 2, 1948, to Mar. 31, 1950, and that the Law has been a valid and effectual part of the law of Israel since Mar. 31, 1950, and that the translations supplied are true and accurate.

A No witness was called to give expert evidence of Israeli law. The plaintiffs' counsel did not raise any objection on that ground, or contend that the defendant necessarily failed to prove his case by reason only of no such witness having been called. When I asked what the position was in that respect, I understood that both counsel on behalf of the parties desired that the regulations and the Law should be construed and applied without expert assistance, and it was their view or submission that that course could properly be taken. I have thought it right to verify that by reference to the authorities, and for that purpose have considered the following: *Concha v. Murrieta, De Mora v. Concha* (30) (40 Ch.D. 550, 551, 554); *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse* (31) ([1923] 2 K.B. 643); *Princess Paley Olga v. Weisz* (32); *Lazard Bros. & Co. v. Midland Bank, Ltd.* (33) ([1933] A.C. 298); *De Beeche v. South American Stores, Ltd. & Chilean Stores, Ltd.* (34) ([1935] A.C. 158, 159); *Re Cohn* (35); the *Tallina* case (16) (80 Lloyd's Rep. 107, 113, 116), and DICEY'S *CONFLICT OF LAWS*, 6th ed., at pp. 73 and 868.

C I think that it appears from the reports of *Re Cohn* (35) that in that case UTHWATT, J., construed and applied a provision of the German Code without having had any oral evidence of German law, and if that is so it affords a precedent for this case. Also there is a passage at p. 868 of DICEY'S *CONFLICT OF LAWS*, where it is said:

D "How far can judges examine foreign laws for themselves? On this point it is impossible to lay down any absolute rule, the courts wisely having avoided any pronouncement which might unduly fetter their discretion. They recognise as obvious the impossibility in normal cases of judges forming any useful opinion on foreign law except on the basis of expert evidence, but by a prudent exercise of common sense they have shown themselves

E willing to waive proof by experts where such is manifestly unnecessary, as, for instance, on points which must be formally proved, but need really no expert testimony, which may be costly or difficult to procure."

In the circumstances I think it right in accordance with the wishes of the parties to face the task of construing and applying the regulations and the Law without the assistance of an expert in Israeli law and subject also to the disadvantage that the documents which I have to construe and apply are translations from the original Hebrew text. I did not feel entitled or qualified to look through volumes of Palestine or Israeli ordinances or statutes or law reports as they were not in evidence and I would not know which of the ordinances or statutes were still in force or which of the reported decisions were still good law at any material time. It must be assumed that the Israeli rules

G of construction are the same as the English rules of construction.

[His LORDSHIP then considered the construction of the emergency regulations of 1948 and of the Law of 1950. He held that the chose in action was movable property within the terms of the regulations and was expressly vested in the Custodian by the regulations. The Law of 1950 replaced the emergency regulations, but the Law was to be read as one with the regulations, which were to

H be deemed to be a law amended by the Law of 1950. The chose in action was "property" within the Law of 1950, and the vesting in the Custodian was not disturbed by the said Law. In general, the Law of 1950 did not (subject to some possible exceptions) apply to property situate outside Israel: *MAXWELL ON INTERPRETATION OF STATUTES*, 10th ed., p. 144; *Bank Voor Handel en Scheepvaart N.V. v. Slatford* (36); *A.-G. v. Campbell* (37); *Colquhoun v. Brooks* (38); *R. v. Jameson* (39); *Tomalin v. S. Pearson & Son, Ltd.* (40); but it was not proved that the chose in action ceased to be situated in Israel by Mar. 31, 1950, or

at any time. The removal of personal property to another country after vesting in the State did not cause it to cease to be so vested: *Princess Paley Olga v. Weisz* (32). HIS LORDSHIP continued:] I hold, therefore, that the defendant succeeds in this issue, because the chose in action became vested in the defendant under the regulations of 1948 and remained vested in the defendant under the Law of 1950.

It is right, however, to say something about a contention of counsel for the defendant, to which much argument was directed on both sides, because, if his contention is correct, the case should be decided in his favour on a different ground. He contended that the law by which a debt or chose in action can properly be affected (whether by discharge or modification or transfer of the right) is the proper law of the contract rather than the *lex situs*. Counsel for the plaintiffs contended, *inter alia*, that the only law by which a debt or chose in action can properly be so affected is the *lex situs*. The problem arises because a debt or chose in action can be regarded in two ways: (i) it can be regarded properly as movable property, and when so regarded it naturally falls under the *lex situs*; (ii) it can be regarded as a still unperformed obligation under a contract, and, therefore, it might be still subject to the proper law of the contract and liable to be discharged or altered by that law. A legislative provision that a debt or a chose in action owing to A shall be discharged by payment to B could be regarded either as involving a transfer of the ownership of the property from A to B, or as an alteration of the contractual obligation by substituting B for A and as the obligee.

I am inclined to think that there is a short answer to the contention of counsel for the defendant in this case. The Israeli Law of 1950 is, on the face of it, a law dealing with property and not with contract, and, therefore, it should be construed as applying only within those territorial limits which are appropriate to property legislation. Accordingly, an initial vesting under that Law could only be of a property situated in Israel, and if counsel for the defendant had to show that this chose in action was caught *de novo* by the Law of 1950, he would fail to do so for want of proof that the chose in action was situated in Israel at or after the time when the Law came into force.

I have, however, considered more generally the authorities relied on by counsel for both sides in support of their respective contentions. I will take first the principal authorities on the defendant's side. In the early cases to which he referred either no distinction or no clear distinction was drawn between the proper law and the *lex situs*, the distinction being avoided by the use of such phrases as "a debt or liability arising in any country". On this point, the beginning of the judgment of LORD ELLENBOROUGH, C.J., in *Potter v. Brown* (41) should be compared with the latter part of his judgment, and with the judgment of LAWRENCE, J., in the same case. In *Ellis v. M'Henry* (42) the judgment of the court, which comprised BOVILL, C.J., WILLES, KEATING, and BRETT, JJ., was delivered by BOVILL, C.J., who said (L.R. 6 C.P. 234), referring to certain previous authorities:

"In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by LORD KING, in *Burrows v. Jemino* (43); by LORD MANSFIELD in *Ballantine v. Golding* (44); by LORD ELLENBOROUGH in *Potter v. Brown* (41); by the Privy Council, in *Odwin v. Forbes* (45), and in *Quelin v. Moisson* (46); and by the Court of Queen's Bench in the case of *Gardiner v. Houghton* (47);

and by the Court of Exchequer Chamber in the elaborate judgment delivered by my brother WILLES, in *Phillips v. Eyre* (48)."

But he also said (*ibid.*, 237):

A "There are nice distinctions which may sometimes arise where, though a contract is made in one country, it is to be performed or to take effect in another; or is made under circumstances which show that it is intended to be subject to some law other than that of the place in which it was made; *Lloyd v. Guibert* (49). But no such point arises in these cases, as the contracts out of which these debts arose were both made and to be performed in Upper Canada."

B In *Perry v. Equitable Life Assurance Society of U.S.A.* (50), the plaintiff had, in May, 1903, taken out a twenty-years endowment life assurance policy for ten thousand roubles, which were payable at the defendants' office in St. Petersburg, and the terms of an Imperial Decree provided that all disputes which might arise in connection with the assurance operations carried on by the defendants in Russia should be settled according to the Russian laws and in the Russian courts of justice. On Nov. 18, 1919, the Soviet government issued a Decree of Cancellation of which the material provisions were (45 T.L.R. 470):

C "(1) Life assurance in all its forms in the R.S.F.S.R. shall be abolished. (2) All contracts entered into with insurance companies and savings banks for the purpose of life insurance are annulled. (3) All insurance premiums shall be transferred to the revenue of the Treasury."

BRANSON, J., said (*ibid.*):

D "The first question is what is the proper law of the contract. In my opinion there is no doubt about the answer. The proper law of the contract is the law of Russia. This appears plainly from condition 7 . . . The proper law of the contract being Russian, the next question, which is one of fact, to be decided upon the evidence, is what has been the effect of the Soviet legislation upon the contract."

E After considering the evidence as to Russian law, he said (*ibid.*, 473):

F "Upon these grounds I accept the evidence as to Russian law of Professor Sack and Mr. Konkievitch, and find, in accordance with it, that the contract between the plaintiff and the defendants was annulled by the Cancellation Decree, if, indeed, there was any contractual nexus left in existence between them after the Monopolisation Decree came into force in December, 1918, and the plaintiff cannot recover upon it."

G That is a clear decision that a contract can be annulled, the contractual nexus between the parties can be dissolved, by legislation of the country whose law is the proper law of the contract. It is to be observed, however, that as no payment would have become due under the policy before 1923, and the contract was annulled in 1919, if not earlier, no chose in action had arisen, so there was nothing to which any *lex situs* could apply.

In *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (51) the headnote reads:

H "In 1917 the British government made an offer in New York of 5½ per cent. secured loan convertible gold notes, the principal and interest of which and of the bonds into which they might be converted were to be payable, without deduction for British taxes, in New York in United States gold coin, or, at the option of the holder, in London, in sterling at the fixed rate of 4.86½ dollars to the pound. The offer was made 'subject to the approval by our counsel of necessary formalities.' The respondents were the holders of a bond, in exchange for a note, by which the British government promised to pay one thousand dollars on Feb. 1, 1937, either in New York, at the office

or agency to be maintained there by them, in gold coin of the United States of the standard of weight and fineness existing in February, 1917, or in London in sterling money at the fixed rate of 4.86½ dollars to the pound. The payment was to be made without deduction for any British taxes. In 1933 by a joint resolution of the Congress of the United States, which it was admitted had the force of law, it was provided that every provision contained in any obligation which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, was against public policy, and that any such obligation should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts. On a petition of right by the respondents claiming that they were entitled to be paid such a sum in dollars as would equal in value the number of dollars of the standard specified in the bond—namely, of the weight and fineness which was prescribed by the law of the United States existing in February, 1917:—Held, (1) that a consideration of all the circumstances relating to the offer of the loan—the fact that the notes were issued in the first instance in the United States, were expressed to be in terms of United States currency, and were to be paid on one option in New York on a value estimated by reference to United States coins—pointed to the law of the United States being the proper law of the contract; and (2) that the joint resolution of Congress had the statutory effect of requiring the bond to be discharged upon payment of dollar for dollar of the nominal amount.”

That shows that the obligation under a bond could before its maturity be converted by legislation of the country of the proper law from what may be called a “piece of gold” obligation into what may be called a “simple currency” obligation. But that case was concerned, solely or at any rate primarily, with debts falling due after the date of the legislation, and does not show what effect, if any, such legislation would be allowed to have on debts already accrued before the coming into force of the legislation.

In *Kahler v. Midland Bank, Ltd.* (52) the assumed facts were that the securities were held by a London bank to the order of a Czechoslovakian bank, and the owner had no contractual relation with the London bank, but had a contract of bailment with the Czechoslovakian bank. The contract of bailment was made in Czechoslovakia and its proper law was Czechoslovakian law; at the time of the contract and at all times thereafter a system of exchange control was in force in Czechoslovakia, and the effect of that was that by Czechoslovakian law the owner never became entitled to take possession of the securities, because the consent of the National Bank of Czechoslovakia was required and not obtained; therefore, the owner never had a right to take possession of the securities and his claim in detinue against the London bank failed. That case does not deal with the position which would have arisen if the owner had at one time had under his contract a right to take immediate possession of the securities in England and supervening Czechoslovakian legislation had purported to deprive him of that right. There is also *Lorentzen v. Lydden & Co., Ltd.* (53), but the decision in that case appears to have been based mainly on the consideration of public policy referred to ([1942] 2 K.B. 215, 216).

On the other side there are a number of authorities which tend to show that only the *lex situs* can alter the title to debts and choses in action: *Re Maudslay, Sons & Field* (18), *Lecouturier v. Rey* (54); *Swiss Bank Corpn. v. Boehmische Industrial Bank* (21); *New York Life Insurance Co. v. Public Trustee* (22); *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd* (23), per SARGENT, L.J. ([1926] 1 K.B. 15), and the same case in the House of Lords, reported as *Employers' Liability Assurance Corpn. v. Sedgwick Collins & Co.* (23) ([1927] A.C. 104, 117, 125); *Re Russian Bank for Foreign Trade* (55) ([1933] 1 Ch.

766, 767, 768); *Sutherland v. German Property Administrator* (25) ([1934] 1 K.B. 430, 431, 433, 434); *The El Condado* (56); *A.G. Der Manufacturen I.A. Woronin Leutschig and Cheshire v. Frederick Hutts & Co.* (57) (79 Lloyd's Rep. 266); *Re Banque des Marchands de Moscou* (26) ([1952] 1 All E.R. 1272-1274); the *Slatford* case (36) ([1951] 2 All E.R. 786-789), per DEVLIN, J., not following *Lorentzen v. Lydden & Co., Ltd.* (53).

A Evidently, there is a considerable weight of authority in favour of the view that only the *lex situs* can alter the title to debts and choses in action, and the authorities cited to prove the contrary proposition do not seem to have that effect. On principle, there is the consideration that, if the action to recover a debt or chose in action is brought in the country where it is properly recoverable and, therefore, situated, and if there is a conflict between the *lex situs* and the proper law (the one having legislation which vests the debt or chose in action in A and the other having legislation which vests the debt or chose in action in B), the court trying the action will be bound to apply its own law which is the *lex situs*. I am unable to accept the contention of counsel for the defendant on this part of the argument.

B On the question what has been and is the proper law of the insurance contract, counsel for the defendant contended that it has been and is the law in force from time to time, i.e., the law of the Mandated Territory in Palestine up to the date of termination of the mandate and thereafter the law of Israel. Counsel for the plaintiffs contended that the proper law of the insurance contract was from the beginning and still is the law of the Mandated Territory of Palestine, and since the termination of the mandate it is that law as existing at the date of termination. In support, or partial support, of this contention, counsel for the plaintiffs cited D a decision of a German court referred to in WOLFF ON PRIVATE INTERNATIONAL LAW, 2nd ed., p. 425, and *Re Fried Krupp Act.* (58) ([1917] 2 Ch. 193). On the other side, counsel for the defendant cited: *Re Chesterman's Trusts* (59) ([1923] 2 Ch. 478), and *Banco de Bilbao v. Sancha*, *Banco de Bilbao v. Rey* (60). The proper law is normally at any rate considered to be the law of a place, e.g., *lex loci contractus* or the *lex loci solutionis*, and I think the contention of counsel for the defendant E is the orthodox view and should prevail.

Finally, there was some argument on the question whether the regulations and the Law or either of them should be considered to be confiscatory. As the regulations and the Law are evidently measures of economic warfare, and analogous to the English legislation and orders relating to the Custodian of F Enemy Property, I would say on the authority of *Re Munster* (61) that they are not confiscatory. That is on the assumption that according to their true construction their operation is in general at least confined within proper territorial limits. If they should be construed as applying universally or to a large extent to property in any part of the world, possibly a different view could be taken, but the refusal of recognition of courts in other countries might be based on the supposed extra-territorial operation rather than on any confiscatory character. G It is not necessary for the purposes of this case to attempt the not easy task of ascertaining from the decided cases what is the meaning or test of "confiscatory" legislation, or what difference confiscatory character makes to its operation in other countries.

My decision, therefore, is in favour of the Custodian on this issue. His claim H is for a declaration that the sum of £5,039 4s. due from the insurance under the said policy is due to the defendant. I think he should have that declaration except that the sum concerned is now a somewhat smaller sum—in fact, £4,962 19s. 9d.

Judgment for defendant.

Solicitors: *Stoneham & Sons* (for the plaintiffs); *Herbert Oppenheimer, Nathan & Vandyk* (for the defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

JONES v. GATES.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
December 10, 11, 1953.]

Agriculture—Agricultural holding—Notice to quit—Exclusion of tenant's right to give counter-notice—"Land . . . required for a use other than for agriculture"—Intention of landlord to sell land as sports ground, but no actual purchaser—No request by tenant for arbitration—Jurisdiction of court to determine validity of notice—"Question arising out of the reason stated in the notice to quit"—Agricultural Holdings Act, 1948 (c. 63), s. 24 (2) (b)—Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190), reg. 4.

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The landlord of an agricultural holding wished to sell the holding as a sports ground if he could find a purchaser, but he did not intend to use it himself or to let it for that purpose. He had received some inquiries regarding the land, but no one had offered to purchase it. On June 25, 1951, he served on the tenant a notice to quit in which he purported to invoke the Agricultural Holdings Act, 1948, s. 24 (2) (b), by stating that the holding was "required for a use, other than for agriculture, for which permission has been granted under the enactments relating to town and country planning." On June 28, 1951, the tenant served a counter-notice under s. 24 (1) of the Act of 1948. In an action by the landlord for possession,

HELD: (i) there being at the relevant time no purchaser and no one who wished to use the land as a sports ground, the land was not "required for a use, other than for agriculture", within the meaning of s. 24 (2) (b), and, therefore, the tenant was entitled to serve a counter-notice under s. 24 (1), and the notice to quit could not have effect unless the Minister of Agriculture and Fisheries consented to its operation.

(ii) as the question raised by the tenant, viz., whether the holding was "required for a use, other than for agriculture", within s. 24 (2) (b), challenged the whole basis on which the notice to quit was given, it was not a "question arising out of the reason stated in the notice to quit", within reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948, and, therefore, the fact that the tenant had not referred the question to arbitration under reg. 4 did not preclude him from raising the point in the landlord's action for possession.

Quaere, whether reg. 4 gave exclusive jurisdiction to an arbitrator on matters within the scope of the regulation.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24 and s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 46, 50; and FOR THE AGRICULTURE (CONTROL OF NOTICES TO QUIT) REGULATIONS, 1948, reg. 4 and reg. 5, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 1, p. 100.

Case referred to:

(1) *Budge v. Hicks*, [1951] 2 All E.R. 245; [1951] 2 K.B. 335; 2nd Digest Supp.

APPEAL by the landlord of an agricultural holding from an order of His Honour JUDGE ARMSTRONG, made at Bournemouth County Court, and dated Aug. 28, 1953, dismissing an action for possession of the holding.

In the notice to quit the landlord stated that the land was required for a use, other than agriculture, for which permission had been granted under the enactments relating to town and country planning. On receiving the notice, the tenant served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1). The county court judge found that the landlord intended to sell the land as a sports ground, that he had not yet received any offer for it, and that he did not intend to let it or use it himself for that purpose. The learned judge

held that the landlord had failed to show that the land was "required" for a use other than agriculture, within the meaning of s. 24 (2) (b) of the Act of 1948, so as to exclude s. 24 (1) of the Act.

R. R. D. Phillips for the landlord.

R. Hughes for the tenant.

SIR RAYMOND EVERSLED, M.R. : This was an action to recover possession of a field of 6.162 acres at Northbourne, in the county borough of Bournemouth. There was at one time a question whether the field, or the tenancy of it, constituted an agricultural holding or a tenancy within the meaning of the Agricultural Holdings Act, 1948, but it is now conceded that it was an agricultural holding, and, therefore, that the subject-matter was within the scope of the Agricultural Holdings Act, 1948. The landlord, who is the appellant in this court, by his solicitors served on the tenant, on June 25, 1951, a notice which, so far as it is relevant, was in these terms:

"We hereby give notice to quit and deliver up [the field which I have mentioned]. The land is required for a use other than agriculture for which permission has been granted under the enactments relating to town and country planning."

On June 28, 1951, the tenant, or his agent on his behalf, served a counter-notice to the effect that s. 24 (1) of the Agricultural Holdings Act, 1948, should apply, and that the notice to quit should not have effect unless the Minister of Agriculture and Fisheries consented to its operation. The form of notice and counter-notice is a reference to the terms of s. 24 of the Agricultural Holdings Act, 1948.

Section 24 (1) provides:

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

I pause to emphasise that Parliament has there enacted in the plainest terms that, where a cross-notice is given within a month, then, subject only to what follows in the next sub-section, the notice to quit is not to have effect unless the Minister consents. Section 24 (2) provides:

"The foregoing sub-section shall not apply where . . . (b) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning . . . and that fact is stated in the notice."

From what I have read it is apparent that the landlord, by the statement at the end of his notice, purported to invoke s. 24 (2) (b), so as to exclude the operation of s. 24 (1). The tenant, on his part, challenged the landlord's right to invoke s. 24 (2), and called on the operation of s. 24 (1), claiming, therefore, that without the Minister's consent the notice was invalid. In those circumstances the first question which fell to be decided by the county court judge was whether it was the fact that the land was required for a use, other than for agriculture, for which permission had been granted under the enactments relating to town and country planning. Nobody has suggested that merely stating that the notice to quit is given on the ground that the land is required for a use other than for agriculture, etc., is sufficient and that the terms of the sub-section are satisfied by the mere ipse dixit of the landlord. The conclusion of the county court judge was as follows:

"As to its being so required, [the landlord] says that he intends to sell

the field as a sports ground and would have no difficulty in doing so. He has, he says, had inquiries from a business firm and a football club but has so far had no offer and is not, I gather, now in negotiation with anybody. He does not propose either to let it for that purpose or so to use it himself. On that evidence [counsel for the landlord] says that a reasonable prospect of use is shown and that satisfies the word 'required'. I do not think that in the absence of a definite person or persons willing to negotiate there could be said to be such a reasonable prospect and I am not, therefore, satisfied that the holding is 'required' for the purpose."

I agree entirely with that language of the county court judge. The finding followed evidence given by the landlord and certain correspondence which has been read to us, from which it is quite plain that, although the landlord has it in mind, if he finds a purchaser, to sell the field as a sports ground, there is at the moment no such purchaser. As the county court judge said, there is no one in negotiation with the landlord nor, as it seems to me on the evidence, was there anybody at any relevant time. The matter may, I think, therefore, be put briefly thus. If the question be: Is the land required for a use other than for agriculture, then who now so requires it? Not the landlord, because as the county court judge says, he does not propose to use it or to let it, and there is no one else except what counsel for the landlord calls "the prospective purchaser," who is an unidentified and, possibly, non-existent person. It follows, therefore, in my judgment, that the county court judge rightly decided adversely to the landlord.

Certain other points which were put are dealt with by the county court judge and they do not arise here, save one only. Counsel for the landlord contended strenuously that the jurisdiction of the court is wholly ousted in this matter as the result of the joint effect of s. 26 of the Act of 1948 and certain regulations made thereunder. Before I turn to an examination of that section and of the regulations, I would like to say that I am by no means satisfied that the point is really open. I do not doubt that counsel for the landlord took the point before the county court judge generally, though from the place in which it appeared in the judge's note I should imagine that it was directed to certain other points which counsel for the landlord adumbrated, and which might arise under the Town and Country Planning Act, 1947. If this point had been a valid point, then it should have been taken right at the beginning, because it leads to the conclusion that in the circumstances of the case the tenant was not entitled to challenge the notice at all, and, therefore, that the evidence which the plaintiff himself gave was inadmissible and was a waste of time. However, I will assume that the matter is open. A second preliminary observation which I would like to make is that s. 24 (1) of the Act of 1948 makes it abundantly plain that in the circumstances mentioned in the section a landlord is not entitled to serve an effective notice against a tenant of an agricultural holding without the Minister's consent, save in cases in which one or other of the provisions of s. 24 (2) are shown to be satisfied. *Prima facie*, therefore, it is for a landlord, if he desires to obtain an order for ejection, to show that s. 24 (1) is excluded.

Section 26, which gives rise to the problem, is in these terms:

"(1) The Minister [of Agriculture and Fisheries] may make regulations—
(a) for requiring any question arising under s. 24 (2) of this Act to be determined by arbitration under this Act . . . (2) The power conferred on the Minister by this section shall be exercisable by statutory instrument . . ."

Before I consider the regulations, one of the points which was urged on us by counsel for the landlord was that that section was obligatory, i.e., that the Minister was bound to make regulations. He draws attention, quite fairly and rightly, to the point that the general policy of the Agricultural Holdings Act, 1948, is that questions of fact which arise and require to be determined between

landlord and tenant (e.g., as regards compensation and other matters) are to be decided by arbitration. But I am quite unable in its context to construe s. 26 as making it obligatory on the Minister to make regulations, or to say that, unless he does, the effect is to render s. 24 wholly inoperative. The many references in the Act to arbitration make it, I think, quite plain that, when compulsory arbitration is intended, wholly different formulae are used from those used in s. 26. I quote, for example, s. 2 (2), which says:

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“ Any dispute arising as to the operation of the foregoing sub-section in relation to any agreement shall be determined by arbitration under this Act.”

On the other hand, I will assume that, if the Minister makes regulations and makes them so as to “ require ” a question to be determined by arbitration, then, if the regulations produce that effect, the right to arbitrate may well be the exclusive means of challenge.

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The regulations which we have to consider are the Agriculture (Control of Notices to Quit) Regulations, 1948, which came into operation on Mar. 1, 1948, before the Agricultural Holdings Act, 1948, came into operation, but it is, I understand, conceded here, as it was in *Budge v. Hicks* (1), that these regulations must now be treated as applicable under the present Act. Regulation 4 is in these terms:

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“ In any case where it is stated in a notice to quit that the notice is given for one or more of the reasons specified in the next following regulation, it shall be open to the tenant, within one month from the giving of the notice to quit, to serve on the landlord a notice in writing requiring any question arising out of the reason stated in the notice to quit to be determined by arbitration under [the Agricultural Holdings Act, 1923].”

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In the next following regulation, viz., reg. 5, one of the reasons specified is that the land is required for use other than for agriculture for which permission has been granted, etc., following the terms of s. 24 (2) [: see reg. 5 (c)]. Regulation 4

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was considered by this court in *Budge v. Hicks* (1), and the question then arose as to its scope and whether, within its scope, it was obligatory. The three lords justices in this court carefully left the matter open. Not unnaturally, each of them drew attention to the fact that, if it was meant to be obligatory, then the formula “ it shall be open to the tenant ” was a somewhat surprising one to use, because, ex facie, it seemed to give an option. SOMERVELL, L.J., said ([1951]

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2 All E.R. 248) that he thought it was the intention of the Act of 1948 that technical agricultural matters should be dealt with by arbitration rather than in the courts. With that I agree. But, plainly, the matter with which we are concerned is in no sense a technical agricultural matter. What we have been asked to do is to decide what is the true meaning of the Act and particularly of the word “ required ” in s. 24 (2), and on such a matter I am bound to say that

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it would be, I think, surprising if reg. 4 of the regulations of 1948 had the effect for which counsel for the landlord contended. This was a notice served on June 25, 1951, to take effect on July 19, 1952. According to the argument, unless the tenant, by July 25, 1951, served a notice calling for arbitration of the question whether the landlord really did require the premises as alleged, the tenant was for ever thereafter shut out from challenging the validity of the notice. On the

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view that we hold, it turns out that the notice was really a fictitious notice, in the sense that it was based on a fictitious or unreal and wholly invalid ground (and in using the word “ fictitious ” I am not, of course, making any kind of suggestion against the good faith of anybody—it just did not, in fact, exist). A tenant would be in great difficulty, I should have thought, in discovering to his own satisfaction within one month whether or not a landlord intended or proposed to use, or whether anyone else wanted or intended to use, the holding in a particular way and whether permission had been granted. The practical

effect would be that a tenant, for his own protection, would have to serve an arbitration notice in every case so as to keep open the point that the notice might be challenged. Counsel for the landlord said that there would be no great harm or expense in that, but it does seem to me undesirable, and, I should have thought, a very unlikely intention of Parliament.

The question, however, remains : Are the terms of reg. 4 such as quite clearly to exclude the jurisdiction of the court ? Section 24 being expressed as I have already stated, plainly nothing short of perfectly clear terms of exclusion will suffice. It is true that, as the regulation sets a time limit, saying that it shall be "open to the tenant, within one month", to serve on the landlord the notice there specified, it can be argued that, unless that is done within one month, the right of challenge will be gone, but, looking at the regulation according to its ordinary meaning, I am unable to hold—and I have not been persuaded by counsel for the landlord that we can hold—that the effect of the regulation has been to exclude the tenant's right in this case to challenge the basis on which the notice to quit has been given.

Without desiring to determine now what is the exact scope of this and other regulations and whether as regards other matters they may have the effect of giving exhaustive and exclusive jurisdiction to an arbitrator, in this case I am not satisfied that the point which the tenant takes, namely, whether s. 24 (2) has been effectively invoked, can be said to be a "question arising out of the reason stated in the notice to quit" within reg. 4. The question which the tenant here raises by his challenge is whether the reason is a reason at all within the meaning of s. 24 (2), and I think that the language chosen, namely, "any question arising out of the reason", is not really apt to cover the question of the premises on which the validity of the notice rests.

For these reasons I reject the argument that the tenant is now precluded from raising the point whether the land is required for a use other than for agriculture. It follows, therefore, that, in my judgment, the learned county court judge rightly concluded this case in giving judgment for the tenant, and in those circumstances the appeal fails and must be dismissed.

JENKINS, L.J.: I agree and have nothing to add.

MORRIS, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Rendall, Litchfield & Co.*, Bournemouth (for the landlord); *Peacock & Goddard*, agents for *Luff, Raymond & Williams*, Wimborne Minster (for the tenant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PATRICK (INSPECTOR OF TAXES) v. BROADSTONE
MILLS, LTD.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), December 7, 8, 9, 10, 11, 1953.]

Income Tax—Profits—Stock-in-trade—Valuation—Base stock method—Fixed process stock on machines not in trading account—Spare process stock awaiting process at arbitrary valuation.

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In arriving at its profits for income tax purposes for the accounting period 1947-48 a company used the base stock method of accounting, under which, of the base stock, the fixed process stock (i.e., cotton undergoing process on the machines) appeared at an indeterminate amount in the item "land, buildings, boilers . . . and fixed stock" in the balance sheet, but did not appear in the trading account or the profit and loss account, and the spare process stock (cotton awaiting process) was valued at an arbitrary figure of 28d. per pound at the beginning and at 30d. per pound at the end of the period. The base stock method was found to be recognised in the industry and to be sound commercial accounting, but evidence was accepted by the commissioners that in cases of changes in the level of stocks and of rises in prices, as had occurred here, it involved an understatement of profits and the creation of a hidden reserve.

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HELD: the fixed process stock and the spare process stock were both stock to be turned into yarn and in the computation of profits for income tax purposes their value should be taken into account at the beginning and at the end of the accounting period at actual cost or market price, whichever was the lower, and, therefore, the base stock method, however well recognised for company accounting purposes and satisfactory in normal times, was not the proper method of accounting.

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AS TO STOCK-IN-TRADE IN THE COMPUTATION OF PROFITS FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 122-124, paras. 227-232; and FOR CASES, see DIGEST Supp.

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Cases referred to:

(1) *Whimster & Co. v. Inland Revenue Comrs.*, 1926 S.C. 20; 12 Tax Cas. 813; Digest Supp.

(2) *Inland Revenue Comrs. v. Cock, Russell & Co., Ltd.*, [1949] 2 All E.R. 889; 29 Tax Cas. 387; 2nd Digest Supp.

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(3) *Sun Insurance Office v. Clark*, [1912] A.C. 443; 81 L.J.K.B. 488; 106 L.T. 438; 6 Tax Cas. 59; 28 Digest 58, 295.

(4) *General Accident, Fire & Life Assurance Corpn., Ltd. v. McGowan*, [1908] A.C. 207; 77 L.J.P.C. 38; 98 L.T. 734; 5 Tax Cas. 308; 28 Digest 58, 294.

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(5) *Ryan v. Asia Mill, Ltd.*, (1951), 32 Tax Cas. 275; 2nd Digest Supp.

APPEAL against an order of VAISEY, J., dated July 24, 1953, allowing an appeal from a decision of the Special Commissioners of Income Tax holding that the company was entitled to use the base stock method of accounting in computing its profits for income tax purposes for 1948-49. In applying the method the company, a cotton spinning company, had excluded fixed process stock (stock undergoing process on the machines) from its trading account and had valued spare process stock (stock awaiting manufacture) at arbitrary figures. It contended that, in consistently employing the base stock method of accounting, it was employing a recognised principle of commercial accounting, that its accounts were drawn in accordance with sound commercial practice, and that the method should, therefore, be adopted for the purposes of its assessments under appeal. The Crown contended that the base stock method of accounting employed by the company was not in accordance with the practice of the great

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majority of concerns in the cotton industry, that it did not accord with sound principles of commercial accountancy, and that it did not show the full amount of the profits of the relevant year, but showed a distorted view of them and understated them. They submitted that the company's process stock at the beginning and end of the year should be valued and brought into account at cost (being lower than market value) and not at any fixed or arbitrary figure for the purpose of computing the company's profits in relation to the assessments under appeal. A

Sir Andrew Clark, Q.C., and Sir Reginald Hills for the Crown.

Cyril King, Q.C., S. M. Young and H. H. Monroe for the company.

SINGLETON, L.J.: This is an appeal by the company, Broadstone Mills, Ltd., against an order of VAISEY, J., which reversed a decision of the Special Commissioners and restored an assessment to income tax made on the company for 1948-49 under Case I of sched. D to the Income Tax Act, 1918, in the sum of £27,000, and an additional assessment for the same year in the sum of £19,218 less £11,853 capital allowances. The company carries on business as a cotton spinner at Stockport. It was incorporated in 1920, when it took over as a going concern the cotton spinning business which had been carried on since 1904 by Broadstone Spinning Co., Ltd. It owns two mills (herein referred to as No. 1 mill and No. 2 mill), which are adjacent and are, indeed, joined together by buildings. In these mills cotton is subjected to processes in various machines resulting in the production of yarn. The average time taken for raw cotton to pass through the mill and emerge as saleable yarn is approximately six to eight weeks. B

The company has always adopted a system of accounting known as the base stock system. Under that system the fixed process stock, i.e., the cotton which is on the machines, does not appear in the trading account at all, and the spare process stock is taken at an arbitrary figure. The company's contention is that the system is well recognised and is in accordance with the principles of sound commercial accountancy and that it ought to be adopted in order to arrive at the company's liability to tax. On behalf of the Crown it is said that, even if the system is satisfactory for ordinary commercial requirements over a period of years, it is not a proper way in which to arrive at the company's profits for taxation purposes in any year of assessment, and, further, that it does not show the full amount of profit for the year in question. Moreover, it is claimed that no system will give the true profits of the year unless there is a valuation of stock made (either on market price or cost price) at the commencement and at the end of the accounting period: in other words, if there is a variation between the beginning and the end of the year in the amount of stock, or in its value, those are matters for consideration which are omitted to an extent if the company's method of valuation is applied. C

The commissioners found that the method adopted by the company in dealing with its base stock in its accounts was one of the methods recognised in the trade of cotton spinning and was in accord with sound commercial practice. They also found that the method the company had adopted for computing its profits was in accordance with sound commercial practice, and they allowed the appeal against the assessment. They did not deal with contention (3) put forward by the representative of the Crown. That contention was D

"that [the company's] method did not show the full amount of the profits of the relevant year, but showed a distorted view of those profits and understated them, and the company had been under-charged in the first assessment made upon it." E

Their failure to deal with this has led to the expenditure of much time in this court. Counsel for the company submitted that, on the findings of the Special Commissioners, the company was entitled to succeed. Counsel for the Crown F

A submitted that, notwithstanding the findings, the method adopted could not be a proper way to ascertain the profits of the company in the year of assessment if it did not show the full amount of the profits, or if it showed a distorted view of them, and he set out to show that this was so. To which counsel for the company replied that we ought to be guided by the findings of the commissioners on fact. All this could have been avoided if the commissioners had made a finding on the third contention. They ought to have done so. For some time I thought that this court ought to remit the case to them for a finding, but it was put to us that there could only be one answer and that, in such circumstances, there was no point in sending the case back.

B There is a further matter to which I direct attention. Four witnesses gave evidence before the Special Commissioners, who set out a summary of their evidence in paras. 9, 10, 11 and 12 of the Case. In each case the commissioners say of the evidence, "which we accepted". I do not know what that means, in regard to the evidence of the accountants in particular. If it means that they accepted the views given as those of the witnesses who gave them, it carries one nowhere. If it means more than that, it does not appear to me that they could accept both of two conflicting views. The essential requirement of a Case Stated is that it shall contain the findings of fact of the tribunal which states it. This C Case is lacking in that respect. It is said by counsel for the company that we ought to assume that the commissicners accepted the evidence of Mr. Robson (in para. 10) in preference to that of Mr. Gower (in para. 11) by reason of their conclusion in para. 15. That may be a fair assumption to make. But the commissioners have already said that they accept the evidence of both, and nowhere do they say that Mr. Gower is wrong in the view he expressed that the method D adopted by the company led to a distorted view of the profits in the relevant year. I mention these matters with the object of saving time in future cases. It is not what someone says which is of importance. The court ought to have before it the findings of fact of the tribunal. If those are clearly stated, there is usually no need to set out the evidence which is given.

E It is not easy to state the facts in this case, which involves some technical matters, without reading a considerable part of the Case itself:

F "3. At all stages in the production of yarn, quantities of cotton in various stages of manufacture are either on the machines or are waiting by each machine ready to take the place of the cotton on that machine. The cotton which is actually on the machines and undergoing process is termed fixed process stock and that which is waiting to replace the cotton on the machines is termed spare process stock. There were produced to us (and are annexed hereto, marked A, and form part of this case) a series of photographs of various machines used in the mills, showing the fixed process stock on the machines and the spare process stock in convenient positions by the machines. 4. We were concerned in the appeal with the method of dealing, G in computing the company's profit for income tax purposes, with the fixed process stock and an agreed weight (hereinafter called the base weight) of spare process stock (being the minimum required to ensure continuity of production); these are together referred to as base stock. The company in fact held spare process stock in excess of the base weight of spare process stock, but there was no dispute as to how this should be dealt with. It was H agreed that for income tax purposes the excess should be valued at cost price (being lower than the market value). 5. (1) The company, and its predecessor, Broadstone Spinning Co., Ltd., has always adopted a system of accounting known as the base stock system. In this system the base stock and any further spare process stock held are not carried in the accounts at cost or market value, but are carried, either at a fixed price or at an arbitrary price. (2) There was produced to us, for the purpose of illustration, a hypothetical account in illustration of the company's trading account for

the accounting period (which follows closely the actual trading figures for the period) and a copy of the company's balance sheet as at Apr. 3, 1948. . . . (3) In the trading account the base stock, assumed to be 123,000 pounds in weight, does not figure at all, either in opening or in closing stocks, and the further spare process stock in excess of the base weight is carried at a figure of 28d. per pound. This is an arbitrary figure designed to represent the cost of raw cotton plus a weighting for the cost of processing. The figure was originally 12½d., and was increased in 1945 to 17d. then to 28d. at Mar. 29, 1947, and later to 30d. at Apr. 3, 1948. (4) In the balance sheet the fixed process stock is included in the item 'Land, buildings, boilers . . . and fixed stock —£333,236.' It is so included at an unascertained figure representing the cost of the fixed process stock on the purchase of the mills by the company in 1920, and has not been changed since."

That paragraph makes clear two or three matters of great importance. The first is that the fixed process stock, i.e., the cotton on the machines which has been processed, is not taken into account so far as regards the trading account. It is omitted entirely, because on the company's system it is not dealt with as part of the stock in the ordinary sense but is said to be included in the item of "Land, buildings, boilers . . . and fixed stock" in the balance sheet. It is not in the profit and loss account, or in the trading account. Secondly, the spare process stock included in the trading account is taken, not at its value, but at an arbitrary figure. The third matter of importance is the very large variation in the price of cotton which has taken place over the years. Paragraph 5 (3) shows even the arbitrary values of the company rising from 12½d. to 30d., and I think I am right in saying that the later figures show that by the end of the accounting year the actual value had risen to 42d. per pound.

Paragraph 6 of the Case states the practice which had been followed by the company:

"(1) In all previous years of assessment the profits of the company and of its predecessor, Broadstone Spinning Co., Ltd., were computed for income tax purposes according to the base stock system, i.e., the fixed process stock did not figure in the account (although, as stated in para. 5 above, a value was in fact attached to it in the company's balance sheet), the base weight of spare process stock was valued at the arbitrary figure referred to in para. 5 (3) above, and any further 'spare process stock' in excess of the base weight was valued at cost. (2) The assessments under appeal were made upon the basis of bringing in all stocks of cotton at cost (which was agreed to be lower than market value); i.e., the base stock and the whole of the further spare process stock in excess of the base weight were brought in at the opening and the close of the account at a price representing the cost (at such opening or close) of raw cotton plus the cost of processing. (3) The question for our determination was whether the company was entitled to have its profits computed for income tax purposes according to the base stock system."

It is common ground that there ought to appear in that paragraph after the word "profits", "for the accounting period".

Paragraph 8 mentions two documents to which I shall have to refer later, D1 and D2, which become of importance when the court is asked to consider whether there could be more than one answer to the Crown's contention No. 3. Paragraph 7 (b) again sets out the variation in prices.

"8. The weight of fixed process stock on machines in No. 1 mill rose during the accounting period from 31,191 pounds to 44,204 pounds (vide statements D1 and D2). No. 1 mill was put out of production in 1941 as a result of arrangements for the concentration of industry, and the cotton on the machines was run off. The company then created a reserve of £7,132

(which figures in the balance sheet, exhibit C) to cover the estimated cost, at prices then current, of re-clothing the mill. No. 1 mill is now gradually being brought back into production, and the machines are partially re-clothed. The cost of the fixed process cotton on the machines in this mill has not yet been debited to the reserve account, but had temporarily been charged against revenue, although the company intends to capitalise it. When fully clothed, the machines in No. 1 mill will carry a weight of 88,000 pounds of cotton."

Let me add that No. 2 mill carries 92,000 pounds of cotton on the machines, so that the two mills together would carry on the machines 180,000 pounds of cotton. It is not shown in the company's trading account, though it is said it is in the balance sheet figure of land, buildings, etc.

The next four paragraphs in the Case deal with the witnesses who appeared before the Special Commissioners. Paragraph 9 begins:

"9. Mr. J. J. Wilkinson, the secretary of the company, attended and gave evidence before us (which we accepted) to the following effect."

Mr. Wilkinson in his evidence said it was essential for the economical running of a mill that the machines should always remain clothed, and he described the system of buying the cotton and selling the cotton. He said that the fixed process stock was taken into the company's balance sheet as a fixed asset and did not figure in the trading account, and the directors of the company had always taken the view that that was the way they wished the accounts to be presented to the shareholders, it being their view that a true trading result was arrived at in that way. I think it might well be said that, if every year there is the same amount of base stock and fixed process stock, and if its value is the same, it would not affect the position of the trading account. But if the amount changes and the value changes, the position is not the same. In para. 9 (4) the secretary is recorded as saying:

"He agreed that the cotton on the machines (i.e., the fixed process stock) is always changing and is always on the move, and that the cotton on the machines at the end of the accounting period had in fact cost the company 42.85d. per pound as shown in exhibit D2. The cotton on the machines at the end of the accounting period must have been bought during the period and its price would be included in the purchases charged in the company's accounts. The price would, however, have been debited to the particular sale occasioning the purchase of the cotton. The 136,000 pounds of cotton on the machines at the end of the accounting period had cost the company 31.88d. per pound, that was, the bale price, plus the cost of processing work done on that stock. That cost turned into sterling was £7,892 plus £16,425. The company had in fact allowed cotton bought at the advanced price to replace cheaper cotton on the machines. It had, however, advanced the price of yarn immediately the raw cotton price increased: the increase in the price of raw cotton was immediately (and, in his opinion, rightly) priced on yarn and not left on the base stock on the machines."

Mr. Robson, who was a member of the firm of Messrs. Price, Waterhouse & Co., chartered accountants, gave evidence on behalf of the company, which again the commissioners say they "accepted". He said that the company had followed

"a recognised commercial accountancy basis. The base stock method is a good method of accounting, though some other people might say there is a better method. He did not agree that it was undoubtedly a better method to bring in base stock at the beginning and end of the year at cost or market value; business people who consider the base stock method suitable in their businesses consider it the best."

He added that

"An accountant would give an unqualified certificate to accounts as giving a true and fair view of the profits of a company whether it employed the one method or the other so long as the company had adhered to one method consistently"

from year to year. I find later in para. 10 in the record of his evidence:

"He agrees that in times of rising prices accounts prepared on the base stock method would show profits lower in amount than accounts prepared on the cost or market value basis; in times of falling prices, the opposite result would be produced."

As far as I can gather from the figures shown in the Case, there have been for some years consistently rising prices for cotton. That means that, if the fixed basis is followed year after year, the accounts would show profits lower in amount than accounts prepared on the cost or market value basis. The record of the witness's evidence continues:

"But, on the basis of the principles which those people who use the base stock method hold, there is no distortion of profits in times of rising prices."

The meaning of that is that those who use this principle prefer to look on the base stock in precisely the same way as they look on the machines. In other words, they are regarding the cotton, the raw material, at one stage as part of their fixed capital merely because it is on the machines. But it does not remain on the machines. It passes through the machines in the course of a few weeks and is dealt with just as is any other cotton. That is the meaning of Mr. Robson's words,

"on the basis of the principles which those people who use the base stock method hold."

He added:

"Business people who use the base stock method do so because they consider it an appropriate method for their particular businesses; they regard the cotton clothing the machines as part of the machines, without which the machines cannot function, just as a sewing machine cannot function without a certain minimum amount of thread upon it. They say, in effect, that the weight of base stock is just as much a part of the machine as the lever which engages it."

On this view, which the witness considered a tenable view,

"the base stock is part of the fixed assets, and replacements are replacements for maintenance purposes to be charged against trading as a maintenance cost."

It must follow from that principle, if it is adopted, that as prices rise the cotton which is upon the machine costs more. It is paid for out of revenue, but the cotton which is on the machines is not shown in the revenue account.

Paragraph 11 of the Case deals with the evidence of Mr. Gower, chartered accountant, who is the principal advisory accountant to the Board of Inland Revenue. Some criticism was directed against his evidence. I think there is no doubt from what I have read, and from what we have been told, that Mr. Gower has for some years been contending for what he regards as the true principle of real prices and real values, and that he has sought to show that the base stock method of accounting is not right, at least for tax purposes. I can well understand that those who follow that system of accounting equally hold the view that they ought to be allowed to have their own method of accounting. Mr. Gower's evidence, according to para. 11, begins in this way:

"He thought it was common knowledge that the general basis for the valuation of stock-in-trade in all forms, whether raw material, processed material, or finished goods, was cost price or market value, whichever was the lower."

There is no finding on that. Is it common knowledge that the general basis of the valuation of stock-in-trade in all forms is cost price or market value? That was stated in one or two of the cases to which our attention has been drawn, but I am dealing here rather with the evidence of the witness.

A "He said that the base stock method had been employed by a limited number of concerns—limited both as regards the trades in which it was used and the number of concerns in any particular trade using it. He considered that it was unobjectionable and made little difference to results over a number of years provided the quantity of base stock did not vary, and provided there were no violent fluctuations in the cost of the raw material; but in a time of violent fluctuations, and in particular in a time of consistently rising prices, in his view, the use of the base stock method could and did give rise to very misleading results."

B He said that if one had a position in which prices were rising continually the accounts did not show a fair view of the position. In the present case he said the quantity of base stock had risen and in the period under review

C "the price of raw cotton had risen seriously. The cost of the 'fixed process stock' had increased during the year by something like 10½d. per pound from about 32d. per pound to about 42d. per pound. Valued in accordance with the Revenue's contention at cost, the process stock was worth £22,502 at the beginning of the year and £37,947 at the end—an increase of £15,445. As shown by the company's books, the increase during the year in the value of the process stock was £4,289. There was thus a difference of £11,156 which had been charged against the profits in this year."

D He went into further figures, and he said they pointed to the conclusion that the base stock method resulted, in the prevailing circumstances,

E "in an understatement of profits and the creation of a hidden reserve. This was due to the fact that the base stock method was being used for times for which it could not be considered at all suitable."

F Let me say that the paragraph which summarises the evidence of Mr. Gower said that the commissioners "accepted" it. Again, there is no finding of the commissioners on the last part of para. 11. The statement of Mr. Gower's evidence continues:

G "He agreed that the base stock method is a reasonable and recognised method of accounting, and one which business men could reasonably and properly adopt, and is good commercial accounting, but he made the qualification that in times of rising prices it is a conservative method, and does not produce such correct results as the cost or market value method. By 'conservative' he meant keeping something well in hand. No auditor would cavil at conservative accounts; he rather welcomed them for shareholders' purposes. It was open to the company to use the base stock method. Asked whether the company's accounts were erroneous, he expressed the view that they were conservative and understated the profits by reason of a hidden reserve of the true cost of cotton. In his opinion the base stock method did not show the true quantum of profits earned in the relevant year. In times of falling prices it worked in the reverse way; where costs were falling you were losing some of the conservative element and were absorbing some of the hidden reserve. Once you got back to a stage where the prevailing cost of cotton was the same as that adopted for base stock, you were back to zero. On present day prices he described the base stock method as distorting the real trend of results. In a stable period, when prices hardly rose or fell, there was nothing in it."

Mr. Gower emphasised that the Special Commissioners were asked to deal with the tax position for one accounting period. The evidence which he gave was to this effect: "I do not like the base stock accounting system for tax purposes. It does not matter if you keep your base stock at the same figure and if prices remain the same. If one or other of the elements changes you do not get, by using it, the true profits of the relevant year." He went on to say that the process stock was not a fixed asset. It was just the same as any other cotton bought that passed through the mill and through the machines in the mill, and it ought to be treated as any other cotton was.

One other witness, the principal inspector of taxes, Mr. Mitchell, said that efforts had been made to get everyone to adopt the system of cost or market price in regard to stock. He had found that in the cotton trade 88½ per cent. of the spinners were now valuing process stock at cost in their books, and 11½ per cent. were adopting the base stock method, although, he added,

"the latter concurred in the adjustment to the cost basis for taxation purposes."

There is no importance in that from the point of view of the law, but I think it does show that on the whole it is recognised—and that means it is recognised by accountants who advise trading concerns—that, when there are changing prices, violently fluctuating prices, the cost or market value of the stock gives the more accurate result in any accounting period.

The first matter for consideration is what is fixed process stock and what is spare process stock? The answer surely is clear. They are both stock. They are so called. They are bought as stock. All the cotton, the raw material, is bought for the purpose of its being turned into yarn by being passed through the mill in the ordinary way. Both the fixed process stock and the spare process stock are paid for out of revenue. The evidence of Mr. Wilkinson, the secretary, in para. 9 (4) of the Case shows that the cotton on the machines at the end of the accounting period must have been bought during the period and its price would be included in the purchases charged in the company's accounts. The cost of that cotton has passed through the company's accounts.

How can one arrive at the profits of the year without considering what one has on the other side? The position is illustrated by the two documents referred to earlier, D1 and D2. D1 shows the company's cotton stock as at the commencement of the accounting period, Mar. 29, 1947. D2 shows the position at the end of the accounting period, Apr. 3, 1948. The first thing I notice is the figure in regard to cotton on the machines, the fixed process stock. In the case of No. 2 mill the amount on the machines remains the same, i.e., 92,000 pounds. It is working to capacity. No. 1 mill had been used for something else during the war—it was taken over by some government department, I think—and it had been stripped of its cotton. During this accounting year it was being gradually brought back to full production. At the commencement of the accounting year the amount of cotton on the machines was 31,191 pounds. At the end of the year it was 44,204 pounds, an increase, as the Case shows, of 13,000 pounds in the accounting year. At 42d. a pound that would be something over £2,000. So that there was in No. 1 mill somewhere over £2,000 worth of cotton more in quantity at the end of the accounting period than there was at the beginning of that period, and that cotton had been paid for out of revenue. The figures in D1 and D2 show also the spare process cotton, and it appears from D1 as though the company had on Mar. 29, 1947, some 45,000 pounds of spare process cotton, i.e., cotton waiting near by to be used on the machines as occasion arises. That 45,000 pounds was taken in the accounts at an arbitrary figure of 28d. a pound. How it is possible to get accuracy in any account by taking an arbitrary figure I do not know. The broad middle column in D1 shows the division up of that 45,000 pounds odd into 23,278 pounds and 21,774 pounds. I take it that was because it had been

pointed out by someone, no doubt on behalf of the Revenue, that the company could not well claim, even on their valuation basis, to have so much spare process cotton as 45,000 pounds at any one time. It was too much. So they reduced that figure to 23,278 pounds, and thereafter in the accounts the figure of 28d. appears against 23,278 pounds, and the balance of 21,774 pounds is taken at what is said to be the cost price of 32.1d. a pound. I find it difficult to see any reason for putting on the spare process cotton a lower figure than cost or market price. Prices were rising all the time.

When I look at D2, which shows the figures for the end of the year, I find in the left hand column the figure of spare process cotton is there put as 76,371 pounds. I do not appreciate the reason for that great increase. True, it is said that the mill was coming into further use, as is shown by the increased cotton on the machines in No. 1 mill, but I should not have thought there would have been anything like that increase in spare process cotton. Indeed, that seems to have been recognised, because in the broad column in the middle, in the same way as in D1, the figures are split up later and the same weight is taken, 23,278 pounds, for the spare process cotton, on which an arbitrary figure of 30d. is put, whereas the balance of 53,093 pounds has against it the value of 42.85d., to which the price had risen. I do not follow the reason for any arbitrary price at all in a matter of this kind, but again it may not matter if conditions do not change through the year. As I have said, the justification for the practice, so far as there is justification, was said by Mr. Robson to be that those who adopted it in this trade—and it may be in some other trades—regarded the cotton on their machines as part of the machines.

In arriving at the correct position, those who have to make valuations are guided by s. 29 (1) of the Finance Act, 1926:

“ . . . any income tax in respect of profits or gains or income chargeable under Case I, Case II, Case IV, or Case V of sched. D which would but for the foregoing provisions of this section have been computed as aforesaid shall be computed, subject to the provisions of this Part of this Act and subject as hereinafter provided, on the full amount of the profits or gains or income of the year preceding the year of assessment.”

The same is shown by s. 1 of the Income Tax Act, 1918, and by the Rules Applicable to sched. D, r. 1 (a) (2). The object is to find the profits or gains from the trade for the year of assessment. In considering the question of stock, I think that the principle stated by the Lord President, LORD CLYDE, in *Whimster & Co. v. Inland Revenue Comrs.* (1) in 1925, has been accepted generally. The Lord President said (12 Tax Cas. 823):

“ In computing the balance of profits and gains for the purposes of income tax, or for the purposes of excess profits duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts*. In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes.”

As I say, that has been adopted in general and it is sound in practice. The Lord President, in saying that

"the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower",

was in one sense going into accountancy matters. But I venture to think that that view of his is based on general experience and common sense—you cannot get at the true position unless you take actual figures as distinct from arbitrary figures.

In the same case LORD SANDS said (*ibid.*, 826):

"Where a trader sits down to ascertain from his books his profits or losses for the year, it is not enough that he should set on one side the money he has paid out, other than capital outlay, and on the other the money he has received in respect of the year's business plus the price he paid for commodities now in his possession. There are at least three other things that he must take into account—the present value of these commodities, the debts he has incurred, and the debts due to him, in respect of the year's operations."

The cotton in the present case whether it be in bale in the mill or ready to be used alongside the machine or on the machine, is a commodity which the trader has bought in order to turn into yarn. Later, LORD SANDS said (*ibid.*, 827):

"The consideration of how it would be prudent for a trader to act does not solve the question here presented to us as one of revenue law. Under this law the profits are the profits realised in the course of the year. What seems an exception is recognised where a trader purchased and still holds goods or stocks which have fallen in value. No loss has been realised. Loss may not occur. Nevertheless, at the close of the year he is permitted to treat these goods or stocks as of their market value. This exception to the general rule has never, however, been extended to the case of probable or indeed apparently inevitable loss to be incurred in the execution of future contracts entered into during the year in question, and the authorities are against it."

Counsel for the company referred us to *Inland Revenue Comrs. v. Cock, Russell & Co., Ltd.* (2), in which CROOM-JOHNSON, J., cited the words I have just read from the *Whimster* case (1) and said (29 Tax Cas. 392):

"There is nothing in the relevant legislation which indicates that in computing the profits and gains of a commercial concern the stock-in-trade at the start of the accounting period should be taken in and that the amount of the stock-in-trade at the end of the period should also be taken in. It would be fantastic not to do it; it would be utterly impossible accurately to assess profits and gains merely on a statement of receipts and payments or on the basis of turnover. It has long been recognised that the right method of assessing profits and gains is to take into account the value of the stock-in-trade at the beginning and the value of the stock-in-trade at the end as two of the items in the computation."

Counsel for the company also directed our attention to *Sun Insurance Office v. Clark* (3). The headnote reads (6 Tax Cas. 59):

"A company carrying on the business of fire insurance, had made a practice of carrying forward annually, in its published accounts, as a reserve, forty per cent. of the yearly premium receipts representing estimated losses on unexpired risks, and had claimed to be assessed on this basis. It was found as a fact by the commissioners that forty per cent.

was a reasonable and proper allowance, and the company's claim was admitted. The Crown contended that the company was not legally entitled to the allowance. *Held*, [by the House of Lords] that *General Accident, Fire & Life Assurance Corpn., Ltd. v. McGowan* (4) notwithstanding, there is no rule of law as to the admissibility of an allowance for unexpired risks in estimating profits, but the question is one to be decided by reference to the facts in each case; and that on the facts found in this case the allowance claimed was a proper allowance to be made."

The general commissioners for the city of London in that case had found that the allowance was a proper one to make. There was an appeal to the Revenue Court, and BRAY, J., dismissed the appeal. The Court of Appeal allowed the appeal from BRAY, J., and the House of Lords restored the order of BRAY, J., and of the commissioners, allowing the appeal from the order of the Court of Appeal. The difficulty which arose in that case was due to a misunderstanding, which was said to be a failure to appreciate the reasons for the decision of the House of Lords in the *McGowan* case (4).

Counsel for the company relied on the *Sun* case and the case of *Cock, Russell & Co.* (2) in support of his submission that the court ought not to interfere with what he claimed was a finding of fact by the commissioners. If the report of the case is examined, I think it hardly supports the proposition for which counsel contends. LORD LOREBURN, L.C., said (*ibid.*, 75):

"An estimate being necessary and the arriving at it by in some way using averages being a natural and probably inevitable expedient, the law, as it seems to me, cannot lay down any one way of doing this. It is a question of fact and of figures whether what is proposed in each case is fair both to the Crown and to the subject."

The Lord Chancellor dealt with the decision in *McGowan's* case (4):

"In *McGowan's* case (4), to which reference is made, three methods of estimating these gains or profits were before the House. I place first, merely for convenience sake and not for its importance or value, a faint suggestion which was made in the case of *McGowan* (4), which as I understood it, was as follows:—It was suggested that each contract of insurance made during a particular year should be considered separately. If it had expired then the actual result should be taken, whether profit or loss. If it had not expired then an estimate should be made, having regard to the period unexpired and the degree of risk, which might be different (in summer and winter for example) during that period. I do not imagine that either the Crown or the company would seriously desire such an enquiry. I do not know how many fire insurances are effected by a great company within a twelvemonth, probably scores of thousands or even hundreds of thousands. Such a process, as to the unexpired contracts, would be minute and almost interminable. It was rejected because there was no evidence that it would be a reasonable way of ascertaining what was desired. The second method suggested in that case was that of merely taking for each year the sum total of the premiums received and the sum total of the losses paid and subtracting the one from the other, without regard to the fact that the premiums cover risks running on into subsequent years and the losses include losses arising out of contracts made in previous years. This method is of course not precise or scientific. It proceeds upon the view that, when this is done for the three consecutive years indicated by the statute and the figures thus reached are averaged, a fair and reasonable conclusion is attained. This method was adopted long ago and has more than once been the subject of consideration in courts of law. I can conceive it being unfair either in the case of a rapidly increasing or of a rapidly diminishing fire insurance business. It may

prove unfair in both cases. But in *McGowan's* case (4) it has not proved to be unfair. On the contrary it closely corresponded with the dividends actually distributed and was upon the facts of that case clearly the most accurate and reasonable of the methods which alone were propounded for our consideration. Accordingly it was adopted. I think it is in general a good working rule, but no one in this House has said that it ought to supersede the truth if the truth is in conflict with it in any case. A third method, similar in principle to that advanced by the now appellants, was also considered by your Lordships in the case of *McGowan* (4). This method is to carry forward annually at the close of the year a percentage of the premium income in order to allow for unexpired risks. It has no pretensions to being precise. I can easily imagine cases in which an actuary could show it was misleading. But if it comes nearer to the truth than any other method in a particular case, I do not understand why it should not be adopted. This third method, however, in its application to that case, the *McGowan* case (4), would have meant that the insurance company was to pay income tax upon the footing of about £15,000 profits and gains in the three statutory years, whereas they had divided dividends of about £60,000 in those three years. And there was no evidence and no finding, nor could there honestly have been, that the third method worked fairly between the Crown and the subject. In those circumstances this House rejected the third method. The House adopted the second, but so far from laying it down as a rule of law, it was expressly pointed out that the second method was of itself imperfect and, though a good working rule generally, would not be applicable if in any case it appeared upon the facts to involve hardship. The headnote in the LAW REPORTS is quite wrong and the view of BRAY, J., of what the House decided in *McGowan's* case (4) is accurate."

Towards the end of his speech the Lord Chancellor added (*ibid.*, 77):

"I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it they can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, viz.: that the true gains are to be ascertained as nearly as it can be done."

Thus, I read LORD LOREBURN as having said there may be one or two or three methods of arriving at the profits for the relevant period. The one which shows most accurately the position between the revenue, on the one hand, and the taxpayer, on the other, is the one which ought to be adopted. In other words, it is not sufficient to say that a particular system of accounting is a well-recognised system of accounting and satisfactory during normal times if the contention on the other side is that the system does not give a true result for the particular year, the accounting year. That was the case the Crown put forward before the Special Commissioners. It is shown by their contentions, particularly the one to which I have already referred, but the Special Commissioners, though they had this case before them for quite a long time, failed to deal with that contention.

I would state these general propositions: (1) One cannot arrive at the profits of the year without taking into account the value of the stock one has at the beginning of, and at the end of, the accounting year. (2) The figures for stock are just as important as any other figures. Values may have to be estimated when market price is taken, but any departure from accuracy is reflected in the trading account. (3) Stock should be taken either at cost price or at market price, whichever is the lower. The company's method of accounting does not

meet these requirements for the relevant year. It has more stock, purchased out of income, than its trading account shows, and other stock is not taken at the right figure. It seems to me that the submission of counsel for the Crown that there can be only one answer to the Crown's third contention is established.

VAISEY, J., towards the end of his judgment, said:

- A "On the whole, I have come to the conclusion that my decision in this case must be for the Crown. I am satisfied that the base stock method of accountancy as adopted by the company is recognised and accepted in the industry and is unobjectionable for some commercial purposes. But I hold that it is not appropriate for the purpose of assessments to income tax, because it does not afford a true picture of the profits in any one year of charge, and because for that purpose the process stock of the company
- B at the beginning and end of a year of charge should be valued and brought into account at cost (being lower than market value). It seems to me that in computing the company's profits no part of such stock should be either treated as a fixed asset or brought into account as a mere arbitrary figure."
- C The Special Commissioners, having made the findings to which I have referred, said:
- "We held that the appeal succeeded and we left the figures to be agreed."
- I think it is right to say that they held that the appeal succeeded on their findings already stated in para. 15 of the Case. It appears to me that on the facts they misdirected themselves in law in so holding. The decision of
- D VAISEY, J., was right, and, in my view, this appeal ought to be dismissed.

BIRKETT, L.J.: I am of the same opinion. I will state briefly my reasons for coming to the same conclusion as my Lord, though I accept my Lord's reasoning and the conclusions on all those detailed matters with which

E he has dealt so fully. The matter came before the Special Commissioners by way of appeal from the assessment made on the company by what I may call the Gower method of assessment. The company submitted that it was not bound by that method, but was entitled to be assessed on the system which had been in vogue in the company for almost fifty years, taking their pre-

F decessors into account. I was very much impressed by the argument of counsel for the company that the only question before this court was whether there was evidence to support the findings of the Special Commissioners. If the answer to that question was in the affirmative, then this court had no other course but to uphold the decision of the Special Commissioners and reverse the judgment of VAISEY, J.

- G The question which this court had to determine, as formulated by the Special Commissioners on the face of it seems complete. It was "whether the company was entitled to have its profits computed for income tax purposes according to the base stock system." Counsel for the company said, with force, that the commissioners had the precise question before them and they had had detailed evidence in documents and evidence from rival accountants. They formulated the questions for this court in this way:

- H "The questions of law for the opinion of the court are:—(i) Whether there was evidence upon which we could arrive at our findings in para. 15 of this Case, and (ii) Whether, in view of such findings, our decision was erroneous in law."

My Lord said that the commissioners had not really made the proper findings, but counsel for the company strenuously argued that they had, and that looking at the form in which they had stated their question, they must be taken to have

known that they had before them the assessment for the income tax year. It is plainly so stated in sub-para. 1, which reads: "Those are our findings which we set out in para. 15", and the findings in para. 15 are two:

"We, the commissioners who heard the appeal, found that the method adopted by the company dealing with its base stock in its accounts is one of the methods recognised in this particular trade of cotton spinning and is in accordance with sound commercial practice."

I do not think anybody is ready to dispute that finding, because Mr. Gower in his evidence lent support to it, and Mr. Robson said the same thing. The commissioners also said:

"We also found that the method the company had adopted for computing its profits was in accordance with sound commercial practice."

So far as the accountants were concerned, that would seem to follow their first finding, because both Mr. Gower and Mr. Robson said that there are reputable firms who prefer this method for their companies' accounts. Then the commissioners said: "We held that the appeal succeeded". By that they must have meant, I think, that, because they had found the base stock method employed by the company was in accordance with sound commercial practice, therefore, it was suitable for income tax purposes. I think that third conclusion was wrong, and I prefer to put it in this way. If that be a proper construction of the findings of the commissioners, it was erroneous in law, being not so much a pure question of fact as a mixed question of fact and law.

The relevant words of s. 29 (1) of the Finance Act, 1926, provide that income tax in respect of profits shall be computed on the full amount of the profits or gains or income of the year preceding the year of assessment. The Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, r. 1 (1), provides:

"The tax shall be charged without any other deduction than is by this Act allowed."

Then by r. 3:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (e) any loss not connected with or arising out of the trade, profession, employment or vocation. (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

I should have thought that the true question properly formulated for the Special Commissioners was this. Did the base stock method of accountancy for which the company contends correctly ascertain the full profits as enjoined by s. 29 (1) for income tax purposes for the year of assessment? I do not think they really answered that question. I was looking again at the evidence of Mr. Robson on which counsel for the company placed so much reliance and I had in mind his criticism of VAISEY, J., who said that Mr. Robson did not seem to commend that system. Counsel said it was not part of the duty of Mr. Robson to commend any system—he was giving evidence about the matter. Counsel also complained of VAISEY, J.'s arrogating to himself the task of the Special Commissioners when he said:

"But I hold that it is not appropriate for the purpose of assessments to income tax because it does not afford a true picture of the profits in any one year of charge."

Counsel said with force that that is said only because the company did not adopt what is called the Gower system, but adopted its own base stock system. I think it is a little singular that Mr. Robson, if his evidence is analysed carefully, seems to skirt the central question: Is the base stock method of computing profits the proper method in accordance with the Income Tax Acts?

I will summarise the evidence in this way. It is quite true that no one method can be described as the proper method to apply, speaking generally, among cotton spinning concerns. Some use the base stock method and others the Gower method of cost or market value. But the company was following commercial practice when applying the base stock method. It is a good method, though other people may say there is a better method. With great respect to counsel, I think that that is dealing with the company's own methods of presenting its accounts for company purposes. Mr. Robson said that he did not think the Gower method was the better method, i.e., to bring in the base stock at the beginning and end of the year at cost or market value. The base stock method gave a true view of the profits of the company if it was employed consistently. He had given certificates certifying companies' accounts framed on that basis. For example, for the purpose of ascertaining the commission of a manager in a particular company, he would adopt the method consistently used by the company and would not institute any other method. All the way through, while he is discussing the question of rising prices and falling prices and the base stock method in relation thereto, he nowhere says: "In my view, this method produces an accurate result in that it provides the full profits for the year of assessment." I think that VAISEY, J., was to that extent justified in commenting on Mr. Robson's evidence.

LORD PORTER said in *Ryan v. Asia Mill, Ltd.* (5) (32 Tax Cas. 296):

"Moreover what may be prudent accountancy for a company is not necessarily the correct method of ascertaining the proper assessment for income tax."

In my view, the Special Commissioners in their findings were concerned almost wholly with the first part of that sentence of LORD PORTER. The base stock method is the appropriate method for this company, which has adopted it consistently for its own purposes, i.e., for company purposes, but I do not think the commissioners have really addressed themselves to the true question in this case: Did this base stock method of accountancy correctly ascertain the full profits for income tax purposes for the year of assessment? Quite naturally, all sorts of subsidiary questions thereupon arise, such as: Did the base stock method have the effect of making deductions from profits which are expressly or by necessary implication forbidden by the Act of 1918 or any other relevant taxing statute? But if we are asked to say: "Here are findings by the Special Commissioners, and if there is evidence to support them, then the task of this court is ended, because it must support them", I must answer that the findings of fact by the Special Commissioners do not conclude the matter. Even if there was nothing with which I could quarrel so far as these findings went, nevertheless the true issue is still left undetermined, and I think that VAISEY, J., was right. As he expressed it, he did not, perhaps, cover quite accurately the real issue, and I would prefer to formulate it in this way. The Special Commissioners only considered the facts up to one particular point and then stopped short. Bearing in mind that in the base stock system as described by my Lord the fixed stock never comes into the trading account or appears in the balance sheet and that the spare process stock has an arbitrary figure attached to it, I think that the Special Commissioners reached that stage and then stopped. They said: "There is no doubt at all that the base stock method has been in vogue amongst cotton spinners for very many years—in this particular case in vogue for nearly fifty years." For the purposes of the company there is, perhaps, no quarrel to be made with it, and for computing profits for the company's purposes no fault was to be found with it. But, the real question being whether the method was a proper one for ascertaining accurately the full profit in accordance with s. 29 (1) of the Act of 1926, I think the Special Commissioners did not really address their minds to that topic.

For this reason I am of opinion that this appeal ought to be dismissed, and I concur fully in the judgment delivered by my Lord.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue ; Peacock & Goddard, agents for Barlow, Parkin & Co., Stockport (for the company).*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] A

Re SPENSLEY'S WILL TRUSTS. BARCLAYS BANK, LTD. v. STAUGHTON AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), B
December 17, 18, 1953.]

Charity—Benefit to community—Gift in favour of High Commissioner for Australia.

Perpetuities—Rule against perpetuities—Alternative disposition—Gift to charity on future uncertain event.

Charity—Trustee—Restriction of objects by nature of trustee—Appointment of National Trust as trustee—Discretion as to objects—Restriction to charitable uses necessarily charitable. C

By his will dated Mar. 24, 1932, a testator, who died on Mar. 3, 1938, devised land, dwelling-houses, and other buildings at Westoning, and also the lordship of the manor and an advowson, to the National Trust for Places of Historic Interest or Natural Beauty to hold them in trust for F. for life, and after her death for S. for life, and after the death of both for the use of the High Commissioner for Australia as a country residence in a similar way to that in which Chequers is used by the Prime Minister of England. The will further provided: "Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date then for such other uses preferably for some purpose in connection with Australia as the said National Trust and [F.] if then alive may jointly decide or if the said [F.] be not then alive as the said National Trust may decide but so that the said estate of Westoning may as far as possible be kept intact". The testator suggested that, if the Australian government refused the gift, a certain part of the land should be sold, but that the remainder of the estate should be maintained as a small residential agricultural estate. On July 11, 1938, the National Trust disclaimed "all estates, interests and powers therein given to or vested in it as trustee or devolving" under the will. On Sept. 3, 1938, the High Commissioner for Australia disclaimed all his interest and that of the government of Australia, under the will. On the question of the validity of the trust to take effect on the disclaimer by the government of Australia, D

HELD: (i) the primary trust in favour of the High Commissioner was not a charitable trust as being for the benefit of a section of the community (viz., the citizens of Australia), and it followed that the alternative trust which arose on renunciation of the primary gift by the government of Australia, whether charitable or not, failed because it would not arise within the perpetuity period. E

Re Corelli ([1943] 2 All E.R. 519), applied.

(ii) the alternative trust was not limited to charitable objects by the character of the National Trust as trustee, because (a) the choice of objects did not rest only with the National Trust, but rested with the National Trust and F. jointly; (b) the primary trust in favour of the High Commissioner not being charitable, there appeared no ground for restricting H

the alternative trust to charitable uses; and (c) the primary trust was in any event not within the objects of the National Trust and there was, therefore, no ground restricting the objects of the alternative trust to such objects.

Re Flinn ([1948] 1 All E.R. 541), distinguished.

Dictum of LORD MACNAGHTEN in *Dunne v. Byrne* ([1912] A.C. 409), applied.

A Decision of VAISEY, J. ([1952] 2 All E.R. 49), reversed in part.

AS TO GIFT FOR BENEFIT OF A SECTION OF THE COMMUNITY, see HALSBURY, Simonds Edn., Vol. 4, p. 228, para. 508; and FOR CASES, see DIGEST, Vol. 8, pp. 259, 260, Nos. 209-217.

Cases referred to:

- B (1) *Re Flinn*, [1948] 1 All E.R. 541; [1948] Ch. 241; [1948] L.J.R. 923; 2nd Digest Supp.
- (2) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- C (3) *Re Corelli*, [1943] 2 All E.R. 519; [1943] Ch. 332; 112 L.J.Ch. 348; 169 L.T. 265; 2nd Digest Supp.
- (4) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest 294, 718.
- (5) *Re Davidson*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 8 Digest 296, 735.
- D (6) *Re Verrall*, [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 8 Digest 260, 217.
- (7) *Re Garrard*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest 294, 716.
- (8) *Re Norman*, [1947] 1 All E.R. 400; [1947] Ch. 349; [1947] L.J.R. 780; 177 L.T. 125; 2nd Digest Supp.
- E (9) *Re Ashton's Estate*, [1938] 1 All E.R. 707; [1938] 1 Ch. 482; 107 L.J.Ch. 282; 158 L.T. 441; *affd.* H.L., [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.
- (10) *Re Strakosch*, [1947] 2 All E.R. 607; [1948] Ch. 37; *affd.* C.A., [1949] 2 All E.R. 6; [1949] Ch. 529; [1949] L.J.R. 1477; 2nd Digest Supp.

F APPEAL by first, second and third defendants against an order of VAISEY, J., dated May 15, 1952, and reported [1952] 2 All E.R. 49, on an originating summons to determine, inter alia, whether, on the true construction of the will and codicil of Howard Spensley, deceased, and in the events which had happened, subject to the successive life interests of the defendants, Ethel Fairchild and Tassie Mary Skene, the trusts contained in cl. 14 and cl. 15 of the will concerning the testator's estate of Westoning and the furniture and contents of the manor house at Westoning failed or were good charitable trusts.

G VAISEY, J., held that the trusts contained in cl. 14 and cl. 15 were charitable trusts and directed that a scheme should be brought in. Notices of appeals were also given in respect of the decision of VAISEY, J., on a further question raised by the summons (see [1952] 2 All E. R. 49), but the appeals were settled by agreement.

H *E. B. Stamp* for the first, second and third defendants, a nephew of the testator and two children of the said nephew, interested in residue.

N. S. S. Warren for the fourth defendant, Mary Gluckman.

J. A. R. Finlay for the fifth defendant, an infant son of Mary Gluckman.

J. W. Mills for the sixth and seventh defendants, two infant sons of Mary Gluckman.

D. S. Chetwood for the eighth defendant, Ethel Fairchild, the first tenant for life.

Denys B. Buckley for the Attorney-General.

Hillaby for the plaintiffs, the trustees.

SIR RAYMOND EVERSHED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: In this case, the testator, Howard Spensley, by cl. 14 of his will dated Mar. 24, 1932, made a disposition in the following terms:

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"I devise and bequeath my land houses and buildings in the parishes of Westoning Harlington and Tingrith in the county of Bedford (except as herein otherwise dealt with) including the lordship of the manor of Westoning and the advowson of the living of Westoning hereinafter called the estate of Westoning to the National Trust for Places of Historic or Natural Beauty of 7 Buckingham Palace Gardens Westminster (hereinafter called the National Trust) upon the following trusts: (1) For my sister Ethel Fairchild for life; (2) After the death of the said Ethel Fairchild for my sister Tassie Mary Skene for life; (3) After the death of both of my said sisters for the use of the High Commissioner or other person representing the government of the Commonwealth of Australia in England for the time being to be used by him as a country residence in a way similar to that in which Chequers is used by the Prime Minister of England. Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date then for such other uses preferably for some purpose in connection with Australia as the said National Trust and my sister Ethel Fairchild if then alive may jointly decide or if the said Ethel Fairchild be not then alive as the said National Trust may decide but so that the said estate of Westoning may as far as possible be kept intact. The presentation to the said living of Westoning to be made by the person for the time being having the use of the said manor house or if that be not possible then by the said National Trust. I hope should the Australian government accept this bequest they will appoint to the living of Westoning men having experience in Australia so that a greater knowledge of the two countries the one by the other may arise."

Then there is a provision in which a sale is recommended of part of the Westoning property, but the testator suggests

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"that the remainder of the estate be not sold but may as far as possible be maintained in the state in which it now is that is to say as a small residential agricultural estate."

Clause 15 of the will is in these terms:

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"I bequeath the furniture and contents (other than moneys securities or legal documents and except as herein otherwise disposed) of my manor house at Westoning to the said National Trust to be used in connection with the said house and to follow the trusts created in respect of my Westoning estate."

The testator died on Mar. 3, 1938, and his will was proved on June 8 in the same year. On Sept. 3, 1938, the High Commissioner for the Commonwealth of Australia by deed renounced and disclaimed the trust for the benefit of the High Commissioner or other person representing the government of the Commonwealth of Australia in England for the time being, which trust I will refer to as "the primary trust". In view of that renunciation and disclaimer, the primary trust (whether it would or would not otherwise have constituted a valid disposition) ceased to have effect by virtue of the express provision in the primary trust which brings the second, or alternative, trust, as I will call it, into operation in the event of the government of the Commonwealth of

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Australia refusing the bequest at the time of the testator's death or renouncing it at any future date. On July 11, 1938, the National Trust disclaimed the trusteeship of the dispositions to which I have referred. In these circumstances, the question arose whether the alternative trust which, in the events which happened, so far as it lawfully could, took (subject to the life interests) immediate effect, was a valid charitable trust. By his judgment dated May 15, 1952, VAISEY, J., held that the alternative trust was a valid disposition for charitable purposes, and from that decision the beneficiaries interested in residue now appeal to this court,

The decision of VAISEY, J., was founded on an application of the principle deducible from certain authorities referred to and followed in *Re Flinn* (1), in which a testatrix bequeathed to "His Eminence the Archbishop of Westminster Cathedral London for the time being" her residuary estate "to be used by him for such purposes as he shall in his absolute discretion think fit". It was held that the bequest was a gift to him as a trustee and not beneficially and that he held the residuary estate on a valid charitable trust for ecclesiastical purposes.

The reasoning which led VAISEY, J., to apply the principle deducible from those cases to the case now under consideration was substantially to this effect. Starting with the proposition that the National Trust is a corporation established for exclusively charitable purposes, he went on to hold that, although the testator purported to confer on Ethel Fairchild jointly with the National Trust the discretionary power of deciding on, or selecting, the uses to which the property was to be put under the alternative trust, the effective selection of such uses was in the hands of the National Trust alone inasmuch as the property could only be applied to the purposes in question on the death of Ethel Fairchild. He, therefore, concluded that the gift here, so far as the alternative trust was concerned, was in substance equivalent to a gift to the National Trust to be applied for such purposes as the National Trust might decide, and, therefore, comparable to a gift of the type considered in *Re Flinn* (1). In other words, the learned judge regarded the gift here in question as tantamount to a gift to a corporate body established for exclusively charitable purposes with a superadded direction to the effect that such charitable body was to apply the property for such purposes as it might think fit, and, so regarding it, held, on the principle deducible from *Re Flinn* (1) and the cases therein cited, that the superadded direction, being merely in general terms which purported to give an unfettered discretion to the charitable body, viz., the National Trust, did not have the effect of enlarging the permitted objects of the gift beyond the charitable purposes which the National Trust itself could properly pursue under its constitution.

The reasoning on which the learned judge's decision was based has been criticised in this court on behalf of those interested in the residuary estate. To those criticisms I will return later in this judgment, but I should first of all deal with a point taken before us which, so far as I am aware, was not argued before VAISEY, J., and that was this. It is, of course, well known that trusts for charitable purposes are exempt from the rule against perpetuities, that being one of the important privileges or advantages accorded to charity by the courts. Nevertheless, a gift to charity, unless it takes effect on the failure or determination of a previous gift to charity, must take effect, if at all, within the period allowed by the rule against perpetuities. Applying that principle to the present case, those interested in residue contend that the primary trust in this case was not a charitable trust, so that on any view there is no appropriation of the fund to charity by the terms of this disposition until the failure or determination of the primary trust. They further point out that the primary trust is limited to endure until such time as the bequest may be refused or

renounced by the government of the Commonwealth of Australia, as appears from the words:

“Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date then for such other uses . . .”

They contend that this provision is apt to cover the case of a renunciation by the government of the Commonwealth of Australia at any future time, not necessarily a time falling within the period permitted by the rule. They, therefore, submit that the alternative trust, even if it could otherwise be upheld as a charitable trust, is a trust which, according to the terms of the will, might take effect beyond perpetuity limits and, accordingly, even if it could otherwise be held to be charitable, is void as infringing the rule. A

Counsel for the Attorney-General contested that argument substantially on these grounds. First, he said, the primary trust is a charitable trust, and, therefore, one has here an immediate appropriation to charitable purposes and the exemption applies to a gift at any distance of time from one charitable object to another. Secondly, he said that the words B

“Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date . . .” C

connote a refusal or renunciation either at the testator's death or within a reasonable time thereafter, and should not be construed as introducing a possibility of a failure of the gift at a time extending beyond the perpetuity period. As to the latter point, I see no ground in the context for placing that limited construction on the words “or renounce it at any future date”. In my view, the government of the Commonwealth of Australia could properly be said to renounce this gift within the meaning of the provision in question if, after accepting it and enjoying it for a period, they decided (for whatever reason) that the benefit of the trust should be given up. In my view, therefore, the provision concerning refusal or renunciation does open the possibility of the primary trust taking effect and continuing for a period longer than that permitted by the rule against perpetuities and then failing, with the consequent taking effect of the alternative trust beyond the permitted limits. D

As to the argument that the primary trust is a trust for charitable purposes, counsel for the Attorney-General invited us to draw an analogy between this case and the cases in which trusts have been upheld as conducive to the efficiency of the armed forces of the Crown. He also said, if I understood him correctly, that this trust could be upheld as charitable as being for the benefit of a section of the community, viz., the citizens of Australia, the cost to whom of maintaining in this country their duly constituted representative would be pro tanto reduced and who would also enjoy the more efficient services of such representative, due to the opportunities for rest and recuperation afforded by the country retreat which the testator was minded to provide. I find myself unable to accept that argument. It seems to me that this trust is simply a trust to provide certain amenities for a person for the time being holding in this country a particular office under the Australian government. I think it would be an unwarrantable extension of the fourth head of “charity” in the classification contained in *Income Tax Special Purposes Comrs. v. Pemsel* (2) to hold such a disposition as that to be charitable. E

I am fortified in that view by the circumstance that those responsible for framing the Chequers Estate Act, 1917, clearly regarded the comparable purposes to which Chequers was to be devoted as open to objection, inferentially on the ground of perpetuity, unless validated by Act of Parliament. The deed scheduled to the Act contains this recital: F

“And whereas the trusts hereinafter declared in relation to the Chequers estate and the said trust fund would infringe certain rules of law unless G

these presents were confirmed and made valid by Act of Parliament and it is intended that a Bill shall be introduced into Parliament for the confirmation of these presents accordingly . . . ”,

and in addition to that the Act which confirmed the scheduled document contains the recital:

A “And whereas the trusts created by the said deed cannot take effect without the authority of Parliament, and it is expedient that the said trusts should have full force and validity . . . ”

I find some further support for my conclusion in the decision of COHEN, J., in *Re Corelli* (3). In that case a testatrix gave the residue of her estate and effects to trustees to enclose all the freehold land as a breathing space and air zone for the health of the town of S., her expressed intention being that the ultimate trusts of the house and grounds at M.C. be continued in perpetuity for the benefit and service of distinguished visitors from far countries visiting S. who would otherwise seek their quarters in a hotel. The learned judge held that the purpose comprised in the provision that the house and grounds be continued in perpetuity for the benefit and service of distinguished visitors from far countries visiting “S.” was not a valid charitable purpose.

C Accordingly, in the view I take, the object of the primary trust, though, no doubt, it might be said to be a desirable and useful public object, is not such an object that it can properly be held to be a charitable object within the legal definition of “charity”. It follows that, in my judgment, the new point taken in this court should succeed, with the result that the alternative trust is invalid as infringing the rule against perpetuities, even if it could otherwise be upheld as a valid charitable trust.

E That conclusion makes it strictly unnecessary to deal with the actual ground of the learned judge's decision, but, in view of the fact that it was the ground on which the case was decided before him, and in view of the argument presented to us, it is only right that I should proceed to deal with it also. The learned judge, as I have said, founded himself on the principle deducible from the cases summarised and followed in *Re Flinn* (1). I find it unnecessary to review those authorities at length, because counsel for the fourth defendant, in the course of his argument on behalf of residue, stated the principle deducible from them in terms which, if I may say so, appear to me to be wholly adequate, and from which counsel for the Attorney-General did not dissent. The principle deducible from those authorities was thus stated by counsel: “Where there is a gift to a person who holds an office the duties of which are in their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for the charitable purposes inherent in the office”. On the other hand, it is necessary also to bear in mind the principle stated in such cases as *Dunne v. Byrne* (4) and *Re Davidson* (5). The principle deducible from those cases is of this nature—and to contrast it with the principle deducible from *Re Flinn* (1) and the cases there followed it can appropriately be introduced with a “but”—“But where the purposes of a gift are plainly expressed in terms not confining them to purposes which are in the legal sense charitable they cannot be confined to charitable purposes merely by reference to the character of the trustee”.

H To quote from LORD MACNAGHTEN's judgment in the Privy Council in *Dunne v. Byrne*, LORD MACNAGHTEN said ([1912] A.C. 409):

“The learned counsel for the appellants began by insisting that inasmuch as according to the authorities a gift to a Roman Catholic archbishop and his successors, without more, would be a good charitable gift, there is to be found in this will an overriding charitable intention sufficient to supply the lack of certainty—if lack of certainty there be—in the declared object

of the bequest. Their Lordships have no hesitation in rejecting this argument. A similar argument was advanced and rejected in the Court of Appeal in England in the case of *Re Davidson* (5). It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee".

It will be seen that inevitably those two principles must be liable to produce fine distinctions in particular cases and it may often be hard to decide on which side of the line a given case falls. Is it a gift to a holder of an office of a charitable character *virtute officii* with merely superadded words conferring wide powers of disposition? If so, on the principle followed in *Re Flinn* (1), the gift will *prima facie* be charitable by virtue of the charitable character of the office. On the other hand, is it a gift to a trustee bearing a charitable character or holding a charitable office on trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature? If so, then the scope of the trusts is not to be limited by reference to the character of the trustee.

In the present case, speaking for myself, I feel little difficulty in holding that the gift here in question cannot properly be upheld as a charitable gift on the strength of the principle followed in *Re Flinn* (1). The learned judge was able to reach a different conclusion, the nature of which I have already indicated. I should, perhaps, quote that part of his judgment in which he states his conclusion. He says ([1952] 2 All E.R. 52):

"I am bound to say that, applying the principle explained rather than laid down by JENKINS, J., in *Re Flinn* (1), it seems to me that I have to look at this case as if the person who has the effective disposing power is the National Trust. The National Trust is, admittedly, a charity with defined charitable purposes. That is best to be seen from *Re Verrall* (6), where it was held that the purposes for which the National Trust had been incorporated were charitable purposes, and they are expressed by ASTBURY, J. ([1916] 1 Ch. 115), as being '... plainly public purposes, expressly stated to be for the benefit of the nation...' He further went on to say that they had no choice of applying them to any other purposes. It is said that the words which I have read, 'preferably for some purpose in connection with Australia', must necessarily exclude any idea of the purposes to which the National Trust was confined, and in declaring these alternative purposes, which have to be brought into operation in the events which have happened, those words preclude the National Trust from applying the purchase money to the general purposes for which it, the National Trust, was incorporated. I do not think I can accept that. To begin with, the words introduced by the word 'preferably' cannot, I think, be more than a mere predilection, and I think I must so look at this matter that it is the National Trust, not only by way of property, but also by way of power, which has the disposing power over this property now represented by the proceeds of sale."

Then the learned judge refers to *Re Garrard* (7) and *Re Norman* (8), two of the cases mentioned in *Re Flinn* (1), and expresses the view that the present case goes a little further than those cases, but that the learned judge's decision "follows as a necessary sequel to those decisions". He says of the present case (*ibid.*, 53):

"It is not so simple, it is not so straightforward, and it is not so clear-cut, but on the whole I think that the National Trust, by virtue not only of this property, but also by virtue of the power which it has, is given only such control over this property and over these proceeds of sale as

enables it to dedicate to purposes which are either the same or in pari materia with its own proper purposes as an incorporated charity."

Before I leave the authorities it would be right for me to refer to *Re Ashton's Estate* (9) to which reference was made by counsel for the Attorney-General. *Re Ashton* (9) was the well-known case of a gift to certain vicars and church-wardens "for parish work". There SIR WILFRID GREENE, M.R., said ([1938]

A 1 All E.R. 710):

"I quite agree that, if the words could be construed in the way in which [counsel for the appellants] would have us construe them, he would be entitled to succeed, but I find myself quite unable to construe them in that way. First of all, I do not think that it is legitimate to cut down the purposes which are specified by reference to the character of the trustees. That is a rule that has been enunciated more than once. The passage in which it is most frequently quoted is the passage in the judgment of the Privy Council in *Dunne v. Byrne* (4) delivered by LORD MACNAGHTEN. [He read the passage to which I have referred.] I quite agree that LORD MACNAGHTEN is there referring to a trust expressed in plain language, and he certainly did not mean to suggest that the character of the trustee is a thing which is to be disregarded in construing the gift as a whole. I can well conceive of cases where the purpose named takes its colour from the character of the trustee, but, where one finds that there is plain language, it is not legitimate to cut down that language by reference to the fact that the trustees named hold a particular office, or have a particular character."

D So here, says counsel for the Attorney-General, there are no trusts declared in plain language, but merely a general reference to

"such other uses preferably for some purpose in connection with Australia, as the said National Trust and my sister Ethel Fairchild if then alive may jointly decide",

E and he says that those words, being vague and colourless in themselves, should be given the proper colour by reference to the character of the National Trust as trustee.

The learned judge's conclusion based on the principle followed in *Re Flinn* (1) is attacked on the part of the residuary legatees substantially on these grounds. They are, I think, disposed to concede that if the gift here had been a gift to

F the National Trust to be applied by the National Trust for such purposes as it might think fit, or on trust to apply the same for such purposes as the National Trust might think fit, that might well be a valid disposition for charitable purposes by analogy to the cases of a gift to the holder of some office of a charitable character by virtue of his office, for, while pointing out that there is no exact correspondence between a gift to an individual as the holder for

G the time being of some office and a gift to a corporation aggregate, as in the present case, they are not, as I understand their argument, concerned to dispute the validity, or probable validity, of a gift in the terms I have stated. The burden of their argument is that the actual gift here in question is by no means of that character. They point out that this is not a case where the property is given simply to the National Trust as sole trustee to be applied as the National

H Trust may think fit: it is a case where the property is given to the National Trust for such uses as the National Trust and the testator's sister, Ethel Fairchild, may jointly decide, and although it may well be that a gift to the National Trust in trust to apply the same for such purposes as the National Trust should think fit would be a valid charitable gift, on the ground that the superadded words should not enlarge the National Trust's power of disposition beyond the purposes necessarily charitable which it can properly pursue under its constitution, there can be no ground for the same conclusion in the case of a

gift to the National Trust jointly with an individual on trust to apply the same for such purposes as they (the two trustees) may think fit, or in the case of a gift (as the gift here actually is) to the National Trust for such uses as the National Trust and a named individual may jointly decide. They say that in such a case no inference can be drawn from the character of the trustee as regards the nature or scope of the trusts to which the joint power of selection extends. They criticise VAISEY, J.'s conclusion as having been reached by the unjustifiable process of treating the discretion conferred for the purposes of the alternative trust as a discretion reposed in the National Trust alone. It is, of course, true that, after the death of Ethel Fairchild, the National Trust, if they had accepted the trust, would have been left in sole control, but it is impossible to ignore the fact that the power of selection of objects is in the first instance, undoubtedly, given to Ethel Fairchild and the National Trust jointly, and the testator quite clearly contemplated that in certain circumstances Ethel Fairchild would play an active and effective part in making the selection. A

Criticism does not end there, for it is also said that the primary trust is not a trust for charitable purposes. With that contention I agree, for the reasons I have already endeavoured to state. The primary trust not being charitable, it is asked, with force, what ground can there be for restricting the uses to which the power of selection extends, expressed as they are in the most general terms, to charitable uses? Further, it is pointed out that the primary trust, whether it was charitable or not, was not a trust of a kind falling within the charitable purposes for which the National Trust was constituted. We were referred to the National Trust Acts, 1907 and 1937, but for my part I have seen nothing in them to justify the conclusion that it would be a legitimate object of the National Trust to maintain a country residence for the High Commissioner for Australia for the time being. One, therefore, finds in the primary trust that the testator contemplates that the National Trust will act as a trustee for the purposes of a trust not falling within the charitable objects of its constitution, and again it is asked, with force: If that be so, what justification is there for drawing the inference that the other uses to which the property is to be applied under the alternative trust should be uses falling exclusively within the authorised charitable objects of the National Trust? B C D E

Then it is said that the preference expressed in the words "preferably for some purpose in connection with Australia" shows that the testator had in mind objects by no means necessarily within the scope of the National Trust's legitimate objects, and although VAISEY, J., was not impressed with this argument it seems to me to be not without force. I do not think that any further light is thrown on the question by cl. 15 of the will, which contains the gift of the furniture. The gift there is to the National Trust without any mention of the joint power of selection, but it is a referential gift, and I cannot regard the omission as affording any real support for VAISEY, J.'s conclusion. F

I think I have now dealt with substantially all the arguments directed against the validity of the alternative trust, and for my part I find them unanswerable. Counsel for the Attorney-General has persuasively argued the contrary. He says that the alternative trust is wholly separate and distinct from the primary trust, and that here one finds objects expressed in vague and general terms which should be construed by reference to the fact that the National Trust is the trustee, and by that process limited to charitable purposes within the scope of the legitimate objects of the National Trust. For my part, I cannot find in cl. 14 any indication sufficient to justify controlling and limiting the purposes of the alternative trust in that way, and in the view I take on this ground also, as well as the ground of perpetuity dealt with above, the alternative trust fails to qualify as a valid charitable trust, with the consequence that the property comprised in the disposition in question is not validly disposed of and must sink into residue. Accordingly, I would allow this appeal. G H

SIR RAYMOND EYERSHED, M.R.: I am of the same opinion, and only for the reason that we are differing from VAISEY, J. (with what hesitation, on a matter of this kind, I need not say) I add some few observations of my own.

The law which has to be applied is not, I think, in doubt. Counsel for the fourth defendant stated it in terms which counsel for the Attorney-General was content to accept and which JENKINS, L.J., has quoted. To that statement
 A I only venture to add, in reference to *Dunne v. Byrne* (4) and *Re Davidson* (5), a short statement from the argument of Mr. Stranders in *Re Flinn* (1):

“ . . . a gift, which is otherwise not charitable, does not become charitable through its being given to a corporation which occupies a charitable office.”

My Lord has also quoted from the judgment of SIR WILFRID GREENE, M.R.,
 B in *Re Ashton* (9). I cannot say in this case, obviously, that we have here “plain language”, but if, for the words “plain language” in SIR WILFRID GREENE’s statement, I substitute “language having on its true construction the effect of comprehending non-charitable objects”, then the passage in *Re Ashton* (9) is applicable here. The problem in this case (as in all cases) is in
 C the end to construe properly the language which the testator has used and to discern therefrom whether or no he has expressed what is called a general charitable intention.

I am of opinion (and, I confess, clearly of opinion) that what JENKINS, L.J., has called the primary trust—i.e., the first trust in favour of the High Commissioner for the Commonwealth of Australia—is not a charitable gift. That view was not, as counsel for the Attorney-General said, argued below and he
 D has, I think, argued that question, perhaps, a little faintly here, but however that may be, the suggestion that it is charitable as tending to promote the public interest of the diplomatic service of the Commonwealth of Australia seems to me too spectral and remote. The object is to provide a commodious and appropriate country residence for the amenity of the holder of the office of the High Commissioner for Australia, and I cannot think that that, how-
 E ever laudable and desirable, is a charitable object.

If that be a correct view of what has been called the primary trust, the result is of great importance, in my judgment, although it is not conclusive. It is of great importance, first, because of the point raised by counsel for the fifth defendant, on which I share the view expressed by JENKINS, L.J., viz., that the charitable trust which follows, if it be charitable, may not take effect
 F until a time beyond the period allowed by the rule against perpetuities. Counsel for the Attorney-General asked us to construe the word “renounce” in the phrase “or renounce it at any future date” as having the technical significance of the word when used in reference, say, to a legacy, meaning, renounce it altogether before ever it has been in any respect enjoyed. I do not take that view of the meaning of the word in this context. The phrase is:

G “Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date . . .”,

and it is to be borne in mind that the opportunity of enjoying this gift may arise immediately (if, for example, the prior life tenants surrendered) or at some distant date after the death of one or both of them. In such a context, and
 H having regard to the dictionary use of the word “renounce”, it seems to be that the testator was saying: “Should the Commonwealth at any time, and whether it has in the meantime taken under the benefit or not, give up or surrender its beneficial interest”.

That, as JENKINS, L.J., has said, is sufficient to determine the appeal, but on the second point, on which VAISEY, J., took a different view, I also share the conclusions of JENKINS, L.J. Again, my conclusion on the effect of the primary or first trust appears to me of great importance, and for this reason.

If the disposition for the High Commissioner's benefit is not charitable, then I start with this, that the National Trust, who are appointed trustees of these premises, are directed to hold them for a purpose which is both outside the defined objects for which the trust exists according to the National Trust Acts, 1907 and 1937, and is also non-charitable; and if that is right then, to my mind, the real basis of the argument of counsel for the Attorney-General is at once destroyed, for, if the trust is from the start a trust which is, or at least may be, foreign to the inherent charitable nature which the National Trust Acts imposed on the National Trust, then it seems to me that, in the absence of some very clear words indicating a change of intention, the same view must be applicable to the remainder (the vital part, for this purpose) of the gift. I can find nothing in the later language which has so limiting an effect. The first words, "for such other uses" (and I agree they mean all other uses than the one already specified) are perfectly general in effect. Similarly, the words "preferably for some purpose in connection with Australia" (like the words "for parish work" in the *Ashton* case (9)) provide a formula obviously apt to comprehend purposes other than charitable, although they may also include charitable purposes.

I will not repeat what my brother has said as to the significance of joining as nominator of the purpose with the National Trust the testator's sister, Mrs. Fairchild. I agree with him as to the inference to be drawn from that circumstance. Looking at the whole clause and deriving from it, viewed as a whole, the sense which lay behind the testator's expression, I am for my part much impressed by this. The testator opens with a disposition (which I am now assuming is not charitable) in favour of the Australian High Commissioner in England. He then makes a direction for designating a trust *prima facie* quite unlimited in character, and with the qualification that it is "preferably for some purpose in connection with Australia". Finally, he directs that, as regards presentation to the living of Westoning, persons should be appointed

"having experience in Australia so that a greater knowledge of the two countries the one by the other may arise."

Laudable, plainly, as that object is, it seems to me that it is an object which may be described more appropriately by the word (used in its proper and general sense) "political" than "charitable". It is an expression of an intention analogous, as I think, to the intention which this court held to underlie the disposition in *Re Strakosch* (10).

For these reasons, in addition to those which JENKINS, L.J., has stated and with which I find myself in full agreement, I think, as he does, that the intention to be derived from this part of the will is not a charitable intention, and I think, therefore, that this appeal must be allowed and that the gift which is here in question must be declared invalid.

MORRIS, L.J.: I find myself in full agreement with the two judgments which have been delivered and I do not desire to add anything.

Appeal allowed.

Solicitors: *Radcliffes & Co.* (for the plaintiffs and the first, second, third and eighth defendants); *Leman, Harrison & Flegg* (for the fourth, fifth, sixth and seventh defendants); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

MASON AND ANOTHER v. CLARKE.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), November 18, 19, 20, 23, 24, 25, December 8, 1953.]

Landlord and Tenant—Reservation—Sporting rights—Right to take rabbits reserved to landlord—Right of tenant farmer to kill rabbits in interests of good farming—Right to agree to destruction of rabbits by agricultural executive committee—Right of landlord to set snares in tenant's fields—Profit à prendre—Oral grant—Ground Game Act, 1880 (c. 47), s. 1 (1) (b).

By an agreement in writing, the predecessor of the second plaintiffs let to the defendant, a farmer, certain pasture fields, reserving to himself “(subject to the provisions of the Ground Game Act, 1880) all the game, rabbits, wild fowl and fish with liberty for himself and all other persons authorised by him, to preserve, hunt, course, kill and carry away the same,” and the defendant agreed, subject to the Act of 1880, “not to shoot or otherwise sport on the land”. Between December, 1949, and October, 1950, the land became overrun with rabbits, and, in pursuance of a notice served on him by the agricultural executive committee, the defendant agreed that the committee should gas the rabbit-holes in the hedgerows on the fields. In October, 1950, by an oral agreement, the second plaintiffs sold the right to take rabbits on the land to the first plaintiff. The receipt given to the first plaintiff by the second plaintiffs for the amount paid to them by the first plaintiff for the right to take the rabbits was, to the knowledge of both those parties, a false receipt, designed, the court found, to defraud the Inland Revenue. The first plaintiff laid snares in the fields where the defendant grazed sheep, and on Oct. 15, 1950, the defendant ordered the first plaintiff, who was snaring rabbits, off the land, but he refused to leave. On Dec. 2 the defendant kicked over snares which the first plaintiff had laid on the land. On Oct. 22 a man with two companions took rabbits with ferrets in the hedgerows with the written authorisation of the defendant. On Oct. 24 a servant of the agricultural committee, with the help of the defendant's son, gassed the rabbit-holes in the hedgerows. The plaintiffs alleged that these incidents constituted a breach of covenant by the defendant and a trespass against the enjoyment of their profit à prendre.

HELD: (i) the reservation of sporting rights by the second plaintiffs operated by way of re-grant by the defendant whose obligations in regard to it were to abide by the terms of his covenant and not to derogate from his grant by wilfully destroying the game or rabbits except in the proper exercise of his rights of cultivation and management of the land; in authorising the gassing of rabbits by the committee and the ferreting, the defendant was doing what was advisable in the interests of good farming.

(ii) in any event, the defendant was entitled to gas the rabbits under the Ground Game Act, 1880, s. 1 (1) (b), the word “employed” in that subsection including any employment, direct or indirect, and the servant of the agricultural committee being indirectly employed by the defendant to do the work; the ferreting was also within s. 1 (1) (b) of the Act since the man who killed and took away the rabbits was duly authorised in writing by the defendant.

(iii) it was not reasonable for the first plaintiff to lay snares in the defendant's fields, having regard to the fact that sheep were grazing there, and the defendant had a right to remove them to safeguard the sheep.

(iv) the first plaintiff had no right in law (and, in view of the falsity of the receipt accepted by him, no equitable right) to a profit à prendre since his right to take rabbits was granted orally and not by deed, and, therefore, he, not having been lawfully authorised by the second plaintiffs had no right to go on the defendant's land.

(v) consequently, the action failed.

AS TO RESERVATION OF RIGHTS IN GAME, see HALSBURY, Hailsham Edn., Vol. 15, p. 418, para. 787; and FOR CASES, see DIGEST, Vol. 25, pp. 353-355, Nos. 44-63.

Cases referred to:

- (1) *Boyer v. Warbey*, [1953] 1 All E.R. 269; [1953] 1 Q.B. 234; 117 J.P. 106.
- (2) *Wickham v. Hawker*, (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 25 Digest 354, 55.
- (3) *Peech v. Best*, [1931] 1 K.B. 1; 99 L.J.K.B. 537; 143 L.T. 266; Digest Supp.
- (4) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.
- (5) *Walsh v. Lonsdale*, (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 30 Digest, Replacement, 415, 590.

APPEAL by the defendant from an order of CROOM-JOHNSON, J., dated May 8, 1953.

The second plaintiffs, the Shepton Mallet Transport Co., Ltd., were the owners of the Hothorpe estate in Leicestershire and Northamptonshire which they had purchased in December, 1949. Fields on the estate had been let as pasture land for many years to the defendant, a farmer, under a tenancy agreement by which the landlord purported to reserve to himself the right to take all the game and rabbits on the land and the defendant agreed "not to shoot or otherwise sport" on the land. When the land was sold to the second plaintiffs the benefit and burden of the agreement passed to them. Between December, 1949, and October, 1950, the estate became overrun by rabbits, and in October the Agricultural Executive Committee of Northamptonshire, in exercise of their powers under s. 98 (1) of the Agriculture Act, 1947, served notices on the defendant and the second plaintiffs requiring them to destroy the rabbits. The defendant agreed that the committee should gas the rabbit-holes in the hedgerows at his expense. In October, 1950, under an oral agreement not evidenced in writing, the second plaintiffs sold the right to take rabbits on the land to the first plaintiff, Mason, for £100. Mason proceeded to snare and sell some hundreds of rabbits. On Oct. 15, 1950, the defendant ordered Mason who was engaged in snaring rabbits, off the land, and he refused to leave; on Dec. 2 the defendant kicked over snares which Mason had laid in the fields; on Oct. 22 a man with two companions was ferreting in the hedgerows with the defendant's permission; and on Oct. 24, the committee, by agreement with the defendant, gassed the rabbit-holes in the hedgerows. In the present action, which arose out of these four incidents, the plaintiffs alleged that the defendant had wrongfully broken his covenant not to shoot or otherwise sport on the land and had trespassed on and interfered with the plaintiffs' rights by himself killing rabbits and by procuring the committee to kill rabbits by gassing them. They also alleged that the defendant had prevented them from enjoying the benefit of their profit à prendre. The defendant alleged, inter alia, that the reservation of the profit à prendre did not entitle the plaintiffs to kill and take away rabbits for commercial gain nor to lay snares in the defendant's open fields. CROOM-JOHNSON, J., gave judgment for the plaintiffs, and awarded them damages.

J. G. S. Hobson for the plaintiffs.

Perrett for the defendant.

Cur. adv. vult.

Dec. 8. The following judgments were read.

DENNING, L.J.: There is an estate of about four hundred acres in Leicestershire and Northamptonshire called the Hothorpe estate which used to be owned by the de Trafford family, but in December, 1949, was bought by a company called the Shepton Mallet Transport Co., Ltd., the second plaintiffs, which is run by a Mr. Bennett. The fields have been let for many years to a tenant

farmer, Mr. Clarke, the defendant, and his father before him, but the spinneys have been retained by the owners in their own occupation. The owners have also retained the shooting rights over the fields let to the defendant. The defendant keeps many sheep on the fields. There was no trouble between him and the owners until the limited company came on the scene. Since then there has been acute hostility. This action is an outcome of it. It all arises out of the rabbits which have their holes in the spinneys and in the hedgerows and run over the fields. After the company took over the land, these rabbits became a serious nuisance. In the middle of 1950 the agricultural executive committee gassed the holes in one spinney, but this did not remedy the mischief. By October, 1950, the pest had become so bad that the agricultural executive committee decided to put into force their powers under s. 98 (1) of the Agriculture Act, 1947, to exterminate the rabbits. The defendant, Mr. Clarke, was very ready to co-operate with the agricultural executive committee. He was not, of course, in occupation of the spinneys, but he did have the hedgerows, and he agreed that the committee should gas the rabbits there at his expense. This was done on Oct. 24, 1950. The owners (the limited company) were, however, not so forthcoming. They had just sold the rabbiting to a Mr. Mason, the first plaintiff, for £100 and did not want to deprive Mason of them. The agricultural executive committee served the statutory notice on the owners on Oct. 14, 1950, but the spinneys in the owners' occupation were not gassed until January, 1951. Meanwhile, Mason had snared some hundreds of rabbits and sold them.

This action concerns four occasions of conflict. On two of these occasions the defendant sought to interfere with Mason. On Oct. 15, 1950, the defendant ordered Mason off the fields, but he did not go. He went on with his snaring as if nothing had happened. On Dec. 2, 1950, the defendant kicked over some of the snares which Mason had laid in the fields. The two other occasions concerned the killing of rabbits. On Oct. 22, 1950, a man with two companions went ferreting in the hedgerows with the permission of the defendant, and on Oct. 24, 1950, the agricultural executive committee, by agreement with the defendant, gassed the rabbit-holes in the hedgerows. I propose to consider these last two occasions first.

The question is whether the defendant had any right to kill or authorise the killing of rabbits on the land in his occupation. In this respect, the rights of the owner and the defendant are regulated by a tenancy agreement made in writing (not under seal) many years ago between Mr. de Trafford, the former landlord, and the defendant. It was originally for one year, but it has been continued from year to year. When Mr. de Trafford sold the land to the Shepton Mallet Company, the benefit and burden of the agreement passed to the company: see *Boyer v. Warbey* (1). The agreement was an ordinary letting of pasture land, but the landlord reserved to himself

“(subject to the provisions of the Ground Game Act, 1880) all the game, rabbits, wild fowl and fish with liberty for himself and all other persons authorised by him, to preserve, hunt, course, kill and carry away the same”,

and the tenant agreed (subject to the provisions of the Ground Game Act) “not to shoot or otherwise sport on the land.” Although the landlord purported to “reserve” the game, rabbits, etc., this was not in strictness a reservation. It was long settled at common law that an “exception” is only properly allowed of things in esse, such as trees or minerals; a “reservation” is only properly admitted of services to be rendered by the tenant, such as paying rent or providing a beast (heriot), whereas a right to come and kill and carry away wild animals is only a liberty or licence—a profit à prendre—which can take effect only by grant and not by exception or reservation. Words of reservation of sporting rights, operate, therefore, not by way of reservation proper, but by way of re-grant by the tenant: *Wickham v. Hawker* (2). In former times there was a drawback in

this view of the matter in that a reservation could not technically operate as a re-grant unless the tenant executed the lease himself. This technical drawback was eliminated by the Law of Property Act, 1925, s. 65 (1). So that a reservation now operates as a re-grant without any execution by the tenant, but that section does not, I think, affect the substance of the obligations. In point of law the reservation still operates as a re-grant by the tenant to the landlord and the rights of the parties must be ascertained on that footing. When this reservation is regarded as a re-grant, it is clear that the obligations of the tenant in regard to it are two only: First, he must obey his express covenant "not to shoot or otherwise sport on the land" except in accordance with the Ground Game Act, 1880; secondly, he must not derogate from his grant. This obligation "not to derogate" means that he must not wilfully destroy the game or the rabbits except in the proper exercise of his rights of cultivation and management of the land. The farmer is not precluded from

"... carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land ..."

per GREER, L.J., in *Peech v. Best* (3) ([1931] 1 K.B. 18). It does not, therefore, prevent him from cutting furze or underwood, or stopping rabbit-holes when that is advisable in the interests of good farming: see *Peech v. Best* (ibid., 8, 9) per SCRUTTON, L.J.; but it does, of course, prevent him from netting partridges or dynamiting the fish, or doing wilful destruction of that kind.

Applying this test, it is plain that the second plaintiffs cannot complain of the gassing of the hedgerows on Oct. 24, 1950. Early in that month the agricultural executive committee had come to the conclusion that the rabbits on the land had become such a pest and were so injurious that they must be exterminated. The committee had tried persuasion, but it was of no avail. So they decided to serve compulsory notices on the second plaintiffs as owners and on the defendant. The pests officer told the defendant of this decision, whereupon the defendant agreed to let him deal with the rabbits in the hedgerows. The committee sent one man to gas the holes and he did it with the help of the defendant's son. It seems plain to me that the defendant did not derogate from his grant in so doing. He was only doing what was advisable, and, indeed, necessary in the interests of good farming. By the same token, the company cannot complain of the ferreting on Oct. 22, 1950. The three men were only killing rabbits in the hedgerows which had become such a pest that they had to be exterminated, and they were, as we know, justifiably gassed two days later.

On this view, it is unnecessary for the defendant to justify himself by reference to the Ground Game Act, 1880, but, if it were necessary, I should have thought that the gassing was authorised by s. 1 (1) (b) of that Act in that it was done by the defendant's son and one man from the agricultural executive committee. The defendant employed the committee in good faith for reward to destroy the rabbits, and they appointed one man to do the actual gassing. If the defendant had employed the man directly, there could have been no doubt that he was justified under the Act. He should not be any the less justified because he employed the man indirectly through the committee. The word "employed" in s. 1 (1) (b) includes, I think, any employment, direct or indirect. So far as the ferreting is concerned, that also was authorised by s. 1 (1) (b) of the Act of 1880 because the man who was taking the rabbits had himself been duly authorised in writing, and there was no need for his two companions also to be authorised in writing. A written authority is needed by the one who kills and takes the rabbits, but not by his assistants. I ought to mention, perhaps, that the man who ferreted did not overlap with the agricultural executive committee because he had finished before they did their gassing, and there would be no point in his ferreting afterwards.

I turn now to the two occasions when the defendant interfered with the plaintiff, Mason. The question is what right had Mason to go on the land? He had no right at law to a profit à prendre. That can only be granted by deed, and there was no deed until Dec. 31, 1950. Before that time Mason had only an oral agreement with the owners whereby he paid £100 for the rabbiting on the estate. Did that give him a right in equity? It must be noticed that the oral agreement was not evidenced by writing. All that Mason had was a receipt which said that the £100 was a contribution "towards bailiff's wages on Hothorpe estate". That statement was false and no satisfactory explanation has been given of it. The landlord's agent who prepared the receipt said that Mr. Bennett, who runs the landlord company, instructed him to make out the receipt as being "towards bailiff's wages", and he obeyed those instructions. He added significantly that Mr. Bennett had a strong personality and expected his instructions to be carried out. But Mr. Bennett himself was never called to say why he wanted the receipt made out in that way and the court has been left in complete ignorance. In the absence of any explanation of this patently false receipt, I can only infer that it was done with a dishonest motive, for why otherwise should a man make a statement which he must have known was false? It has been suggested that it was done in order to deceive the revenue authorities, but I do not propose to inquire into the precise motive. Suffice it that it was a false receipt knowingly false, and done with some dishonest motive. The plaintiff, Mason, took the receipt without making any objection. He said that he read it, saw that it was a receipt for his £100, and thought that what Bennett did with the £100 was no concern of his. What is the effect of this false receipt? It means, I think, that Mason has no right in equity to a profit à prendre. I cannot think that any court of equity would grant him a decree of specific performance when all he could produce was such a strange and suspicious receipt. What, then, was Mason's position? He had no right at law to a profit à prendre because he had no deed. He had no right in equity because he could not get specific performance. Had he any right at all to go on the land? If he was lawfully authorised by the landlord company to go rabbiting on the land, then, of course, he could go, but the difficulty is to see that he was lawfully authorised, when the only thing he could himself produce was this false receipt. I take it to be clear law that a person who comes on to a farmer's land, asserting that he has the authority of the owner so to do, must be prepared to vouch his authority when called on to do so. In the absence of it, the farmer can turn him off the land as he would any stranger. Mason seems to have realised that the receipt would not be any warrant of authority, because he did not take it with him, not even on Oct. 11, 1950, on the very first occasion when he went to see the defendant, and, what is more, he gave the defendant on that day a wrong account of it. He said he had paid £100 and had a receipt for it giving him authority to catch rabbits on the estate, whereas the receipt gave him no such authority. It seems to me that Mason cannot be in a better position by not producing the receipt than he would have been by producing it. If he had produced it, it would not have shown him to be lawfully authorised to be on the land, let alone to snare rabbits there. He had, therefore, no lawful authority. The importance which the defendant attached to the receipt is shown by a letter which the defendant after the first meeting wrote to Mr. Smart, the pests officer of the agricultural executive committee:

"Today I have seen and spoken to a man whom Bennett has sold the rabbits to for £100. This man holds a receipt for his payment. He has promised to bring it for my perusal when I shall make a copy of same and you will be able to have one also if you wish."

Mason, however, never produced the receipt to the defendant. The only person

to whom he did produce it was to Mr. Smart who went to see Mason on Oct. 13, 1950, and asked to see the receipt. Mason produced it and Mr. Smart examined it. There can be little doubt that Mr. Smart told the defendant what it contained and thus enabled him to bring it to the notice of the court. It was suggested that Mason need not rely on this false receipt, but could derive his authority from a letter written by the landlord's agent to the defendant. I do not think that is correct. The false receipt taints the whole of his authority: see *Alexander v. Ruyson* (4); and makes him a person not lawfully authorised to be on the land. This means that neither Mason nor the company can complain in respect of the interference by the defendant with Mason. Not Mason, because he had no right to be on the land either at law or in equity. Not the company, because Mason was not a person lawfully authorised by them. It was said that Mason had a possessory title, but I do not agree with this. Not being lawfully authorised, he had no better title than a poacher. Even if I were wrong about this, however, the only thing that Mason can complain of is interference with his snares. The hard words on Oct. 15 broke no bones and gave no cause of action.

In considering whether he (Mason) had the right to lay snares in the field, the question is whether it was reasonable for him so to do, having regard to the fact that sheep were there. The law is that each

" . . . must use their land reasonably having regard to the interest of the other . . . ":

see *Peech v. Best* (3) ([1931] 1 K.B. 14) per SCRUTTON, L.J. It is, I think, not reasonable to lay snares in a field where a man's sheep are grazing, except by arrangement with the farmer beforehand. The reason is because there is a danger of the sheep becoming caught in the snares, which may lead to trouble—and, even from the snarer's point of view there is a danger of the snares being knocked over. Mason gave no notice to the defendant of his intentions to lay snares, nor of the places where he was going to lay them. This was, I think, unreasonable, and the defendant had a right to kick them over so as to save danger to his sheep.

In my opinion, therefore, neither the company nor Mason has any cause of action against the defendant. The judge came to a different conclusion, largely because of the view he took about the receipt. He thought that the defendant should not have taken any point about it, so much so that he seems to have awarded punitive damages against him for raising it. I do not think he had any jurisdiction to do this. In my opinion, the appeal should be allowed and judgment entered for the defendant.

ROMER, L.J.: I agree. In the absence of some alternative explanation (and none was offered) I cannot avoid the conclusion that the one and only purpose of describing the rent in the receipt as a contribution "towards bailiff's wages" (a statement which was repeated on the stub in the receipt book) was to facilitate a fraud on the Inland Revenue, and, if so, the fact that the receipt was never applied to that purpose is nihil ad rem. That such was the object is apparent to anyone with knowledge of the facts who sees it and, as the plaintiff saw it, and retained it in his keeping, it must have been apparent to him. How, then (if at all), does the falsity of the receipt affect Mason's right to sue the defendant in these proceedings for alleged interference with his rights of sporting? In considering this question it is necessary to bear in mind that Mason was not, during the relevant period, the legal tenant of the rights, for they constituted a profit à prendre and were not demised to him by deed. Such rights, then, as he possessed could only take effect and be enforceable in equity. It is said (in reliance on the principle of *Walsh v. Lonsdale* (5)), that, as he paid for the rights and the agreement was acted on, equity would recognise them as fully as though they had been validly created at law. It is true that

he paid for them and was permitted to enjoy them, but linked with the payment was a dishonest intent by the company, the furtherance whereof was promoted by the form of the receipt which Mason was content to accept. How, then, can Mason found a claim to recognition in equity on such a payment? It is perfectly clear to me that no court of conscience would afford him any recognition or relief whatever in relation to a transaction which involved a payment so manifestly tainted. He who comes to equity must come with perfect propriety of conduct or (as has been sometimes said) with clean hands. Had the company repudiated its oral grant of the sporting rights equity would never have granted Mason a decree of specific performance but would have relegated him to such claim as he might possess to damages at law. The position, then, is that at all material times when he was on the defendant's land in quest of rabbits he had no title to do so at law nor any right entitling him to be there which would be recognised in equity. The result of this seems plain. The defendant, by the terms of his lease, was only bound to submit to the presence on his land in pursuit of game of the lessors or persons authorised by the lessors, which means lawfully authorised. If, as, in my judgment, is the case, Mason's authority derived from an agreement which was of no effect either at law or in equity, it cannot be said that his authority was lawful so as to bring him within the category prescribed by the defendant's lease. It follows that Mason was, at all material times, in no better position than a trespasser on the defendant's land and that his claims in this action, accordingly, fail.

Assuming, however, that in spite of the false receipt Mason is entitled to have his claims against the defendant entertained by the court, they would, in my opinion, fail on the main issue of interference for another reason. Mason could have no better rights than the lessors themselves were entitled to exercise and neither he nor they could, in my judgment, kill game on the defendant's land in a way or by methods which were unreasonable in relation to the defendant. The land let to the defendant by the 1926 and subsequent leases was pasture land and was used by the defendant as such. He kept sheep on the land, and did so for years without trouble. Mason's way of killing the rabbits which ran on the defendant's land from the spinneys was almost entirely by the use of snares. That these devices are potentially harmful or injurious to animals other than rabbits can hardly be denied. Mr. Miles, who is a veterinary surgeon, said in evidence that he had a Labrador dog which had been caught in snares six or seven times in its life. Then, as to sheep, the defendant's daughter, Mrs. Garner, who, apparently, created a favourable impression on the judge as a witness, said that in early December, 1950, she found about thirty of her father's sheep with snares attached to their legs. It is true that neither the Labrador nor these thirty sheep apparently suffered physical injury from being caught in the snares, but not much imagination is required to realise that injury might ensue, and, if imagination is not sufficient, proof of the possibility is afforded by the defendant's dead teg to which Mr. Miles was called in January, 1951. In these circumstances, it does not appear to me that it is a reasonable exercise of sporting rights to lay down quantities of snares in pasture that is occupied by sheep, except by arrangement with the farmer. It was suggested in argument that, even so, the remedy of the tenant is to seek redress in the courts rather than to remove the snares himself, but I cannot accept this contention. If a man finds something on his land which has no business to be there and is likely to injure his livestock he needs no order from the courts to obviate the danger. In my opinion, accordingly, Mason has no cause of action against the defendant in respect of the alleged interference with the snares or with Mason's attempts to use them.

It remains to consider the position of the plaintiff company. If I am right in the view that no sporting rights effectively passed to Mason in October, 1950, it follows that those which were reserved to the lessors by the lease of 1926

remained vested in the company, and, in relation to their exercise, the illegality of the company's agreement with Mason is irrelevant. It is contended by the company that the defendant invaded their rights in two respects, viz., by ferreting for rabbits on Oct. 22, 1950, and by procuring and instigating the Minister of Agriculture to gas the rabbits in the hedgerows. I am not at all satisfied that the defendant was not acting within his rights under the lease on both of these occasions. The negative covenant imposed on him was

"not (subject to the provisions of the Ground Game Act) to shoot or otherwise sport on the land."

The words "or otherwise sport" appear to me to be referable to the earlier phrase in the reservation, "shoot, hunt, course", and as neither the ferreting nor the gassing come within that description I do not think that the defendant was, on either occasion, acting in breach of the covenant. He was, however, "killing" rabbits, and it is not altogether plain to me that he had not the right to do so (apart altogether from the Ground Game Act), although the rabbits when killed would belong to the lessors under the earlier reservation. The lessors reserved the game, etc., to themselves but only (in terms) a "liberty", and not an exclusive right, to kill them, and "killing" was not mentioned in the negative covenant. I appreciate that the defendant could not (for example) net partridges, but rabbits are a pest and I am doubtful whether taking the language as a whole, the defendant was not impliedly authorised to kill them. But, be that as it may, it seems to me that the October incident was within the defendant's powers under the Ground Game Act. Geoffrey Mason, who was of the party, had the defendant's written authority to kill the rabbits which he kept for himself as his "reward". As for the other two men who were with him they were only assisting him, and I cannot think that a person who is "authorised" for the purposes of the Act is not entitled to bona fide assistance.

As to the gassing, the allegation in the statement of claim is, not that the defendant gassed rabbits, but, as I have already indicated, that he procured and instigated the Minister to do so. In these circumstances, I doubt really whether the Ground Game Act is relevant, although it was repeatedly referred to by counsel on both sides in connection with this issue. It does not seem to me that the evidence bears out the complaint as pleaded. Mr. Smart said that his committee decided to gas only after it became obvious to them that persuasion (i.e., persuasion directed at the lessors) was of no avail. On Oct. 9, 1950, they authorised Mr. Smart to serve notices on both the defendant and Mr. Bennett, as representing the lessors. He visited the defendant on Oct. 10, notified him of this, and told him that, if he was willing that the committee should deal with the rabbits for him, an order would not be necessary. The defendant, accordingly, signed an agreement then and there for the gassing of the rabbits. No notice, therefore, was served on him, but one was served on Mr. Bennett on Oct. 14. Mr. Smart saw Mason on Oct. 13 and it seems that, as a result of the conversation which he then had with him, the principal gassing operations on the estate were held over until early in the following year. The agreement with the defendant, however, was implemented on Oct. 24, and it is of that gassing that the company complains. As, however, the committee had already decided to exterminate the rabbits by gassing before the defendant signed the agreement authorising them to do so on his land, it cannot be said that he procured and instigated the Minister, as alleged on Oct. 14. It is true that on Oct. 11 Mr. Smart had sent the defendant contract forms for his signature and that he returned the covering letter with encouraging remarks on the back, but I cannot see that this suffices to establish the company's case. And, indeed, an answer by Mr. Smart in examination in chief shows that the committee's decision to gas was not brought about by the defendant at all. On Oct. 18, 1950, the company's solicitors wrote to the Northamptonshire Agricultural Executive Committee with reference

to the order of Oct. 14 which had been served on Mr. Bennett and suggesting that it had been inspired by the defendant. This suggestion was put to Mr. Smart when he was in the witness box and he repudiated it. "Of course not", he said. "My committee were only concerned with the rabbit infestation". In my opinion, accordingly, the company's charge against the defendant of procuration and instigation falls to the ground.

A For the above reasons I think that both the plaintiffs fail in their action and the appeal should be allowed.

SOMERVELL, L.J.: I agree and I have nothing that I wish to add to the two judgments which have been delivered. *Appeal allowed.*

Solicitors: *James & Charles Dodd*, agents for *Josiah Hincks & Son*, Leicester (for the defendant); *Wigan & Co.*, agents for *Phipps & Troup*, Northampton (for the plaintiffs). [Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

R. v. BRIGHTON JUSTICES. *Ex parte* JARVIS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Barry, JJ.), December 18, 1953.]

C *Licensing—Licence—Occasional licence—Grant to holder of off-licence—Under-taking by licensee not to sell for consumption on premises—Licensing Act, 1953 (c. 46), s. 148 (1).*

D Justices consented to the grant to the holder of a retailer's on-licence of an occasional licence in respect of other premises for which he held an off-licence, authorising him to sell intoxicating liquor outside normally permitted hours, the licensee undertaking not to sell during that time intoxicating liquor for consumption on the premises. A rival trader applied for an order of certiorari.

E HELD: (i) the consent granted by justices under the Licensing Act, 1953, s. 148, for which application was made to and considered by them sitting in open court and as to which they had to exercise a discretion in deciding whether or not the grant of an occasional licence would be expedient for the convenience and accommodation of the public, was a judicial, not an administrative act, in respect of which the remedy of certiorari would apply.

R. v. Rotherham Licensing JJ. Ex p. Chapman ([1939] 2 All E.R. 710), and *R. v. Torquay Licensing JJ. Ex p. Brockman* ([1951] 2 All E.R. 656), applied.

F (ii) an occasional licence, which could be granted only to the holder of a retailer's on-licence, was an on-licence, and justices had no power to consent to the grant of such an occasional licence to the holder of an off-licence, restricting it so that it was in effect an off-licence, and, therefore, an order of certiorari would be made.

G AS TO OCCASIONAL EXCISE LICENCES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 113-117, paras. 269-273; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 81, 82, Nos. 624-633.

Cases referred to:

- H (1) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 30 Digest, Replacement, 12, 51.
 (2) *Boulter v. Kent JJ.*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 30 Digest, Replacement, 75, 579.
 (3) *R. v. Rotherham Licensing JJ. Ex p. Chapman*, [1939] 2 All E.R. 710; 160 L.T. 558; 103 J.P. 251; 30 Digest, Replacement, 82, 627.
 (4) *R. v. Torquay Licensing JJ. Ex p. Brockman*, [1951] 2 All E.R. 656; [1951] 2 K.B. 784; 115 J.P. 514; 3rd Digest Supp.

MOTION for an order of certiorari.

On Dec. 11, 1953, the respondent, Paul Andre Schremer Dauthieu, applied to justices for the county borough of Brighton under the Licensing Act, 1953,

s. 148, for their consent to the grant of an occasional licence. He stated that he was the holder of an on-licence at the Bear Inn, 45 North Street, Taunton, Somerset, and also traded as "Peter Dominic" at 64, London Road, Brighton, in respect of which premises he held an off-licence. The grounds of his application were that in the period immediately prior to Christmas great pressure was experienced by his staff in conducting his business, and, if the application were granted to cover this special occasion, it would benefit afternoon shoppers. He, accordingly, asked for an occasional licence to permit sales to the public between the hours of 2.30 p.m. and 6 p.m. on Dec. 19, 21, 22, 23 and 24, 1953, at 64, London Road, Brighton, and undertook to allow no sales for consumption on the premises. In reply to the chief officer of police he stated that he had been interested in the off-licence at 64, London Road, Brighton, since November, 1953. The justices gave their consent to the grant of an occasional licence to the respondent

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"(being the holder of a retailer's on-licence in respect of the Bear Inn, 45, North Street, Taunton in the county of Somerset) authorising the sale by him of intoxicating liquor on Dec. 22, 23, and 24, 1953, between the hours of 2.30 p.m. and 6 p.m. in premises situated at 64, London Road, Brighton . . . on the occasion of Christmas shopping facilities."

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Endorsed on the licence were the following words:

"This occasional licence was granted on undertakings given by the [respondent] (a) not to sell any intoxicating liquor for consumption on the premises between 2.30 and 6 p.m. and (b) to close the premises for sale of intoxicating liquor for consumption off the premises at 7 p.m."

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The applicant, John William Charles Jarvis, a licensed victualler carrying on business at Park View Hotel, Preston Drive, Brighton, applied for an order of certiorari to bring up and quash the consent to the grant of the occasional licence on the grounds:

"(i) that the justices had no power to grant the said consent in respect of (a) the occasion or (b) the period or (c) the premises for which the same was given; (ii) that the [respondent] did not state in his application for the said consent the occasion or any occasion for which an occasional licence was required by him; (iii) that the . . . justices gave the said consent subject to conditions which they had no power to impose; (iv) that in granting the said consent the justices exceeded their jurisdiction."

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The applicant filed an affidavit stating that he was a member of the general purposes committee of the Brighton and County Licensed Victuallers' Protection Society and Friendly Association, and that in common with other members he was a rival trader to the business carried on at 64, London Road, Brighton; that the trade of the members, including himself, would be affected by the grant of an occasional licence to the respondent; and, in particular, that the respondent's premises would remain open for the sale of intoxicating liquor for consumption off the premises while other licensed premises would not be permitted to remain open for such trading.

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J. G. S. Hobson for the applicant.

Harold Brown for the respondent.

LORD GODDARD, C.J.: By the Customs and Excise Act, 1952, s. 151, it is provided:

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"(1) Where the appropriate consent has been obtained by the holder of a retailer's on-licence, the commissioners shall grant to him an excise licence (hereinafter in this section referred to as an 'occasional licence') authorising the sale by him of any intoxicating liquor to which his retailer's licence extends at such place other than the premises in respect of which his retailer's licence was granted, during such period not exceeding in

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Great Britain three weeks . . . at one time, and between such hours, as may be specified in the consent . . . (2) In the foregoing sub-section, the expression 'the appropriate consent' means—(a) in England or Wales, the consent of the justices granted on an application made in accordance with s. 64 of the Licensing (Consolidation) Act, 1910; . . . Provided that, without prejudice to any discretion of the appropriate authorities aforesaid to refuse their consent or permission, they shall not grant it unless they are of opinion that the grant of an occasional licence is expedient for the convenience and accommodation of the public."

The Licensing (Consolidation) Act, 1910, is now repealed and replaced by the Licensing Act, 1953, s. 148 of which provides:

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"(1) For the purposes of s. 151 of the Customs and Excise Act, 1952 (which provides for the grant of occasional licences to the holders of retailers' on-licences who have obtained the appropriate consent), the expression 'appropriate consent' means consent granted by justices of the peace under this section. (2) The justices shall not hear an application for consent unless satisfied that the applicant has served on the chief officer of police at least twenty-four hours' notice of his intention to apply for the consent, stating the name and address of the applicant, the place and occasion for which the occasional licence is required, the period for which he requires it to be in force, and the hours to be specified in the consent. (3) Without prejudice to any discretion of the justices under this section to refuse their consent, they shall not grant it unless they are of opinion that the grant of an occasional licence is expedient for the convenience and accommodation of the public."

Sub-section (4) provides that the application is to be made to justices acting for the petty sessional area in which the place to which the application relates is situated, and the number of justices before whom the application is to be made is such as is required by the Magistrates' Courts Act, 1952.

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The first objection taken by counsel for the respondent is that, apart from the particular facts of this case, certiorari is a remedy that does not lie here, because this is an administrative and not a judicial act. I can only say that that argument is made, if I may so put it, about sixty years too late. It has been held since *Sharp v. Wakefield* (1), *Boulter v. Kent J.J.* (2), and that class of case, that the acts of justices in relation to licensing matters are judicial. It seems to me clear that *R. v. Rotherham Licensing J.J. Ex p. Chapman* (3) and *R. v. Torquay Licensing J.J. Ex p. Brockman* (4) are recent authority for the proposition that certiorari (although in those cases it was mandamus) will lie. The court finds no difficulty in saying that the giving of this consent, for which application is made to and considered by justices sitting in court and as to which they have to exercise a discretion in deciding whether or not the grant of an occasional licence would be expedient for the convenience and accommodation of the public, is a judicial act, and, therefore, the consent which they have given is an order which can be brought up and reviewed by this court.

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The respondent is the holder of a retailer's on-licence at the Bear Inn, Taunton. He also holds some off-licences in Brighton and other south coast towns. For this purpose it may be remembered that the main division is between on-licences and off-licences, on-licences permitting the consumption of intoxicating liquor on the premises during certain permitted hours, and off-licences permitting the sale, but not the consumption, of intoxicating liquor at the premises during the same permitted hours.

The respondent thought that it would be convenient for the public (and, I have no doubt, profitable for himself) if he could sell at or deliver from his shop at Brighton intoxicating liquor all day irrespective of the permitted hours. Accordingly, he applied to the Brighton justices, not in his capacity of a Brighton

licensee, but in his capacity of the holder of a licence at Taunton, for the grant to him of an occasional licence. It seems an astonishing procedure, but it was thought out as a way of getting round the Licensing Act, 1953, s. 148. I am surprised that in the circumstances the justices entertained the application. The grounds for the application were that there was great strain on the respondent's assistants during Christmas week and he thought that it would be convenient for everybody concerned if he could sell intoxicating liquor over the counter during the afternoon when other licensed premises in Brighton would not be allowed to do so. The justices consented to the grant of an occasional licence, authorising him to sell intoxicating liquor on Dec. 22, 23, 24, between the hours of 2.30 p.m. and 6 p.m. in premises situated at 64, London Road, Brighton "upon the occasion of Christmas shopping facilities." The occasion of Christmas shopping might be an "occasion", but I do not know how "shopping facilities" can be an "occasion". However, I am not going to determine this case merely on that point. Then they put on the licence:

"This occasional licence was granted on undertakings given by the [respondent] (a) not to sell any intoxicating liquor for consumption on the premises between 2.30 and 6 p.m. and (b) to close the premises for sale of intoxicating liquor for consumption off the premises at 7 p.m."

The justices can grant only a full on-licence. That is what an occasional licence must be. Whether or not they can impose any conditions I do not know. But what they have done here is to say: "We will give you an occasional licence, that is to say, a full licence, on the terms that you use it only as an off-licence and sell at places where you have got an off-licence."

In fact, however, the justices have no power to consent to the grant of such a licence. There is no power to turn an off-licence into an on-licence in this way, and no power to restrict an on-licence into an off-licence. If the justices consent to the grant of an on-licence the licensee can sell only during, and for as long as, the permitted hours. If, on the other hand, he has an off-licence, he cannot have granted to him an on-licence which is in effect an off-licence merely to enable him to sell intoxicating liquor during hours when his off-licence does not allow him to do so. The object of an occasional licence (which is granted, for example, for a flower show, or a race meeting, or a festival occasion which may last as long as three weeks) is to give the public a chance of getting refreshment when attending at that particular place. Assuming for this purpose, without deciding the point, that other licensees are not interested persons, the issue of certiorari is discretionary and not as of right, and I think that this is eminently a case in which we should exercise our discretion and make an order because, if this state of affairs were allowed to continue, it would be an obvious way of getting round the provisions of the Licensing Act, 1953, and the justices would be acting in a way which, in our opinion, the law does not permit. The application, therefore, is granted.

SELLERS, J.: I agree. I think that the justices misconceived the position here. They consented to the grant of an on-licence for premises where no on-licence was required and where there was no occasion to grant one. Then they sought to turn what was obviously an on-licence, granted to the holder of a retailer's on-licence, into something which was an off-licence and restrict it in a way which I do not think that they were empowered to do.

BARRY, J.: I agree.

Order for certiorari.

Solicitors: *Godden, Holme & Co.*, agents for *Edwin Boxall & Kempe*, Brighton (for the applicant); *Blyth, Dutton, Wright & Bennett*, agents for *Graham Hooper & Betteridge*, Brighton (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PARKINSON v. H. & J. PLUMPTON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), December 10, 1953.]

Master and Servant—Wages—Regulation—Catering worker—Minimum remuneration—Employment of two persons at joint wage above minimum for single worker—Claim by one worker for minimum wage—Competency—“Lodging”—Sleeping accommodation—Provision of unfurnished room—Provision of full board without lodging—Catering Wages Act, 1943 (c. 24), s. 9 (1), s. 10 (1)—Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I., 1949, No. 433), sched. I, para. 3, cols. 1, 2, 3; para. 22 (6) (7).

By an oral agreement made between the plaintiff and her husband and the defendants, the plaintiff and her husband were employed by the defendants to look after a garage with a café attached at a joint weekly wage of £4 10s. The plaintiff and her husband were given full board and were also provided with an unfurnished room on the premises in which they were to live. The employment began in February, 1949, and came to an end in May, 1950. On a claim by the plaintiff to be paid the statutory minimum wage to which she alleged she was entitled as an assistant in charge under the Catering Wages Act, 1943, and the schedule to the Wages Regulation (Unlicensed Place of Refreshment) Order, 1947, sched., para. 2, and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (which replaced the order of 1947), sched. I, para. 3, col. 3, being 70s. per week under the order of 1947 and 80s. under the order of 1949, amounting in all after certain deductions to £238 5s. 10d.,

HELD: the Act of 1943 did not apply to the employment of two or more persons together at a joint wage, and, therefore, the plaintiff had failed to prove the breach of any provision of the Act and her action must fail.

Per curiam: even if the Act and orders had applied to a joint employment, the plaintiff could not claim under col. 2 of para. 3 of sched. I to the order of 1949 (which laid down a scale of minimum wages where the employer supplied “full board” and “lodging”) because the unfurnished room provided by the defendants did not constitute “lodging” within the meaning of para. 22 (7) of sched. I to the order, nor could she claim under col. 3 of para. 3 (which applied where neither full board nor lodging was provided) because in this case full board was provided.

EDITORIAL NOTE. The Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, has been repealed and replaced by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1951 (S.I., 1951, No. 637).

FOR THE CATERING WAGES ACT, 1943, s. 9 (1) and s. 10 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 111 and 112.

ACTION for arrears of wages.

The defendants were the owners of garages in Lancashire with cafés attached, and by an oral agreement between them and the plaintiff and her husband they employed the plaintiff to look after a café and her husband to attend to the adjoining garage at a joint wage of £4 10s. per week with commission at the rate of ten per cent. of the profits. The plaintiff and her husband were so employed from February, 1949, until May, 1950. They were provided with an unfurnished room on the premises in which to live and were also given full board. On behalf of the plaintiff it was contended that as a catering worker her employment was governed by the Catering Wages Act, 1943, and she was entitled to the minimum wages laid down by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1947, and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, which replaced the 1947 order on Apr. 11, 1949. For the period ending on Apr. 10, 1949, the plaintiff claimed that, as a female assistant in charge in provincial area B, under the schedule to the order

of 1947, para. 2, she was entitled to a wage of 70s. per week, and thereafter, as a female assistant in charge over twenty-one years old in provincial area B, under the order of 1949, sched. I, para. 3, col. 3, she was entitled to a wage of 80s. per week. The plaintiff's claim, after certain deductions had been made, and allowing for £40 paid to her by the defendants, amounted to £238 5s. 10d.

S. B. R. Cooke for the plaintiff.

Behrens for the defendants.

LORD GODDARD, C.J., stated the facts and continued: The question which arises for decision is whether the plaintiff has suffered an under-payment in her wages, contrary to the provisions of the Catering Wages Act, 1943. On this point I feel great doubt and difficulty. I cannot put my finger on any provision of the Act which has been broken because I do not think that this question of joint engagement was ever contemplated by the Act. Section 9 (1) of the Act states:

"If a contract between a worker to whom a wages regulation order applies and his employer provides for the payment of less remuneration than the statutory minimum remuneration, clear of all deductions, it shall have effect as if for that less remuneration there were substituted the statutory minimum remuneration clear of all deductions . . ."

The contract in the present case provides for a joint remuneration of two people of £4 10s. It is admitted that, if that £4 10s. was the plaintiff's remuneration alone, it would fulfil the requirements of the statute and orders made thereunder. But when you engage two people jointly and agree to pay a joint sum of money, it seems to me that you agree to pay two people, and any action in law brought on the agreement must be a joint claim. Each owns only half of the whole. It is impossible, however, to find any provision in the Act that where there is a joint employment the joint remuneration is to be treated as divided equally or anything of that sort. I am satisfied that if the plaintiff had sued for the £4 10s. she could have recovered it, although the defendants might have had a right to have the husband added. This £4 10s. was paid jointly, and, as I put it in the argument, it would be an extraordinary thing, assuming that the plaintiff, when employed alone, was entitled to £4 a week and also assuming that the agreement was: "I will engage you and your wife (i.e., two people) at a wage of £12 a week", if the wife could then say: "The plaintiff can now come and claim £4 extra because no provision has been made in the contract that £8 is the husband's wage and £4 the wife's wage."

Counsel for the plaintiff has contended that the matter is concluded in his favour by s. 10 (1) of the Act which provides:

"For the purpose of determining whether the remuneration paid or agreed to be paid to a worker to whom a wages regulation order applies is less than the statutory minimum remuneration clear of all deductions the net remuneration obtained or to be obtained by him in cash from his employer after allowing for his necessary expenditure, if any, in connection with the employment shall, subject to the provisions of this section, be deemed to be the remuneration paid or to be paid to him . . ."

I do not think that this section is meant to provide more than a method of calculating remuneration. In my opinion, the words "obtained by him in cash" are meant to emphasise that the employee is entitled to the money prescribed without any deduction.

The other difficulty which arises in the case is this. The scale of remuneration is now governed by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949. That provides, by para. 1 of sched. I, that, subject to the provisions of certain paragraphs,

"the weekly minimum remuneration for the workers to whom this schedule applies (other than occasional workers) shall be . . . (ii) for

female workers (other than manageresses), in accordance with the provisions of para. 3."

If you look at para. 3 of sched. I you find first set out the grade or description of the worker. The scale for a week of forty-seven hours is set out in col. 2 where the employer supplies the worker with full board and lodging for seven days a week, and in col. 3 where the employer supplies the worker, not with full board and lodging, but with meals while on duty. "Full board" and "lodging" are thus defined by para. 22 which provides:

"(6) 'Full board' means not less than four meals a day of good and sufficient quality and quantity. (7) 'Lodging' means clean and adequate accommodation and facilities for eating, sleeping, washing and leisure."

Therefore, lodging must obviously include facilities for sleeping and washing. It does not mean a bare room. The defendants say that they did not provide lodging in this sense, and, therefore, col. 2 of para. 3 does not apply. One must give an ordinary, common-sense, interpretation to the words, and I cannot find that an unfurnished room, which was what the defendants provided for the plaintiff and her husband, complies with the description "accommodation for sleeping". No doubt, the room in question could be used as a bedroom, but merely because an empty room can be used as a bedroom I do not think it can be regarded as being sleeping accommodation. I think that sleeping accommodation must be a room where there is accommodation for sleeping—in other words, a room furnished with a bed, although I am not sure that, under such vague drafting, sleeping accommodation is anything more than a bed. There was no bed provided by the defendants and Mr. Plumpton (a member of the defendant firm) did not give any evidence which was sufficiently definite for me to find that he offered to furnish a room or any rooms for the plaintiff and her husband.

The words of col. 3:

"Where the employer supplies the worker with neither full board nor lodging but supplies her with meals of good and sufficient quality and quantity whilst on duty",

are obviously meant to deal with the servant who lives out and wants a meal while she is on duty. Some days she may have two meals, some days three meals, some days only one. There we are dealing with a case where the contract is to supply a person with a meal while on duty, but here the contract was to provide full board, and, as col. 3 only applies where the employer does not contract to give full board or lodging, I do not see how I can apply it. I think this is a *casus omissus*, and that the draftsman has forgotten to provide for the case where, as here, board is provided, but not lodging within the meaning of this schedule. I suppose it was thought that full board would only be supplied where lodging was provided, and, as I have said, lodging seems to be put out of account here. These people were there full time, and so, therefore, you have got this unfortunate hiatus. One always tries to construe words so as to give them a sensible construction and prevent their failure, but I do not know of any canon of construction which enables me to construe "where the employer supplies the worker with neither full board nor lodging" to include a case where the employer supplies full board but no lodging. I cannot re-write the legislation. I must enter judgment for the defendants.

Judgment for defendants.

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the plaintiff); *Gregory, Rowcliffe & Co.* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

BARROW GREEN ESTATE CO. v. WALKER'S EXECUTORS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), December 18, 1953.]

Agriculture—Agricultural holding—Dilapidations—Compensation—Claim by landlord—Allegation of lack of good husbandry—Matters to be considered by arbitrator—Agricultural Holdings Act, 1948 (c. 63), s. 57 (1).

In determining the claim of a landlord to recover from a tenant of an agricultural holding compensation under the Agricultural Holdings Act, 1948, s. 57 (1), in respect of the dilapidation or deterioration of, or damage to, the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry, an arbitrator is bound to have regard to the terms and conditions of the lease or agreement under which the holding is held, and any other contractual agreement between the landlord and the tenant in relation to the holding, and also to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, in so far, if at all, as they apply.

FOR THE AGRICULTURE ACT, 1947, s. 10 (3) and s. 11 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 1, p. 165; and FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 57 (1), see *ibid.*, Vol. 28, p. 72.

APPEAL by the tenants from an order of His Honour JUDGE GORDON CLARK at Reigate County Court dated Oct. 6, 1953, on a Case stated by an arbitrator under the Agricultural Holdings Act, 1948, by which order the learned judge reversed the arbitrator's decision that, in an arbitration to determine the claim of landlords to recover from tenants of an agricultural holding compensation under the Agricultural Holdings Act, 1948, s. 57 (1), the arbitrator was either bound or entitled to have regard to the terms and conditions (i) of the lease or agreement under which the holding was held, (ii) of any other contractual agreement between the landlord and the tenant in relation to the holding, and (iii) of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I., 1948, No. 184), in so far, if at all, as they applied.

The landlords claimed compensation under s. 57 (1) of the Act of 1948 in respect of the dilapidation or deterioration of, or damage to, the holding. The tenants disputed the landlords' claims on the grounds that most of them were not properly chargeable and, in any case, were excessive, that the claims sought to ignore many of the landlords' obligations under the lease, and that the landlords were not entitled to evade their obligations and throw the burden thereof on the tenants. The lease contained covenants on the part of both parties with regard to the repair and cultivation of the holding.

The landlords contended that evidence of the lease and the terms thereof and evidence of any other contractual obligation entered into between the landlords and the tenants was inadmissible for the purpose of varying, diminishing or affecting compensation. The tenants contended that the arbitrator, in considering a claim for compensation under s. 57 (1), must have regard to the terms and conditions of the tenancy on which the holding was held and the obligations of the parties thereunder.

A. C. Goodall for the tenants.

J. J. Dean for the landlords.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE GORDON CLARK on a Case stated by an arbitrator under the Agricultural Holdings Act, 1948. The claim was by the landlords under a lease dated Jan. 23, 1939. The lessee was one, David Walker, who died in 1950. A notice to quit was served on his personal representatives as the tenants and they quitted on Sept. 29, 1952. No question arises as to that. The landlords claimed compensation from the personal representatives, as tenants, in respect of the dilapidation

or deterioration of, or damage to, the holding under the Agricultural Holdings Act, 1948, s. 57 (1), which provides:

A "The landlord of an agricultural holding shall be entitled to recover from a tenant of the holding, on the tenant's quitting the holding on the termination of the tenancy, compensation in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry."

The question of law which is posed by the Case Stated is:

B "In an arbitration to determine the claim of a landlord to recover from a tenant compensation under the Agricultural Holdings Act, 1948, s. 57 (1), is the arbitrator (a) bound or (b) entitled to have regard to the terms and conditions (i) of the lease or agreement under which the holding was held, (ii) of any other contractual agreement between the landlord and the tenant in relation to the holding, and (iii) of S.I., 1948, No. 184, [the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948] in so far, if at all, as the said statutory instrument applies to the tenancy?"

D The arbitrator answered those questions in the affirmative, although I am not clear whether he thought he was bound or merely entitled to look at these documents and instruments. The landlords appealed to the county court judge, who reversed that decision and decided that those documents could not be considered.

E Before I refer to the other sections of the Act of 1948 which, I think, are relevant, I might refer to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, which were made under the Agriculture Act, 1947, s. 37 (1). They are still in force, although the rule-making power in s. 37 of that Act has been repealed and replaced by a rule-making power in s. 6 of the Act of 1948. No one disputes that this statutory instrument is still in force. Regulation 1 provides:

F "The provisions set forth in the schedule hereto relating to the maintenance, repair and insurance of fixed equipment, shall be deemed to be incorporated in every contract of tenancy of a holding, whether made before or after the commencement of Part III of the said Act, except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other."

G That is to say, that if and so far as the claim in the present case came under the regulations and the schedule thereto, the arbitrator must have regard to the terms of the original tenancy in order to see whether a liability which under the regulations was imposed on the landlords or tenants was under the tenancy agreement imposed on the other party. So far as the point of law is concerned, it was common ground before the learned judge and before us that this statutory instrument is in the same category as the contract itself because, if I may put it in this way, the machinery by which this instrument attains its object is by deeming that its provisions will be incorporated into the contract. If one cannot look at the contract, one cannot look at the provisions which are deemed to be incorporated in it.

H Before the learned judge, counsel who was then appearing for the tenants lumped these three classes of documents together and referred to them as the contract of tenancy. The words of s. 57 (1) of the Act of 1948 are:

"... non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry."

Those rules are to be found in Part II of the Agriculture Act, 1947, and this Part of the Act has not been repealed. Section 9 provides:

"The following provisions of this Part of this Act shall have effect for the purpose of securing that owners of agricultural land fulfil their responsibilities to manage the land in accordance with the rules of good estate management, and that occupiers of agricultural land fulfil their responsibilities to farm the land in accordance with the rules of good husbandry."

A

Section 10 deals with good estate management and maintaining and repairing fixed equipment as part of estate management. Section 10 (3) provides:

"The responsibilities under the rules of good estate management of an owner of land in the occupation of another person shall not in relation to the maintenance and repair of fixed equipment include an obligation to do anything which that other person is under an obligation to do by virtue of any agreement."

B

We then pass to s. 11 (1) which provides that the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry if he is maintaining a reasonable standard of efficient production, while keeping the holding in a condition to enable such a standard to be maintained in the future. In sub-s. (2) there are set out matters to which regard must be had, but without prejudice to the generality of the provisions of sub-s. (1) in considering what good husbandry is. It is, I think, relevant to notice that in the main, as one would expect, the matters are clearly matters for the tenant. For instance, s. 11 (2) (b) refers to the manner in which arable land is being cropped so as to maintain the land clean, and s. 11 (2) (c) refers to seeing that the unit is properly stocked. Other matters mentioned in s. 11 (2) are:

C

D

"(d) the necessary steps are being taken to secure and maintain crops and livestock free from disease and from infestation by insects and other pests; (e) the necessary steps are being taken for the protection and preservation of crops harvested or lifted, or in course of being harvested or lifted; (f) the necessary work of maintenance and repair is being carried out."

E

There, at any rate, in para. (f), one moves into the area of items which might fall on the tenant or on the landlord, and varying obligations would be found in different leases. Section 11 (3)—and this is relied on by counsel for the landlords in support of the decision of the learned county court judge—contains no express reference to the obligations under any agreement. It provides:

F

"The responsibilities under the rules of good husbandry of an occupier of an agricultural unit which is not owned by him shall not include an obligation to carry out any work of maintenance or repair which the owner of the unit or any part thereof is under an obligation to carry out in order to fulfil his responsibilities to manage in accordance with the rules of good estate management."

G

That would seem to provide that there should be no overlap rather than to be dealing expressly with the terms of the agreement in favour of the tenant.

The Agriculture Act, 1947, s. 37 (1), under which the statutory instrument to which I have already referred was made, assists in solving this problem. It provides:

H

"The Minister may, after consultation with such bodies of persons as appear to him to represent the interests of landlords and tenants of holdings, make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment which shall be deemed to be incorporated in every contract of tenancy of a holding, whether made before or after the commencement of this Part of this Act, except in so far as they would

impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other."

The Act thereby empowers the Minister to deal in detail with the maintenance and repair of fixed equipment and includes an express provision that the regulations must not be deemed to impose on one party a liability which under an agreement is imposed on the other.

- A With that examination of those sections, I will return to s. 57 (1) of the Act of 1948. The submission made on behalf of the landlords seems to me to be one which, on general principles of construction, would require the plainest possible words for one to adopt it in construing this sub-section. What it would mean is this. Let me assume—and it is, indeed, the case here—that under the contract of tenancy the landlord has undertaken expressly an obligation in respect of maintenance and repair which, had the contract of tenancy been silent on the point, would have fallen on the tenant either under the regulations or under the general principles which would be applied in such a matter by an arbitrator. Let me assume that the landlord has failed to carry out his obligations and that if the tenancy continued he could be sued. Without begging any question as to the measure of damage, I will assume that the cost of making good the maintenance and repair which he had failed to carry out would be £500. The lessee having died, the landlord realises that the relatives do not want to retain the property and that the tenant will shortly be quitting. If the landlord is right in this case he could say to himself: "Not only must I not now maintain what I ought to have maintained and repair what I ought to have repaired, but I hope that it all gets rather worse by the time the tenant quits. Assuming then the cost of doing what I should have done is £700, I shall be able to recover £700 under s. 57 (1) of the Act of 1948." It would, indeed, be surprising if Parliament had conferred such a windfall on landlords. Counsel for the landlords said with some force that there may be sections in the Act which confer benefits on tenants and it would not be surprising if one finds somewhere benefits conferred on the landlord. That may well be, but one would not expect to find a benefit conferred on bad landlords, i.e., those who have not carried out their obligations. I think these words in s. 57 (1) of the Act of 1948

"... non-fulfilment by the tenant of his responsibilities . . .",

- F cannot be construed as including an obligation which, under the contract of tenancy, the landlord has himself undertaken to perform. Reliance was placed as against that construction on the fact that, under s. 57 (3), a landlord may, in lieu of claiming compensation under s. 57 (1), claim compensation in accordance with a written contract of tenancy. I do not think that that helps the argument. It is, I think, to cover the possibility of a contract of tenancy which imposes on the tenant a liability greater than that which the Act imposes on him. It was, no doubt, considered wrong to deprive the landlord of a right to proceed under such a contract.

- G I need not refer in detail to s. 7 (1) of the Agricultural Holdings Act, 1948, except to say that I think that reinforces the argument for the tenant. The learned judge referred to s. 10 and s. 11 of the Act of 1947, and he based his decision in part on the absence of any reference in s. 11 (3) to the agreement. I am bound to say that, having regard to the general provisions of that Act, I am led to the conclusion that they were not intended to shift burdens expressly undertaken by one or the other except in the case where express words were used. I would have expected to find a reference in s. 11 (3) to the agreement, but there may be some explanation consistent with my construction of s. 57 (1) of the Agricultural Holdings Act, 1948. I do not propose to go into it in detail because, even if an argument can be based on the absence of any reference there to the agreement, I am quite clear that that would not entitle one to construe s. 57 (1) as including a responsibility which by contract the landlord himself had undertaken. Counsel for the landlords referred to s. 65 of the Act of 1948

which provides that one cannot contract out of the right which the Act confers for compensation, but I do not think that is material in the present case.

For these reasons, with respect to the learned judge, I have come to a different conclusion, and I would allow the appeal and would answer the question by saying that, in my view, the arbitrator is bound to have regard to the terms and conditions of the lease or agreement under which the holding was held, and to any other contractual agreement between the landlord and the tenant in relation to the holding, and to the regulations of 1948 in so far, if at all, as they apply.

DENNING, L.J.: By virtue of the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, the tenant of agricultural land is under a responsibility to farm the land in accordance with the rules of good husbandry. The question in this case is whether the tenants can, by contract, shift this responsibility on to the owners of the land. This question does not arise in regard to the actual cultivation of the land, but only in regard to the maintenance and repair of fixed equipment. Let me give an instance. "Fixed equipment" includes hedges and fencing. If there had been nothing in the contract of tenancy, the tenants would have been bound, under the statutory regulations, to provide all the material and labour to keep up the hedges and fences, but under the contract of tenancy, the landlords were bound to provide the material (such as the posts and wire) and the tenants were bound to provide the labour. The landlords say that, despite the contract, they can impose on the tenants the responsibility of providing the material, and they say that, if the tenants do not provide it, the landlords can, at the end of the tenancy, get compensation for any deterioration on that account.

The question depends on the true interpretation of the Acts. It is quite clear from s. 9, s. 10 and s. 11 of the Act of 1947 that Parliament intended that the fixed equipment should be properly maintained and repaired, and that it should be maintained either by the owner or the occupier, but those sections do not make it clear on whom the responsibility should fall. That only appears from other parts of the Act and from the regulations made thereunder. These show that if the contract of tenancy is silent on the matter, then by the regulations the tenant is bound to maintain and repair the fixed equipment, but if and in so far as the contract of tenancy puts the responsibility on the landlord, then the contractual responsibility remains intact. There is nothing in the Acts which absolves the landlord from his contractual responsibility, but, on the other hand, there is much to preserve it. I need only mention s. 15 (3) of the Act of 1947, which shows that, in order to ascertain their respective liabilities, the Minister can call for a sight of the contract, and s. 37 (1) of the Act of 1947 which says that the regulations must not contradict the contract. Much reliance was placed by the landlords on s. 10 (3) and s. 11 (3) of the Act of 1947, but those provisions are designed only to ensure that there shall be no overlap.

In my opinion, therefore, the arbitrator, in assessing the responsibility of the tenant to farm in accordance with the rules of good husbandry, must take into account any specific obligations which by contract are placed on the landlord. The tenant cannot be made to pay for the landlord's own breaches of contract. I agree with my Lord that the appeal should be allowed.

ROMER, L.J.: I agree. It seems to me that the only point of substance which can be urged in support of the landlords' contention is the difference in phraseology which the legislature used in s. 10 (3) of the Act of 1947 as contrasted with that used in s. 11 (3) of that Act, the difference being that, whereas in s. 10 (3), contained as it is in a section which deals with the responsibilities of the owner in relation to good estate management, it is enacted that these responsibilities

" . . . shall not in relation to the maintenance and repair of fixed equipment include an obligation to do anything which that [the person in occupation of the land] is under an obligation to do by virtue of any agreement "

in s. 11 (3) there is excepted from the responsibilities of the occupier in relation to the rules of good husbandry

“ . . . an obligation to carry out any work of maintenance or repair which the owner of the unit or any part thereof is under an obligation to carry out in order to fulfil his responsibilities to manage in accordance with the rules of good estate management ”,

A which means there the statutory rules of good estate management, or so it is suggested, as distinct from contractual responsibilities. What the explanation of the difference in the language is—the express reference to an agreement in s. 10 (3), and no such express reference in s. 11 (3)—I am not sure. But, as I say, it is, to my mind, the only point which is of any substance or weight in favour of an argument which leads to such remarkable results as have been indicated in the course of the discussion. I think it would be giving it a weight which it is quite unable to bear as a basis for the view which the landlords seek to found on it. The possible results have been illustrated by SOMERVELL and DENNING, L.JJ., and it seems to me plain that the heavier the responsibilities which a landlord contractually undertook, the more inevitably he would resort to s. 57 (1) of the Act of 1948 instead of resorting to his right under the covenants, because he would then recover from the tenant more and more in respect of the damage caused by his own contractual omissions. It seems to me to be almost a ludicrous result and it would need language far clearer than is to be found in any of the statutory provisions to which we were referred to justify such a finding.

D I would add in conclusion that, whatever the intention was in omitting from s. 11 (3) the reference to the agreement which is to be found in s. 10 (3), it seems to me plain that, in order to ascertain what the landlord's obligations are in relation to good estate management, as also in order to ascertain what the tenant's duties are in relation to good husbandry, one has to look at the contract. One is compelled to do that in express terms by s. 10 (3), and, as I think, by virtue of compelling inference under the provisions of s. 11 (3). For these reasons, and for the reasons which my brethren have indicated, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Burges, Salmon & Co.*, Bristol (for the tenants); *Wheeler, Brill & John*, Oxted (for the landlords).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

JAMES ARCHDALE & CO., LTD. v. COMSERVICES, LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), December 8, 1953.]

Negligence—Contracting out of liability—Exception clause—General words—Clear intention of parties.

The defendants were employed by the plaintiffs to re-decorate the plaintiffs' premises under a contract which, by cl. 14 (b), provided: "The contractor [the defendants] shall be liable for and shall indemnify the employer [the plaintiffs] against and . . . shall insure against any liability, loss, claim . . . in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the . . . execution of the works, and provided always that the same is due to any negligence . . . of the contractor, his servants or agents . . . and subject also as regards loss or damage by fire to the provisions contained in cl. 15 of these conditions". Clause 15 (b) provided that the ". . . existing structures and the works and unfixed materials (except plant, tools and equipment) shall be at the sole risk of the employer as regards loss or damage by fire and the employer shall maintain a proper policy of insurance against that risk . . .". While the work of re-decoration was in progress, a fire, which the court found to have been caused by the negligence of the defendants' servants, broke out on the plaintiffs' premises, causing damage to the building. On a claim under cl. 14 (b) in respect of the cost of repairs to the building, the plaintiffs relied on the principle that general words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his servants.

HELD: the principle relied on by the plaintiffs was merely a rule of construction and had no application where the parties had clearly expressed their intention; on the true construction of the contract, in so far as cl. 14 (b) dealt with loss or damage by fire, the parties had clearly expressed their intention that it should be read subject to cl. 15 (b) under which the risk of fire was on the plaintiffs; and, therefore, the defendants were not liable.

AS TO CONSTRUCTION OF EXCEPTION CLAUSES IN A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, p. 327, para. 456.

Case referred to:

(1) *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of HILBERY, J., at Worcester Summer Assizes, dated May 28, 1953.

The defendants, Comservices, Ltd., were employed by the plaintiffs, James Archdale & Co., Ltd., who were engineers and manufacturers of machinery, to re-decorate the plaintiffs' factory and office premises under a contract which was in the form of and included all the matters contained in the standard agreement of the Royal Institute of British Architects and schedule of conditions for building contracts as issued in 1952. Clause 14 (b) of the contract between the parties provided:

"Injury to property. The contractor shall be liable for and shall indemnify the employer against . . . any liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the execution of the works, and provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any sub-contractor or to any circumstances within the contractor's control; and subject also as regards loss or damage by fire to the provisions contained in cl. 15 of these conditions."

Clause 15 (b) of the contract provided:

A "The existing structures and the works and unfixed materials (except plant, tools and equipment) shall be at the sole risk of the employer as regards loss or damage by fire and the employer shall maintain a proper policy of insurance against that risk, which policy and the receipt for the last paid premium for its renewal he shall upon request produce for inspection by the contractor and, if any loss or damage affecting the works is so occasioned by fire, the employer shall pay to the contractor the full value of all work and materials then executed and delivered calculated as provided by cl. 9 of these conditions . . ."

B While the work of re-decoration was in progress a fire broke out on the plaintiffs' premises, causing damage to the building of the machine tool assembly shop and the machinery and plant. In a claim for, inter alia, £2,858 15s. 4d. in respect of the cost of repairs to the building, the plaintiffs alleged that the fire was caused by the negligence of the defendants' servants, and that the defendants were, therefore, liable under cl. 14 (b) of the contract. The defendants contended that the plaintiffs were precluded from recovering such sums in respect of damage to the building because cl. 14 (b), which provided that the liability of the C defendants to indemnify the plaintiffs against damage to property which arose during the execution of the work and was caused by the negligence of the defendants or their servants, was expressly, in respect of fire risk, made subject to cl. 15 (b) which placed on the plaintiffs the duty to insure against fire. D HILBERY, J., found that the fire was caused by the negligence of the defendants' servants, but held that, on the true construction of cl. 14 (b) and cl. 15 (b), the defendants were protected from liability to indemnify the plaintiffs in respect of damage by fire to the buildings.

Ryder Richardson, Q.C., and *Paul Layton* for the plaintiffs.
Beney, Q.C., and *E. G. H. Beresford* for the defendants.

E SOMERVELL, L.J., stated the facts and continued: Counsel for the plaintiffs referred to cases which deal with exception clauses in relation to the negligence of the party claiming the benefit of the exception. Any clause, of course, has to be considered according to its actual wording, but, speaking generally, I think one can summarise the cases in this way. General words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his servants. There is an F exception to what I may call that prima facie approach if, looking more closely into the subject-matter, it is found that substantially the only scope for the operation of the exception clause is the negligence of the servant of the person who is seeking the benefit of it. In that case, although the words are general, such a clause has been construed as excluding a liability for negligence. An example of this exception to what I call the prima facie approach will be found in G *Alderslade v. Hendon Laundry, Ltd.* (1). I do not think that cases dealing with what I call an ordinary exception clause in a contract, where there is a primary obligation under the contract and then an exception clause, afford any great assistance in construing the present clauses, but, no doubt, it is right that one should bear in mind those decisions. I think it is worth noting (and this relates to the principle applied in *Alderslade v. Hendon Laundry, Ltd.* (1)), that cl. 14 (b) in H the main operates on the negligence of the contractor or his servants or agents. It is true that it brings in negligence of a sub-contractor, or, presumably, his servants or agents, for which, normally, at common law the contractor would not be liable. It also contains what I should describe as the rather cryptic words "or to any circumstances within the contractor's control". But it is worth bearing in mind that by far the most probable scope of its operation would be the negligence of the contractor or his servants or agents. There is another point which I think has some importance, and that is that both cl. 14 (b) and cl. 15 (b) contain

obligations to insure, imposed in the one case on the contractor and in the other case on the employer. Indeed, if one looks at cl. 14 (b), one finds that it was unnecessary to set out that the contractor should be liable for the negligence of his own servants or agents, and, in so far as that part of the subject-matter is concerned, the operative words are those creating the obligation to insure. Having those two points in mind, I am quite clearly of opinion that the learned judge was right and that the natural construction of these two clauses, read together, is that, in so far as loss or damage by fire come within the earlier words of cl. 14 (b), that is to be taken out of cl. 14 (b) altogether. It is then dealt with by cl. 15 (b) under which the sole risk is on the employer, and he must insure.

These questions do not bear of much elaboration, but I think the phrase contained in cl. 15 (b) which was referred to in argument, viz.,

“ . . . the employer shall maintain a proper policy of insurance against that risk . . . ”,

tends, apart from what I may call the general lay-out of the two clauses, to reinforce the conclusion to which I have come. For these reasons I would dismiss the appeal.

DENNING, L.J.: This is not the ordinary case of a clause simply providing which party is to bear the loss. The clauses in this case are directed to the additional question: Which party is to insure? The contractor is to insure against the risk of injury to persons. He is also to insure against the risk of injury to property, save for this—cl. 14 (b) expressly says that loss or damage by fire is in a category by itself. The employer is to insure against the risk of fire. When viewed in relation to insurance it is quite plain that the risk of fire is on the employer however it is caused (even though caused by the negligence of the contractor's servants) and he is the person who must insure against it. I agree, therefore, with my Lord that the appeal should be dismissed.

ROMER, L.J.: I also agree. The principle which was established or recognised by the cases to which counsel for the plaintiffs referred can and ought to be invoked wherever the parties to a contract leave their intention in doubt. But when the parties have clearly expressed what their intention is, there is no necessity to refer to the principle. The principle is one of construction and no more, and it is not entitled to the status of a rule of law.

Construing cl. 14 (b) and cl. 15 (b) of this contract by themselves I have little doubt that they bear the meaning which SOMERVELL, L.J., has attributed to them, for the reasons which he has given. If so, it would be quite wrong to attribute a different meaning simply by reason of a principle of construction which has been evolved for the solution of cases of a similar type, but where the parties have not expressed themselves sufficiently clearly.

With regard to the suggestion that the plaintiffs are liable to pay the defendants for damage by fire caused to the work by the negligence of the defendants, I think cl. 15 (b) has in that respect been clumsily worded, but the intention of the parties, I think, is reasonably clear, and the draftsman's mind was directed to the receipt of the policy moneys under the insurance policy which is contemplated by the sub-clause, and the payment was to be made only out of those moneys. I do not think that that element throws very much light on the problem which we have to solve. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gardiner & Co.* (for the plaintiffs); *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

BANK OF NEW SOUTH WALES v. LAING.

[PRIVY COUNCIL (Lord Porter, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), October 14, 15, 19, 20, 21, 22, December 7, 1953.]

Privy Council—New South Wales—Bank—Current account—Demand by customer for payment of credit balance—Onus of proof of balance—Pleading—Plea of “indebitatus assumpsit”—Effect of plea of “never indebted”—Rules made under the Common Law Procedure Act, 1899 (No. 21) (New South Wales), r. 65.

New South Wales has retained the system of pleadings which obtained in England under the Common Law Procedure Act, 1852, the provisions of which, and the rules made thereunder, being in substance reproduced in the Common Law Procedure Act, 1899, of New South Wales, and the rules made under that Act. By r. 65 of those rules: “To causes of action to which the plea of ‘never was indebted’ is applicable . . . the plea of non assumpsit shall be inadmissible, and the plea of ‘never was indebted’ will operate as a denial of those matters of fact from which the liability of the defendant arises.”

From January, 1947, to February, 1951, the respondent, the plaintiff in the action, had a current account with the appellant bank, the defendant, into which he from time to time paid sums amounting in the aggregate to over £100,000. At intervals during this period he drew cheques on the account which were met by the bank. By October, 1950, he had come to suspect that eight cheques, drawn for a total amount of £19,412 10s. 9d., which had been debited to the account, had been forged, and in February, 1951, he presented eight other cheques through the Bank of Australasia to the bank for amounts exactly corresponding to that of the cheques which he claimed had been forged. The bank refused to meet these cheques, and he claimed £19,412 10s. 9d. from it by specially indorsed writ. In pursuance of the procedure under the Common Law Procedure Act, 1899, the plaintiff filed a declaration based on the old “indebitatus assumpsit” count in the following terms: “For money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant”, and he claimed £19,412 10s. 9d. To this declaration the bank filed the plea of “never indebted”. At the trial neither party gave oral evidence, the plaintiff putting in evidence a copy of his current account and a letter from the bank to the Bank of Australasia returning the eight disputed cheques as admissions by the bank entitling him to succeed, and the cheques themselves as evidence of his demand. The case turned on a point of pleading—the effect in the circumstances of the case of a plea of “never indebted”.

HELD: English authority and the wording of r. 65 made it plain that on the issue raised by the plea of “never indebted” the onus of proving the fulfilment of conditions precedent was on the plaintiff: *Hudson v. Bilton* (1856) (6 E. & B. 565), and *Broomfield v. Smith* (1836) (1 M. & W. 542), applied; in a customer and banker case one such condition precedent was the existence in the customer’s account of funds sufficient to meet the customer’s demand, and it was for the customer to establish this sufficiency as subsisting at the time of demand; the only evidence consisted of the current account and the defendant bank’s letter to the Bank of Australasia, neither of which in themselves, nor the two in combination, amounted to an admission by the defendant bank that the plaintiff’s account contained sufficient funds to meet his demand; and, therefore, the plaintiff had not discharged the onus on him.

Cases referred to:

- (1) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188.
- (2) *Hudson v. Bilton*, (1856), 6 E. & B. 565; 26 L.J.Q.B. 27; 27 L.T.O.S. 154; 119 E.R. 975; 12 Digest, Replacement, 484, 3602.
- (3) *Broomfield v. Smith*, (1836), 1 M. & W. 542; 5 L.J.Ex. 155; 150 E.R. 550; 39 Digest 651, 2455.
- (4) *Scott v. Parker*, (1841), 1 Q.B. 809; 10 L.J.Q.B. 244; 113 E.R. 1341; 9 Digest 415, 2685.
- (5) *Simmons v. Swift*, (1826), 5 B. & C. 857; 5 L.J.O.S.K.B. 10; 108 E.R. 319; 39 Digest 484, 1042.

APPEAL by the Bank of New South Wales, the defendant in the action, against a judgment of the Full Court of the Supreme Court of New South Wales, dated Oct. 7, 1952, affirming a judgment of McCLEMENS, J., in the Supreme Court, dated May 19 and 20, 1952.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the bank.

K. A. Ferguson, Q.C., and *C. L. D. Meares* (both of the Australian Bar) for the respondent (the plaintiff).

Dec. 7. **LORD ASQUITH OF BISHOPSTONE:** This is an appeal by the defendant in the action against a judgment of the Full Court of the Supreme Court of New South Wales given on Oct. 7, 1952. By that decision the Full Court dismissed an appeal from a judgment of May 19 and 20, 1952, of McCLEMENS, J., in an action in which the jury was, by consent, dispensed with at the trial. McCLEMENS, J., found a verdict and entered judgment for the plaintiff for £19,412 10s. 9d. in circumstances hereinafter appearing.

From January, 1947, to February, 1951, the plaintiff was a customer of the defendant bank and had a current account with it, into which in that period he from time to time paid sums amounting in the aggregate to over £100,000. At intervals during this period cheques were presented to the bank drawn on this account, and were met by the bank. By Feb. 8, 1951 (indeed, earlier, in October, 1950), the plaintiff had come to believe or suspect that some of the cheques debited to his account had been forged. These were eight cheques totalling £19,412 10s. 9d. The effect of debiting these cheques to the plaintiff's account was to reduce the credit balance, by Feb. 8, 1951, to about £18. On that date the plaintiff presented to the defendant bank through the Bank of Australasia eight other cheques for amounts exactly corresponding to that of those which he claimed were forged. If they were forged, the bank should not have honoured them, and, if it had not done so, there would, on Feb. 8, 1951, have been £19,412 10s. 9d. in the account and about £18 to spare, and the eight cheques of that date could, accordingly, have been met. The bank returned the eight cheques of Feb. 8, 1951, to the Bank of Australasia indorsed "refer to drawer: bona fide dispute state of account arising alleged forged cheques". The plaintiff customer thereupon, by specially indorsed writ of Feb. 16, 1951, claimed £19,412 10s. 9d. as money "received by the defendant to the use of the plaintiff". Particulars followed of the amounts of the "forged" cheques totalling £19,412 10s. 9d.

The real issue raised by these events was whether the eight suspect cheques were in fact forged or in fact genuine and authorised mandates to draw on the plaintiff's account, and it might not unreasonably have been expected that the parties, or that one of them on whom the onus lay, would give evidence in the box to deny or to affirm the authenticity of the signatures on these cheques of the plaintiff as drawer. However, in the events which happened the pleadings

were so framed as, in the view of both parties, to make it unnecessary for either of them to give oral testimony at all. The case was made to turn on a point of pleading. This seems to their Lordships a regrettable development. The case cannot be understood without bearing in mind that New South Wales has retained the system of pleadings which obtained in England before the Judicature Acts—in fact, that established under the Common Law Procedure Act, 1852, the provisions of which, and the rules made thereunder, are in substance reproduced in the Common Law Procedure Act (New South Wales) of 1899, and the rules made under that Act. In pursuance of this procedure the plaintiff, on Mar. 1, 1951, filed a declaration based on the old “*indebitatus assumpsit*” count, in the following terms:

“For money payable by the defendant to the plaintiff for money received

by the defendant for the use of the plaintiff and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.”

And the plaintiff claimed the sum of £19,412 10s. 9d.

It may be noted, though their Lordships are of opinion that this does not influence the result: (i) that there was a “variance” between the writ and the declaration, since the declaration relied on money had and received and money lent, and the writ, originally, on the former only. This was adjusted by an amendment at the trial, adding to the writ the words “for money lent by the plaintiff to the defendant and” before the words “for money received by the defendant to the use of the plaintiff . . .”; (ii) that the particulars given

under the writ as it originally stood, as particulars of money had and received, and stating that certain sums were subtracted from the plaintiff’s account by forged cheques, could hardly stand as particulars of “money lent” after the writ was amended, except, possibly, as to the total specified of £19,412 10s. 9d. The amount “lent” to the bank might be measured or particularised by the gross amounts paid in, or by the credit balance at a given time, but assuredly not by the amounts (rightly or wrongly) debited to the account by the bank.

However, no application was made based on the insufficiency of the particulars in relation to the added claim for money lent either for further and better particulars or for a stay or for an order to strike out the writ, and their Lordships think nothing turns on this insufficiency.

To the declaration framed on the *indebitatus* count for money lent and money had and received the bank filed the plea of “Never indebted”. By his replication the plaintiff joined issue on this plea.

At the trial at *nisi prius* before McCLEMENS, J., and a jury of four, the jury, as already stated, having been dispensed with by consent at a certain stage, neither party gave nor called oral evidence. The plaintiff, having called on the defendant bank to furnish a copy of his current account, tendered it in evidence, and also relied on the letter of the defendant bank to the Bank of Australasia. The current account showed credits over a long period amounting in the aggregate to over £100,000, and debits which (including the eight disputed cheques) reduced the balance, as on Feb. 8, 1951, to £18 odd. The letter from the defendant bank to the Bank of Australasia, dated Feb. 12, 1951, reads as follows:

“Dear Sir, W. R. J. Laing. With reference to certain cheques itemized hereunder, bearing date Feb. 8, 1951, drawn by W. R. J. Laing, presented by you for payment and returned to you herewith with the answer ‘Refer to drawer—bona fide dispute state of account arising alleged forged cheques’ indorsed thereon, we advise that certain funds which the drawer may have considered were at his disposal and which would have been sufficient to meet such cheques are the subject of a bona fide dispute arising out of alleged forgeries.

No.	841474,	for £2,950,
„	841471,	„ 2,950,
„	841473,	„ 2,210 18s. 9d.,
„	841472,	„ 2,950,
„	841475,	„ 2,338 0s. 8d.,
„	841476,	„ 890 15s. 8d.,
„	841477,	„ 2,225 5s. 4d.,
„	841478,	„ 2,897 10s. 4d.

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You are authorised to communicate this information to your client.”

These documents were tendered by the plaintiff and admitted in evidence (together with other letters which are immaterial to the issue). The plaintiff also tendered the eight cheques of Feb. 8, 1951, referred to in the letter of Feb. 12, 1951, solely as evidence of a “demand”, which, under the decision of the English Court of Appeal in *Joachimson v. Swiss Bank Corpn.* (1), is an essential precondition of a customer’s cause of action when suing a bank for a debt due from it in respect of a current account. It is clear that the plaintiff relied on A, B and C cumulatively as admissions by the bank sufficient to entitle him to succeed. The argument is somewhat elliptically recorded, the formula “argument ensued” occurring repeatedly. Plaintiff’s counsel seems to have claimed in the court of first instance (as he certainly did on appeal to the Full Court) that he had paid money into his current account in excess of the sum claimed and that the last-named sum had been demanded by the cheques of Feb. 8, 1951, for £19,412. Defendant’s counsel, at the close of the plaintiff’s case, asked for a non-suit, but this issue was neither argued nor persisted in, since defendant’s counsel resiled from it and proceeded to ask instead for a “direction verdict”, viz., a direction to the jury that the plaintiff had made out no case. Defendant’s counsel proceeded to argue that on Feb. 8, 1951, there were no funds in the plaintiff’s account sufficient to meet the eight cheques then presented. Counsel for the plaintiff then, as already indicated, asked for leave to amend the writ (which had been limited to “money had and received”) so as to read

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“amount due by the defendant to the plaintiff for money lent by the plaintiff to the defendant and for money had and received by the defendant and dealt with in the manner following:—.”

Then followed particulars of the eight cheques said to have been forged. Counsel for the bank did not oppose this amendment, subject to costs. Counsel for the plaintiff made it clear that he was not suing for the dishonour, as such, of these eight cheques. He merely relied on the presentation of another eight cheques of the same amounts on Feb. 8, 1951, as a “demand”.

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The jury were then discharged by consent and the learned judge, on May 20, 1952, gave judgment for the plaintiff, having reached the conclusion that he could not have directed a jury that the plaintiff had made out no case. After observing that the real issue in the case, viz., the genuineness vel non of the eight (earlier) cheques had been burked or evaded by the parties and that the result of their doing so was to reduce the issue in the main to a technical point of pleading, he proceeded to summarise the arguments presented before him and to hold that there was some evidence (on the pleadings as they stood) to submit for consideration by a jury that

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“the money was lent, that the money was demanded back, and that the money has not been paid.”

The learned judge indicated that in his view the proper plea in such a case as that before him was not “never indebted” but “payment”, an issue which loomed large in the decision, later on, of the Full Court of the Supreme Court. It would seem to follow from this opinion that, in the absence of a plea of “payment”, no evidence could be given of drawings on the account which would, in law, amount to part repayments of the loan or loans. Notwithstanding this, the

A learned judge disagreed with the plaintiff's submission that while the credit items in the account are admissions by the bank and evidence for him, the debit items are "not evidence for the bank, or against" the plaintiff; and says that the plaintiff, having put in this document, must take the document as it stands as a whole. Yet when, on the second day of the hearing, the bank puts forward this contention, he appears to reject it, and adheres to the decision which he had adumbrated in favour of the plaintiff, basing himself on (i) the presentation of the eight cheques on Feb. 8, 1951, and the notation of the bank thereon, (ii) the bank's letter of Feb. 12, 1951, as affording some evidence, on the pleadings as they stood, to go to a jury that money was "lent, demanded back, and not repaid." He seems at this stage to have treated the account, of which he had ruled that both sides—debits as well as credits—were equally valid and binding, either B as affording no evidence in favour of the bank, or as affording no evidence in favour of either party.

Counsel for the plaintiff does not seem to have relied exclusively on these factors, (i) and (ii), either before the trial judge or the Full Court. He relied also on the account. He alleged, in effect, that, on the common count for "money lent", the money lent was represented by the gross payments in to the credit side of his account, and that this, plus a demand for an amount not exceeding the C payments in, was (on a plea of "never indebted") the sole precondition of the bank's liability to repay him that amount. He argued further that the only matters which could be raised in answer to such a claim under the plea of "not indebted"—the only plea entered in this case—were either that the money was not "lent" (in the sense above indicated) or that no demand was made. On a D plea of "payment" the depletion of the account by authorised withdrawals could be proved, but not under a mere plea of "never indebted".

The learned judge, having decided for the plaintiff on the ground indicated, the defendant, by notice of appeal filed on May 28, 1952, appealed to the Full Court of the Supreme Court of New South Wales (STREET, C.J., OWEN and HERRON, JJ.). In his judgment (with which in substance though not in detail the other two judges agreed), STREET, C.J., accepted the submission that on an indebitatus E count for money lent, to which "never indebted" and nothing else was pleaded, the onus on the plaintiff is as follows:

"Coming now to the pleadings in the action, the relationship of the parties being that of creditor and debtor, the cause of action was properly framed as an action in debt in the form of a count for money lent. To this count F there might be many and various defences, but the only plea put on the file was one of 'never indebted' and this defined the issue between the parties. The count for money payable for money lent involves the allegation that money was in fact lent to the defendant under a contract, express or implied, in terms capable of giving rise to a presently payable debt, and it involves also the allegation that in fact the money was payable at the time when the G action was brought. The plea of 'never indebted' in the case of an express contract denies the contract of loan, that is, it denies that the money was lent on a promise *capable of requiring repayment at the date when the action was brought*. [The italics are their Lordships'.] In the case of an implied contract, such as the present, which arises out of the proved relationship of banker and customer, it denies the matters of fact from which a promise H to repay was capable of being inferred. In other words, it denies the loan, and nothing more. Though the money is owed by the bank when it has been received from the customer, it is not in fact repayable until demand is made, but the assertion of the making of the necessary demand is contained in the allegation that the money was 'payable', as this performs the same function as the allegation in a count framed in assumpsit that 'all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff' to sue. A plea of 'non assumpsit' does not put this allegation

of performance of conditions precedent in issue any more than it puts in issue the breach alleged. No question arises here, however, in this respect, as the respondent in fact proved the demand, and having proved the relationship of banker and customer and the deposit of large sums of money, far more than sufficient to meet the cheques of Feb. 8, 1951, he thereby provided prima facie proof of a debt payable at the time of action brought . . . The bank now argues that the respondent, having put in evidence the whole of the bank's statements relating to his account, both the credit and the debit sides, he must fail because he has proved that at the date of the demand the bank only owed him a balance of £18. The appellant's argument is that the bank's statement shows that there was not sufficient money owing to the respondent at the crucial date to meet the cheques drawn on Feb. 8, 1951. This argument is fallacious. Constant reference was made to the balance shown in the books of the bank on Feb. 8, but this means nothing by itself. It does not represent a deposit by the [plaintiff] nor a payment by the bank. It is merely the arithmetical result of a mechanical addition of both the debit and the credit entries, and is a mere summary of the arithmetical effect of those entries. It results from the fact that the books purport to show that while large sums have been paid in by the [plaintiff], other large sums have also been paid out to him by the bank, and the balance is reached by reason of the assertion that, while the bank admits receiving money, it also paid out to the [plaintiff] practically the same total as that paid in. It is true that there are cases where both sides of an account, even if tendered by a party for the purpose of using one side only, must be taken into account also in favour of the other party; but these are cases where both sides of the account are relevant to the issues raised between the parties by the pleadings . . . The plea which was filed denying the loan by the [plaintiff] is, on the bank's own books, admittedly unsupportable, for they record the payments to the bank relied upon by the [plaintiff]. To seek to assert that, despite these substantial payments to the bank, only £18 was owed on Feb. 8, 1951, involves necessarily the assertion that money had been repaid to the [plaintiff] in such amounts as to reduce his credit balance to that figure."

The gist of this judgment is that the implied contract between customer and banker is to this extent on all fours with the contract between any other creditor and debtor: each payment into the account is a loan and creates a debt. The plea "never indebted" merely puts in issue the payments in—the credit side of the account.

It is quite true that the debtor bank may prove, if it can, that the amount credited has been reduced by authorised withdrawals to vanishing point (or, in the case of an overdraft, below that point) and that it suffices for a bank, refusing to meet a demand for £x, to show that by the time of the demand it has thus been reduced to a point where it falls short of £x. But, so the argument runs, the bank must, in order to prove this, set up a plea, not of "never indebted" but of "payment"—the appropriate plea where a debt is alleged to have been repaid in part or in whole—and no such plea was set up in this case originally, nor was any request for leave to amend in that sense ever asked for, though it would have been granted on terms as certainly as the plaintiff's amendment of his writ.

The relevant rules under the Common Law Procedure Act of New South Wales may here with advantage be set out—

"64. In all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

"Exempli gratia.—In an action on a warranty, such pleas will operate

as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

"In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration but not of the breach.

"65. To causes of action to which the plea of 'never was indebted' is applicable, as provided in sched. III to the Common Law Procedure Act, 1899, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of 'never was indebted' will operate as a denial of those matters of fact *from which the liability of the defendant arises*. [The italics are their Lordships']

"Exempli gratia.—In actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

"67. In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

"Exempli gratia.—Infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, etc., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

"73. Payment shall not be received in evidence, in any case in reduction of the debt or claim, without a plea of payment. Provided that in respect of any sum for which the plaintiff has specifically given credit in his particulars of demand, or in the special indorsement, if any, on the summons, no such plea shall be necessary."

The case seems to their Lordships to depend on the answer to two questions: A. What does a plea of "never indebted" and what does it not, put in issue? In particular, does it put the plaintiff to proof of the performance of conditions precedent to the present payability of the debt? B. Whatever onus it throws on the plaintiff, did the plaintiff discharge that onus in this case? On these issues their Lordships are indebted to counsel on both sides for much interesting and helpful argument.

A. As to the first issue, there is curiously little English case law which is directly in point. In BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS, 3rd ed., 1868, at the top of p. 463, the following passage occurs under the heading of "Indebitatus Counts":

"If the plaintiff relies on an express contract which was subject to any conditions before the absolute liability of the defendant attaches, he is bound to prove under an issue raised by this plea the happening or performance of those conditions."

And cf. *ibid.*, pp. 35-37 and p. 462.

The principle here stated was applied by cases such as *Hudson v. Bilton* (2) and *Broomfield v. Smith* (3). In *Hudson v. Bilton* (2) a liquidated sum in money was payable when a certain ship "sailed". The count was an indebitatus count, and the plea was "never indebted". The ship put out over the bar and put

back, the captain being still ashore. The question was whether this amounted to her "sailing". The plaintiff failed because on these facts he did not establish that the ship had sailed; but this decision clearly assumed that proof of this fact, on the pleadings, rested on him. In *Broomfield v. Smith* (3) there was an indebitatus count for the price of goods sold and delivered and a plea of "never indebted". There was no plea in confession and avoidance. The sale and delivery were proved, but there was a term in the contract that the goods were sold on a period of credit, and at the time of the claim this period was unexpired. The plaintiff succeeded before the court of first instance, but failed on appeal, because the expiration of the period of credit was held to be a condition precedent to his cause of action and he had not established it. If the plaintiff's proposition had been well founded the defendant could not have succeeded on a plea of "never indebted", because performance of the conditions precedent (in this case expiration of the period of credit), would have been presumed in his favour. (See also *Scott v. Parker* (4), where, it is true, the plea was non-assumpsit, though the count was an indebitatus count, and *Simmons v. Swift* (5).)

Their Lordships are of opinion that not only these cases but also the wording of r. 65 make it plain that on an issue of "never indebted" the onus of proving the fulfilment of conditions precedent is on the plaintiff. They think the words at the end of r. 65 "from which the liability of the defendant arises" (contrasting with the wording of the preceding rule) are significant. The judgment of STREET, C.J., in effect holds that in such circumstances proof of the performance of conditions precedent to a presently payable debt is not on the plaintiff. His language, when he speaks of a "contract capable of giving rise to a presently payable debt", implies in the plaintiff's favour the presumption that a potential debt has, through fulfilment of conditions precedent, become an actual one. Their Lordships venture, with great respect, to think this is a misconception of the onus of proof on the pleadings as they stood in this case. The plaintiff must prove that the potential liability has ripened into an actual and present one. The question what it is that the plea of "never indebted" to an indebitatus count puts in issue can be approached on different lines. What is, for this purpose, a "debt" (the debt which is denied)? No doubt for some purposes and in some sense if B has lent £5 to A and A is under an obligation to repay B £5 in a week from now, this is in the interval a debt in the sense of *debitum in praesenti, solvendum in futuro*. But is this the type of debt to which the indebitatus counts are directed? Their Lordships think not. The counts are directed to a debt *solvendum in praesenti*: a debt "presently payable": and it is such a debt which the plea "never indebted", filed in answer to an indebitatus count, denies and puts in issue. A common money count is not available unless the debt is presently payable, and "never indebted" puts in issue its present payability. This plea does not put in issue the original contractual promise, which may have been subject to a condition precedent. It puts in issue the promise implied by law to pay presently, which only arises if and when such conditions have been performed, and, consequently, as the two cases cited above show, puts in issue the performance of those conditions and puts the proof of these on the plaintiff. (This is borne out by the language of r. 65.) In a customer and banker case one such condition precedent is the existence in the customer's account of funds sufficient to meet the demand on them. It is for the customer to establish this sufficiency as subsisting at the time of demand.

Their Lordships are fortified in the belief that this view is sound by the formulation by counsel for the plaintiff of the "special" count which would in the circumstances of this case have been appropriate if an indebitatus count had not been resorted to. It reads as follows:

"The plaintiff sues the defendant for that the plaintiff lent to the defendant £100,000 and the defendant promised that it would pay to or to the order of the plaintiff such sums as the plaintiff might from time to time

demand, provided that at the time of any such demand there were sufficient funds in the plaintiff's account to meet the same. And the defendant paid the plaintiff on the demand of the plaintiff from time to time, certain specific sums and no more: so that at the time of the demand hereinafter referred to, there were left in plaintiff's account more than sufficient sums to meet the said demand and the plaintiff demanded £19,000 from the defendant which defendant has not paid nor has he paid any part of it."

A Such is the obligation where it is pleaded on a special assumpsit.

Their Lordships are of opinion that whether or not an indebitatus count is used to recover money lent, where the creditor is a customer and the debtor a bank on current account, the "peculiar incidents" of that relationship govern the legal position and determine what the plaintiff must prove. This is admitted as regards the necessity of demand, a requirement which, in the absence of special agreement, does not attach where an ordinary creditor-debtor relationship exists, and the debtor must "seek out" his creditor. But a further "peculiar incident" is that the bank is only indebted to the customer for the amount (which may be called "a balance" when it is arrived at by deducting authorised withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at this time the "balance" suffices to pay his demand, he succeeds. If the "balance" falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the case of a customer and banker from that relationship in other cases.

B. On this footing, did the plaintiff discharge the onus on him? Their Lordships consider that he did not. If he had gone into the box and sworn that the eight disputed cheques were forged, and had been believed, he would unquestionably have discharged it. He would equally have shifted the onus to the bank if he had gone into the box and testified that only cheques A, B and C drawn on the account were genuine and that, after deducting these, there were still sufficient funds to meet the demand. He did neither. The only evidence before the court consisted of two documents: (i) the current account, produced by the bank; (ii) the bank's letter to the Bank of Australasia. Neither of these documents in themselves, nor the two in combination, amounts to an admission by the bank that at the date of demand, Feb. 8, 1951, the plaintiff's account contained sufficient funds to meet the demand for £19,412 odd.

E In these circumstances their Lordships have no choice but humbly to advise Her Majesty that the appeal should be allowed. In so doing they cannot repress a regret that a matter of substance should have been allowed to turn on a question of technical form. The plaintiff-respondent should pay the costs of this appeal and of the proceedings in the Australian courts.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray* (for the appellant); *Blyth, Dutton, Wright & Bennett* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re CAMPBELL COVERINGS, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), January 11, 1954.]

Company—Winding-up—Voluntary winding-up—Public examination of officer—Power of court to order—Need of “further report”—Companies Act, 1948 (c. 38), s. 270 (1), s. 307 (1), (2).

The “further report” which is required by the Companies Act, 1948, s. 270 (1), before an order can be made for the public examination of an officer of a company, is necessary only in the case of a compulsory winding-up, and, where an application for such an order is made by a liquidator under s. 307 (1) of the Act, the fact that in a voluntary winding-up there can be no “further report” within s. 236 (2), s. 236 (3) and s. 270 (1) does not prevent the court from making the order, if it should decide to do so, provided that the report on which the application is based has been considered by the judge personally.

Dicta of SIR RAYMOND EVERSLED, M.R., in *Re Campbell Coverings, Ltd.* ([1953] 2 All E.R. 76, 78), applied.

FOR THE COMPANIES ACT, 1948, s. 236, s. 270 and s. 307, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 650, 671 and 693.

Cases referred to:

- (1) *Re Campbell Coverings, Ltd.*, [1953] 2 All E.R. 74; [1953] Ch. 488.
- (2) *Re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204; 68 L.J.Ch. 427; 80 L.T. 869; 10 Digest 1039, 7232.
- (3) *Re Medical Battery Co.*, [1894] 1 Ch. 444; 63 L.J.Ch. 189; 69 L.T. 799; 10 Digest 1037, 7202.

MOTION by the liquidator in the voluntary winding-up of a company to discharge an order made by the registrar on Dec. 7, 1953.

On receiving from the liquidator a report under the Companies Act, 1948, s. 334 (2), the Director of Public Prosecutions referred the matter to the Board of Trade, and the official receiver, who was appointed under s. 334 (3) to make a further investigation, presented a report, dated Mar. 18, 1953, in which he submitted that a former director of the company appeared to have committed a fraud on the company. An application by the official receiver for an order, under s. 270 (1), directing the public examination of the director was dismissed by the Court of Appeal on May 5, 1953, on the ground that the application was misconceived. The judgment of the Court of Appeal is reported [1953] 2 All E.R. 74. Following a suggestion made by SIR RAYMOND EVERSLED, M.R., in the course of his judgment, the liquidator applied to the court under s. 307 (1) of the Act of 1948 for the report of the official receiver to be considered by the court and for an order for the public examination of the director, or for such other order as might be deemed just, but his application was dismissed by the registrar.

Denys B. Buckley for the liquidator.

WYNN-PARRY, J.: This is a motion brought by the liquidator of the company in its voluntary liquidation asking that an order made by the registrar on Dec. 7, 1953, may be discharged, and also asking for further relief which, in the view I take of the procedure which should be followed, I need not further mention.

The matter arises in this way. The company, which was incorporated on Dec. 31, 1945, went into voluntary liquidation on June 1, 1950, and the present applicant was appointed liquidator. On July 23, 1952, the liquidator made a report to the Director of Public Prosecutions pursuant to the Companies Act, 1948, s. 334 (2). Following on that, an order was made on Feb. 5, 1953, appointing one of the assistant official receivers of the court to make a further investigation, and on Mar. 18, 1953, he presented a report in which he submitted that it would appear that a director of the company had during the life of the company

committed a fraud. On this a summons was taken out on Mar. 19, 1953, by the assistant official receiver designed to lead to an order for the public examination of the director in question: vide s. 270 (1) of the Act. On Mar. 30, 1953, the summons came before ROXBURGH, J., who made no order thereon. The matter was taken to the Court of Appeal before which it came on May 5, 1953 [see *Re Campbell Coverings, Ltd.* (1)], when the Court of Appeal agreed with the conclusion of ROXBURGH, J., though for a different reason. In the course of his judgment SIR RAYMOND EVERSHED, M.R., who delivered the leading judgment, having first dealt with the reasons which underlay the judgment of ROXBURGH, J., referred to the argument of counsel for the official receiver in which he had advanced the proposition that no report under s. 236 (2) was required, or, indeed, could be made, as the liquidation was a voluntary liquidation. It was the absence of that report and his view that it must be in existence to ground jurisdiction in the court to make an order, that led ROXBURGH, J., to the conclusion to which he came. The Master of the Rolls said ([1953] 2 All E.R. 76):

“With all respect to the learned judge, I agree with counsel that the requirement of a further report as specified in s. 236 (2) ought not to be regarded as a condition precedent to an order under s. 334 (3). The legislature is saying that certain powers may be exercised in a voluntary winding-up, those powers being powers which in a compulsory winding-up are exercisable only if certain things have been done which only can be done in a compulsory winding-up.”

The Master of the Rolls then reviewed a number of sections of the Act and for a different reason came to the conclusion that ROXBURGH, J., was right in refusing to make any order. SIR RAYMOND EVERSHED, M.R., then proceeded to throw out a suggestion which has, in fact, been followed. He said (*ibid.*, 78):

“I do not think that that conclusion is, from the point of view of those concerned in this liquidation, a counsel entirely of despair. I have passed over, in my references, s. 307 (1), which provides: ‘The liquidator or any contributory or creditor may apply to the court . . . to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court’. An application under that section must be by the liquidator or a contributory or a creditor, and the present applicant is the official receiver. If, therefore, it is thought appropriate to set in motion the powers of that section, another applicant will have to be found to make the application. That application is not now before the court, and, therefore, it would not be right for me to express a final view on any problem which might arise if it were. But the view which I have taken, with all respect to ROXBURGH, J., on the question, must there be a ‘further’ report in a voluntary winding-up no less than in a compulsory winding-up, applies in the case of s. 307 as in the case of s. 334. I cannot suppose that when Parliament says that the court may, on application, exercise any of the powers in a voluntary winding-up which it may exercise in a compulsory winding-up, it was saying at the same time that, if the powers in a compulsory winding-up require the existence of conditions which could be only satisfied in a compulsory winding-up, then those powers could not in any event be available in a voluntary winding-up. Such a conclusion seems to me to be in conflict with the express purpose and sense of s. 307 (1). I am aware that in so stating I am expressing a view which is not in accordance with the note which the learned editors have made in BUCKLEY ON THE COMPANIES ACTS, 12th ed., p. 568, and I am, therefore, all the more diffident in expressing a final conclusion on the matter.”

The Master of the Rolls went on to say that, “as at present advised”, his view was as he had stated, and he then proceeded to point out that, assuming that there

was jurisdiction to make an order by virtue of s. 307, it would not necessarily follow that the court would, in fact, make the order. He continued (*ibid.*, 79):

“ . . . for reasons which I have already indicated, I say no more about what might happen if an application was made under s. 307. It is possible that other points may arise which have not been discussed before us today.”

The suggestion of the Master of the Rolls was followed, and on Nov. 19, 1953, a summons was issued by the liquidator asking that the report of the assistant official receiver should be considered and for an order that the director in question should be directed to attend for public examination. On Dec. 7, 1953, the learned registrar refused to make any order on the summons and put his reasons in the form of a note which shows that he gave very careful consideration to the matter. Now the question comes before me by way of a motion to discharge the order of the registrar. The simple question is whether the view expressed by the Master of the Rolls as being his view as then advised is a view which should be followed on the ground that, on careful investigation, there is nothing which should operate to prevent its application. It is true that, as I have said, the Master of the Rolls expresses what he states to be a view “as at present advised”, but, as I read his judgment, the only reason why he did not treat his then view as a concluded and final view was, not because he had any doubt as to the soundness of the reasoning expressed in the passage which I have read from his judgment, but because further investigation might disclose some good reason against the application of that reasoning. He decided as part of his judgment that there was no need, in the application of s. 334 to a voluntary liquidation, to have produced the further report requisite, under s. 270 (1), in the case of a compulsory liquidation, and he states definitely, in a passage which I have quoted, that that reasoning must apply in the case of s. 307 (1) no less than in the case of s. 334. In the face of that reasoning I should feel, in any case, bound to follow it and to apply it if the further investigation which has now been made should disclose nothing to prevent its application. But after careful consideration of the matter I would desire, with respect, to associate myself with that reasoning, and it, therefore, only remains for me to express my view on the result of the more detailed investigation which has since been made by the learned registrar involving the citing of a number of authorities.

The only two cases which, it appears to me, in any way approach this question are *Re 1897 Jubilee Sites Syndicate* (2) and *Re Medical Battery Co.* (3). The *Jubilee Sites* case (2) concerned a petition by the official receiver for the compulsory winding-up of the company, which was being wound-up voluntarily subject to the supervision of the court, and one of the grounds put forward was that a public examination was desirable. In the course of his argument counsel for the official receiver said ([1899] 2 Ch. 205):

“The private examination held under s. 115 of the Companies Act, 1862, has turned out to be insufficient, and what is required is a public examination under s. 8 of the Act of 1890. But s. 8 only applies when a compulsory winding-up order has been made, and the official receiver, therefore, now applies for that form of order under s. 14 of the Act of 1890. If this is not a case contemplated by the framers of that provision, it is difficult to say when the section does apply.”

The voluntary liquidator was represented by counsel and he objected to the making of a compulsory order, but put forward no suggestion that there was any other method of obtaining a public examination. WRIGHT, J., did not deal with this matter at all in his judgment. It is plain that it was never argued, and, although the case would appear to have proceeded on the basis that in order to obtain an order for public examination it would first be necessary for those who sought the order to obtain an order for compulsory winding-up, it is not an authority for saying that s. 138 of the Companies Act, 1862, which corresponds

to s. 307 of the Act of 1948, could not be invoked. Indeed, the reason why this point was overlooked may be that the Act which was invoked was the Companies (Winding-up) Act, 1890, which itself, by s. 8, introduced public examination.

Re Medical Battery Co. (3) was also a case in which a compulsory order was sought, and counsel for some of the creditors said in his argument ([1894] 1 Ch. 446):

- A “The company ought to be wound-up by the court in order that there may be a public examination under s. 8 of the Companies (Winding-up) Act, 1890. Such an examination cannot be directed to be held in a winding-up under the supervision of the court.”

- B No doubt that statement was correct, but the corollary does not follow that there must necessarily be a compulsory liquidation in order that a public examination can be directed. It may well be that it was what was said in the arguments in those two cases that led to the statement in *BUCKLEY ON THE COMPANIES ACTS*, 12th ed., p. 568 (which is a repetition of a statement which first found its place in the 10th edition, at p. 419, in respect of the corresponding sections of the Companies (Consolidation) Act, 1908), that:

- C “To give the court jurisdiction to proceed under this section it is essential —(A) That the official receiver makes a ‘further report’ under s. 236 (2). Semble, therefore, an order for public examination under this section cannot by virtue of s. 307 be made in a voluntary winding-up, nor can such an order be made in a winding-up under supervision (s. 315 and sched. XI).”

- D The rest of the authorities to which my attention has been directed do not appear to me to affect the matter, and they do not disclose even the establishment of such a practice as might make the court hesitant to invoke s. 307 in the present case. Even if they did that but no more, on a question of jurisdiction the matter would have to depend in the end on the interpretation of the language of the statute and not on any practice which might have grown up. When one turns to s. 307 (1), one finds language which, on the face of it, is perfectly clear and is also wide and unfettered by any context to be found in the section:

- E “The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court.”

In view of that wide language, it appears to me, with respect, that the reasoning of *SIR RAYMOND EVERSHED*, M.R., ought to be followed. After considering the reasoning underlying the judgment of *ROXBURGH*, J., the Master of the Rolls said ([1953] 2 All E.R. 78):

- G “As I have already indicated, it seems to me that if Parliament in terms states that powers vested in the court in a compulsory winding-up shall be available also (on application) in a voluntary winding-up, it cannot have been supposed that steps would have been taken in a voluntary winding-up which only arise and which can only be taken, in a compulsory winding-up.”

- H I further respectfully agree with *SIR RAYMOND EVERSHED*, M.R., that that reasoning must apply in the case of s. 307 no less than in the case of s. 334. Therefore, when one turns to s. 270 (1), although it appears, on the face of it, that the section is to apply only in the case of a compulsory winding-up, it must also be applicable in a voluntary winding-up if the court should exercise the power conferred on it by s. 307 (2). The second condition in s. 270 (1), namely, “and the official receiver has made a further report”, is a condition the existence of which, by the reasoning of the Master of the Rolls to which I have already

referred, must be confined to the case where there is a compulsory winding-up. If the court desires to make an order under s. 307 (2), it cannot be any bar to that order that, if the liquidation had been a compulsory liquidation, there would have to have been a further report. It may be thought curious that this is the result, when one considers that in the case of an application for a public examination in a compulsory liquidation a number of steps have to be taken to make sure that an undoubtedly serious step is not taken except in proper circumstances, with the consequence that a certain amount of security or protection is given to the individual whose examination is asked for, and who, in the nature of things, has played no part in the proceedings leading up to the making of the order. But although such a consideration may pass through one's mind in construing the provision relating to the making of an order for a public examination in a compulsory liquidation, yet where one finds the legislature, in such clear terms as the language of s. 307, giving this wide power, it becomes impossible to cut that language down merely because a complete procedure may not be found to be laid down if that section is invoked in a voluntary liquidation for the purpose of obtaining an order for a public examination. But I think, on consideration, that the difficulty is not one of any substance, because in the case of an application for an order for a public examination there is the overriding safeguard, in s. 270 (1), that the report on which the application is based must be considered by the judge personally, and, quite obviously, when the court decides under s. 307 (2) to exercise the power under s. 270 (1) in a voluntary liquidation, it must be furnished with the necessary material for considering whether or not the serious step should be taken of ordering a public examination. For those reasons, applying the reasoning of the Master of the Rolls, which, as I said, I regard as binding on me, but with which also I respectfully agree, I propose on this motion merely to discharge the order of the registrar so that the matter may go back to him with a view to the next step being taken, namely, that I shall be furnished with the report on which the application for the public examination of the director in question is based.

Order accordingly.

Solicitors: *Clifford-Turner & Co.* (for the liquidator).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re BAGSHAW (deceased). WESTMINSTER BANK, LTD. v.
TAYLOR AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 13, 1954.]

Charity—Gift to named charity—Hospital carried on, at date of will, by charitable institution named in will—Name and objects of charity altered before death of testatrix—Vesting of hospital in Minister of Health before death of testatrix—Application of gift to new objects of charity.

By her will, dated July 17, 1942, the testatrix, who died on June 27, 1951, gave her residuary estate to the "B. and District War Memorial Cottage Hospital". At the date of the will that was the correct name of a charity which came into existence in 1921 with the object of providing a cottage hospital for poor persons of the district as a permanent memorial to men of the district who had fallen in the 1914-18 war. The charity was maintained by voluntary contributions and was managed by a governing body of subscribers. Its property was vested in trustees, and it was regulated by rules and a trust deed, dated Dec. 31, 1921, which contained, *inter alia*, the following clause: "If at any time hereafter in the opinion of a two-thirds majority of the governing body a cottage hospital cannot be maintained the trustees shall hold the capital and income of the trust premises for the time being subject to the trusts hereof upon trust to apply the same as capital or as income for such charitable purposes and objects and in such manner for the benefit of the inhabitants of the said parish of Bakewell and the surrounding parishes as the governing body shall in their absolute discretion think fit the governing body having power to settle any scheme or schemes for such last mentioned application." On Mar. 28, 1946, a resolution was passed, in accordance with the clause, that a cottage hospital could not be maintained and that the governing body should draw up a scheme for the future administration of the charity. By resolutions, dated May 23, 1946, and Mar. 27, 1947, respectively, the name of the charity was changed to "the B. and District 1914-18 War Memorial Charity", and its objects were altered, the new objects being to provide (a) such additional hospital benefits of a charitable nature for the benefit of the inhabitants of the district as might not be provided under the National Health Service Act, 1946, and (b) charitable assistance for necessitous ex-service men or women of the district or their dependants. The charity continued to maintain the hospital, under a resolution enabling it to do so, until July 5, 1948, when the hospital vested in the Minister of Health under the National Health Service Act, 1946. From that date the hospital had been carried on by a hospital management committee on behalf of a regional hospital board. The rules of the charity were revised in accordance with the resolutions of 1946 and 1947, the revised rules being adopted in April, 1949. At the date of the testatrix's death the charity was being carried on under its new name and in accordance with the new rules and the trust deed. On a summons by the executor of the will to determine who was entitled to the gift of the residue,

HELD: the gift was to a plainly identified charity which existed at the date of the will under the name which was mentioned in the will; the objects and name of the charity having been legally altered under the terms of the trust deed, the charity remained the same charity notwithstanding the alterations; and, therefore, the gift was for the general purposes of that charity.

Re Faraker ([1912] 2 Ch. 488), and *Re Lucas* ([1948] 2 All E.R. 22), applied.

AS TO GIFTS TO INSTITUTIONS WHICH HAVE CHANGED THEIR NAMES, see HALSBURY, Simonds Edn., Vol. 4, p. 279, para. 581; and FOR CASES, see DIGEST, Vol. 8, pp. 308, 309, Nos. 895-901.

Cases referred to:

- (1) *Re Faraker*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 8 Digest 311, 921.
- (2) *Re Lucas*, [1948] 2 All E.R. 22; [1948] Ch. 424; [1948] L.J.R. 1914; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the residuary estate of the testatrix, Jane Bagshaw, ought to be paid or transferred to the trustees of the Bakewell and District 1914-18 War Memorial Charity, to be applied for the objects of the said charity, or to the Sheffield No. 3 Hospital Management Committee, to be applied for the purposes of the Bakewell and District Cottage Hospital, or whether it devolved as on an intestacy to the next of kin.

By her will, dated July 17, 1942, the testatrix gave her residuary estate to "the Bakewell and District War Memorial Cottage Hospital absolutely." At the date of the will that was the name of a charity which came into existence in 1921 as an unincorporated charitable institution, with the object of providing and establishing a cottage hospital for the reception and relief of sick or temporarily disabled poor persons resident within five miles of the parish of Bakewell, Derby, as a permanent memorial to officers and men of the district who had fallen in the 1914-18 war. The charity was wholly maintained by voluntary contributions and was managed by a governing body of subscribers. Its property was vested in trustees and it was regulated by rules and by a trust deed, executed on Dec. 31, 1921. Clause 8 of the trust deed provided:

"If at any time hereafter in the opinion of a two-thirds majority of the governing body a cottage hospital cannot be maintained the trustees shall hold the capital and income of the trust premises for the time being subject to the trusts hereof upon trust to apply the same as capital or as income for such charitable purposes and objects and in such manner for the benefit of the inhabitants of the said parish of Bakewell and the surrounding parishes as the governing body shall in their absolute discretion think fit the governing body having power to settle any scheme or schemes for such last mentioned application."

The cottage hospital was carried on continuously from 1921 to 1946 when the governing body became anxious about the future, particularly after the National Health Service Bill (now the National Health Service Act, 1946) was introduced in the House of Commons on Mar. 21, 1946. On Mar. 28, 1946, a resolution was passed, in accordance with cl. 8 of the trust deed, that a cottage hospital could not be maintained and that the governing body should draw up a scheme for the future administration of the charity. By a resolution dated May 23, 1946, the name of the charity was changed to "the Bakewell and District 1914-18 War Memorial Charity." By a resolution dated Oct. 10, 1946, the governing body, while maintaining the opinion expressed in their resolution of Mar. 28, 1946, resolved to continue a temporary hospital service. On Mar. 27, 1947, it was resolved (i) that, on the assumption that the hospital premises and their endowments would, on the appointed day under the National Health Service Act, 1946 (July 5, 1948), vest in the Minister of Health and the regional hospital board, the Bakewell and District 1914-18 War Memorial Charity should be continued under the terms of cl. 8 of the declaration of trust dated Dec. 31, 1921, and (ii) that until the appointed day and thereafter any funds vested, or which might after the date of the resolution vest, in the charity should be applied at the discretion of the trustees for new objects, and the committee were directed to revise the rules accordingly. By the new rules:

"The objects of the charity are, primarily, the provision of such additional hospital, medical, and other benefits of a charitable nature for the inhabitants of the parish of Bakewell, and surrounding parishes within a radius of five miles from the memorial cross in Bakewell, and, secondarily, towards such

relief as is charitable amongst necessitous ex-service men or women of the war 1914-18 or the war 1939-45 or their dependants resident in the parishes aforesaid, and the provision of any necessary assistance ”.

Until July 5, 1948, the charity continued to carry on the hospital, and from that date it was carried on, under its original name, by the second defendants, the Sheffield No. 3 Hospital Management Committee, on behalf of the Sheffield Regional Hospital Board. The functions of the hospital were the same as they were before July 5, 1948, except that admission to the hospital was no longer confined to poor persons or to persons resident within five miles of the memorial cross in Bakewell. On Apr. 13, 1949, at a special general meeting of the subscribers to the charity, the revised rules were adopted. On June 27, 1951, the testatrix died, a spinster. She was survived by her father, the third defendant, and her mother, the fourth defendant. At the date of her death the charity was being carried on in accordance with the revised rules and the trust deed.

Wigglesworth for the plaintiff, the executor.

R. O. Wilberforce for the first defendant, the chairman of the committee of the Bakewell and District 1914-18 War Memorial Charity.

M. Browne for the second defendants, Sheffield No. 3 Hospital Management Committee.

J. Monckton for the third and fourth defendants, the testatrix's parents (interested on an intestacy).

Denys B. Buckley for the Attorney-General.

DANCKWERTS, J., stated the facts, and said: The fund comprising the testatrix's residuary estate is claimed, not only by the charity as constituted under the new name and with new objects, but also by the Sheffield No. 3 Hospital Management Committee which, under the National Health Service Act, 1946, carries on the hospital in the hospital buildings which were formerly owned by the charity. It is claimed on behalf of the hospital management committee that this was a bequest which operated, not in favour of the charity whose name appears in the will, and which now bears a different name and has different objects, but for the purposes for which the hospital buildings were used at the date when the testatrix made her will, and it is also claimed that, in substance, those purposes are maintained at the present time through the operations of the hospital management committee. A claim is also made, on the basis of failure of the trusts, by the next of kin of the testatrix. The last-mentioned claim seems to me one which must fail in any event, because it is plain on the authorities that either there was a gift to the charity which still exists or there was a gift for the purpose designated by the description contained in the will of the testatrix.

It is well established by cases such as *Re Faraker* (1) and *Re Lucas* (2) that a charity founded as a perpetual charity can never come to an end, even though its objects may be altered, and, indeed, its name may be altered, according to due process of law. In each of those two cases, a scheme established by the Charity Commissioners had altered the name and objects of the charities concerned. In the present case, the alteration has not been effected by means of any scheme made by an outside body such as the Charity Commissioners or the court, but the objects and the name have been legally altered through the machinery provided in the trust deed created by the founders of the charity itself. It seems to me that there is no distinction whatever in principle between the alteration by one method and the alteration by the other method, and the charity remains the same charity, though its name and objects have been altered. It seems to me that the gift was to a plainly identified charity which existed, at the date of the will of the testatrix, under a particular name which is found in the will, and the gift takes effect in favour of that charity and in favour of no other charity. Therefore, it seems to me that it is merely a gift for the general purposes of the charity described correctly by the testatrix as the Bakewell and District

War Memorial Cottage Hospital, but now known as the Bakewell and District 1914-18 War Memorial Charity. *Order accordingly.*

Solicitors: *Woodcock, Ryland & Co.*, agents for *Goodwin & Cockerton*, Bakewell (for the plaintiff and the third and fourth defendants); *Cree, Godfrey & Wood*, agents for *Brooke Taylor & Co.*, Bakewell (for the first defendant); *Gibson & Weldon*, agents for *L. J. Thomas*, Legal Adviser, Sheffield Regional Hospital Board (for the second defendant); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*] A

PRACTICE DIRECTION.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), January 15, 1954.] B

Justices—Clerk—Presence in retiring room while justices consider decision—Matrimonial proceedings.

LORD MERRIMAN, P.: In a statement made in the Divisional Court of the Queen's Bench Division on Nov. 16, 1953 ([1953] 2 All E.R. 1306) about C
clerks to justices being present when the justices have retired to consider their decision, LORD GODDARD, C.J., said (*ibid.*, 1307) that the ruling of that court did not apply to justices when exercising jurisdiction in matrimonial cases as they were then subject to the directions and control of this Division. Before making any pronouncement in response to several requests for a ruling by this court on the subject, I wished to consult the judges of this Division. I now have D
their authority to say that they agree with the statement I am about to make. I am also authorised by LORD SIMONDS, L.C., to say that he approves of it. VAISEY, J., also asks me to say that he agrees with it.

I wish to say at the outset that it rarely happens that an allegation of undue interference by the clerk in the decision of a complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, is made a ground E
of appeal to this Divisional Court. Nevertheless, it is at least as important in cases of this class as in cases of other classes dealt with by courts of summary jurisdiction that the decision should be that of the justices themselves and not that of the justices and their clerk, and that, not only should this be so in fact, but that nothing should be done to give the parties or the public the impression that the clerk is influencing the decision. I am, therefore, in complete agreement with F
LORD GODDARD, C.J., that it should not be regarded as a matter of course that, if justices retire to consider their decision, the clerk should retire with them. Moreover, whether the justices invite the clerk to retire with them or send for him in the course of their deliberations, I agree that the clerk should always return to his place in court as soon as the justices release him, leaving them to complete their deliberations alone. Bearing in mind that domestic proceedings are often G
lengthy and may involve points of law in relation to the complaint itself or to the amount of maintenance, and that this court insists that a proper note of the evidence must be kept, and that, in the event of an appeal, justices must be prepared to state the reasons for their decision, I recognise that more often than not justices may properly wish to refresh their recollection of the evidence by recourse to the clerk's note, or to seek his advice about the law, before coming H
to their decision.

Having regard to the high standard of care which is generally shown by courts of summary jurisdiction in dealing with these domestic proceedings, I do not think it is necessary for me to say more than that I am confident that justices taking part in them may be trusted to act, and to ensure that they appear to act, on the fundamental principle that they alone are the judges.

WRAITH v. NATIONAL COAL BOARD.

[LEEDS ASSIZES (Glyn-Jones, J.), November 12, December 19, 1953.]

Coal Mining—Statutory duty—Security of travelling road and working place—Reconstruction of disused roadway—Fall of stone from roof—Availability of timber for roof support—“Removal of roof supports”—Provision of temporary supports—Coal Mines Act, 1911 (c. 50), s. 49, s. 51, s. 52 (1)—General Regulations (Coal Mines), 1913 (S.R. & O., 1913, No. 748), reg. 8.

- A By the Coal Mines Act, 1911, s. 49: “The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure.” Section 51:
- B “Where the work of erecting the supports of the roof and sides of working places is done by the workmen employed therein, a sufficient supply of timber or other material suitable for supports shall be kept at or within ten yards of every working place where, in pursuance of this Act, supports are required to be erected . . .” Section 52 (1): “In any part of a mine where any
- C work is being carried out which necessitates the removal of roof supports, temporary supports shall, in all cases, be set so as to secure the safety of the persons employed.”

- The plaintiff was employed by the defendants in their mine in the reconstruction of a disused roadway which had fallen into disrepair so that over much of its length the pressure of the surrounding earth had crumpled the steel arches formerly supporting the roof and falls of roof had almost buried
- D the crumpled steel arches. In many places the heap of debris on the floor reached up to and above the height of the arches and there was an almost continuous cavity in the roof. The system of work was to clear a short length of roadway of debris and then fix a new arch girder above which were placed horizontal timber runners. Across the runners were placed pieces of timber so as to form a continuous strip of covering
- E timber projecting about eighteen inches to two feet beyond the last new arch girder which had been fitted and protecting a workman in the roadway from a fall of roof from immediately above him. The workmen next cleared the roadway sufficiently to make room for the next arch girder which was placed about three feet from the first, and then the old distorted arch or arches, which by this time carried no weight, were removed. When the
- F plaintiff was engaged in clearing debris prior to removing one of the old arches a large stone fell from the roof about six or seven feet away from the last new arch girder and rolled on to his hand which was crushed. In an action against the defendants for breaches of their statutory duty as laid down in the above sections,

- G HELD: (i) if a roadway has fallen into disrepair because it is not used and is no longer needed, it ceases to be a road within the meaning of s. 49 except so much of it as has been reconstructed, and, therefore, there was no road at the point where the stone fell.

- (ii) section 49 draws a distinction between a roadway and a working place; a roadway does not become at any given spot a working place because at that place men are employed to repair it; and, therefore, the place where
- H the plaintiff was injured was not a working place within the section.

(iii) (applying the dictum of LORD ASQUITH OF BISHOPSTONE in *Stapley v. Gypsum Mines, Ltd.* [1953] 2 All E.R. 488) s. 49, did not, in the circumstances of the case, impose on the defendants any duty to make the roof secure as the section permitted workmen to be sent to a road or place which was insecure for the purpose of repairing it.

(iv) if, contrary to the above findings, the defendants were in breach of s. 49, the burden was on them under s. 102 (8) of the Act to prove that it was

not reasonably practicable to make the roof secure, which burden, on the evidence, they had not discharged.

(v) section 51 contemplates circumstances such as those which exist when colliers who work in the getting of coal at the coal face are required to put in props, and even if it was proved (which it had not been) that there was not a sufficient supply of timber within ten yards, it was doubtful whether that section had any application to the facts of this case.

(vi) the work was not such as necessitated the removal of supports under s. 52 (1), as, when the time came for the removal of the old arches, they were no longer serving as roof supports.

(vii) if, contrary to the above findings, there had been a breach of duty by the defendants, no material responsibility should be allocated to the plaintiff for his breach of duty to withdraw from the working place under reg. 8 of the General Regulations, 1913.

Cases referred to:

- (1) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663.
- (2) *Edwards v. National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.
- (3) *Marshall v. Gotham Co., Ltd.*, [1952] 2 All E.R. 1044; 3rd Digest Supp.

ACTION by the plaintiff claiming damages against the defendants for negligence at common law and breach of statutory duty under s. 49, s. 51 and s. 52 (1) of the Coal Mines Act, 1911.

Hinchcliffe, Q.C., and *R. W. Payne* for the plaintiff.

Veale, Q.C., and *A. B. Boyle* for the defendants.

Cur. adv. vult.

Dec. 19. **GLYN-JONES, J.**, read the following judgment. On June 6, 1952, the plaintiff suffered injury by an accident arising out of and in the course of his employment as a coal miner by the defendant board at its Houghton Main Colliery, when a large stone fell on the back of his right hand and crushed it against a steel arch girder. He claims in this action compensation for his injury by way of damages for negligence and for breaches of statutory duty on the part of the defendants.

The facts are as follows. There was a roadway connecting Houghton Main Colliery with certain workings, no longer in use, forming part of the neighbouring Grimethorpe Colliery. The roadway had not been used for a considerable time and had fallen into disrepair in two respects. First, as the result of the pressure of the surrounding earth the steel arches supporting the roof and side of the roadway had been forced inwards and were crumpled. Secondly, over much, probably most, of the length of the roadway there had been falls from the roof which had buried or almost buried the crumpled arch girders so that not only was the roadway impassable, but also, above the heaps of debris, there was an almost continuous cavity in the roof. In many places, and particularly at the spot where the stone which injured the plaintiff fell, the heap of debris on the floor reached to the height of the old arches and, indeed, above them. Some three or four months before the accident the defendant board began to reconstruct this roadway, and during one shift each day two miners called Shone, who were father and son, were employed thereat. The system of work was this. First of all, a short length of roadway was cleared by loading the fallen debris into tubs; next the roof and sides were ripped down sufficiently to make room for a new arch girder or ring which was fixed in position. Above the arch girder were two pieces of timber known as runners, one end of each of which was wedged above the arch girder so that the runners lay horizontally along the length of the road. They were set not quite parallel to one another, but diverging

A a little as they ran forward. Across them were placed side by side pieces of timber about three feet to four feet long so as to form a continuous strip of covering timber which would protect a man standing or working in the centre of the roadway from a fall of roof from immediately above him. Taking advantage of the protection of this strip of timber which projected beyond the newly fixed ring towards the point where the next ring was to be fixed, the men next cleared the roadway sufficiently to make room for the next ring which was placed about three feet away from the first. Once the next ring was in position the next task was to remove and carry away the old distorted ring which by this time carried no weight and was a mere obstruction in the roadway. In each shift the two men at work would not normally do more than put up one ring or arch girder, clearing and ripping the roof and sides as far as was necessary for this purpose, removing the old ring and leaving, after they had finished, the ends of the last two runners projecting forward with or without covering timber across them. The distance between the rings varied a little and so did the lengths of the timbers used for runners; thus, the extent to which the runners projected beyond the last ring to be fixed varied, though as a rule it was about eighteen inches to two feet. On the day of the accident the plaintiff was ordered to work with Arnold Shone, whose father, who had been in charge of this work, on that shift was away sick. That day was the first on which the plaintiff had been employed in this roadway, but he was an experienced miner and had done somewhat similar work elsewhere. When the two men, Arnold Shone and the plaintiff, reached the place they found that the men working on the previous shift had not removed the old crumpled ring which stood beneath the last pair of new rings. D Surrounding this ring was a quantity of debris and, projecting beyond the last ring, were the ends of the last two runners with one or two pieces of covering timber across them. Arnold Shone placed more covering timbers across the runners so as to form a strip projecting about eighteen inches to two feet beyond the last ring. The two men then set to work under the protection of the roof of the last completed section of new roadway to shovel up the debris and load it into tubs and also to remove the old ring which the night shift had left. E The plaintiff, who had been kneeling while shovelling rubble, placed his right hand on the top of the crumpled arch next beyond the last fitted ring to help himself to his feet, and, as he did so, a large stone fell from the roof some six or seven feet away from the last ring, rolled down a heap of debris, which at this point rose to a height above the crumpled arch, on to the back of the plaintiff's hand and crushed it against the arch girder, causing the injury of which he complains. F

[HIS LORDSHIP considered the allegations of negligence at common law; found on the evidence that it was not established that it was reasonably possible to take steps to ensure that the roof of the disused roadway was supported beyond the point to which it had been reconstructed, nor that there was any safe means of providing temporary protection beyond that point; said that, in his opinion, the defendant board was not guilty of negligence at common law; and continued:] G I turn to the alleged breaches of statutory duty. It is said, first, that the roof from which this stone fell was the roof of a travelling road or working place within the meaning of s. 49 of the Coal Mines Act, 1911; secondly, that by that section there is imposed on the mineowner an absolute duty that such a roof should be secure and that the fact that the stone fell is of itself proof that the roof was not secure; and, thirdly, that the duty created by the statute was owed as well to the plaintiff H and Shone as to any other workman, even though they, the plaintiff and Shone, were the very men employed by the defendants in the performance of the defendants' duty to make the roof secure. To this the defendants reply, first, that the roof from which the stone fell was not the roof of a roadway or working place; secondly, that on its true construction s. 49 does not create a duty owed by the defendants to men actually appointed for the purpose of repairing and making secure an insecure roof; and, thirdly, that in any event the defendants

had established the defence provided for them by s. 102 (8) of the statute, namely, that it was not reasonably practicable to prevent the breach or breaches, if any.

I am of opinion that, if a roadway in a mine has ceased to be used as a roadway and has been allowed to fall into disrepair because it is no longer needed, it ceases to be a roadway within the meaning of s. 49 and there is no duty on the mineowner to keep the roof and sides of a disused roadway secure. So much of it as had been reconstructed, but only so much, became a roadway and the defendants then came under a duty to keep the roof and sides of that much of it secure, but the point from which the stone fell was beyond the point at which the reconstructed roadway ended.

I have to consider whether this place may have been a working place within the meaning of s. 49. If the spot where the plaintiff and Shone were working is to be called a working place rather than a roadway, it seems to me that the expression, "the roof of a working place" cannot be limited to the reconstructed roof but must be construed as extending at least to that area of roof above and beyond the spot where the plaintiff was working, from which a fall might put the plaintiff in peril. In my opinion, the section, however, draws a distinction between a roadway and a working place. I do not think that a roadway becomes at any given point a working place merely because at that place men are employed to repair it. If I am wrong and the place where the plaintiff and Shone were was a working place, then I am of opinion that the point from which the stone fell was part of the roof of the working place and the roof had not been made secure.

The next question is whether or not the defendants owed to the plaintiff any duty under s. 49 to make the roof of this roadway or working place secure. *Stapley v. Gypsum Mines, Ltd.* (1) was a case in which the House of Lords was invited to discuss the construction of reg. 7 (3) of the Metalliferous Mines General Regulations, 1938, a regulation in similar terms to s. 49 of the Coal Mines Act, 1911. LORD ASQUITH OF BISHOPSTONE in his speech said ([1953] 2 All E.R. 488):

"There was in this case, in my opinion, no breach by the respondents, by themselves, or by any servant or agent, of the Metalliferous Mines General Regulations, 1938, made under s. 86 of the Coal Mines Act, 1911. The respondents carried out their obligations under reg. 7 (3) to the letter, if the first line and a half of that regulation be read with the last two and a half lines. If the respondents detail X. and Y. to repair a defect in the walls or roof to restore safety, they cannot possibly, it seems to me, be told that they are breaking the regulation by permitting the repairers to work in a working place which, pending the completion of the repair, is insecure."

The actual decision of the House in that case turned on other considerations and LORD PORTER, LORD REID and LORD TUCKER each stated that he thought it unnecessary to decide the question on which LORD ASQUITH had expressed his opinion, while LORD OAKSEY made no reference to it. I do not think, therefore, that I can treat this question as having been determined by the House of Lords, but I humbly state my agreement with the view expressed by LORD ASQUITH and I hold that in the circumstances of this case s. 49 does not impose on the defendants a statutory duty owed to the plaintiff to make the roof of this roadway or working place secure.

Counsel for the plaintiff argued that the duty imposed on the board by the first line and a half of the section was absolute and universal and that the last two and a half lines did not in any way limit the generality of what came before them, but were intended merely to cast on individual workmen a duty not to travel along or work in a road or in a working place, the roof or sides of which were not secure. It may be that these last two and a half lines do cast such a duty on individuals, but I am satisfied that they also cast on the defendants a duty not to permit workmen, other than those appointed for the purpose of exploring or repairing, to go along or into a road or working place which is not secure, and thus

by implication the statute, in my view, does permit the defendants to send workmen to a road or place which is insecure for the purpose of repairing it. I am mindful of the fact that in *Edwards v. National Coal Board* (2), TUCKER, L.J. said ([1949] 1 All E.R. 745):

A "There is no dispute that the joint effect of s. 49 and s. 102 (8) is to impose on the mineowner the absolute duty to make the roof and sides of every travelling road secure . . . "

But in that case the point I have to decide did not arise, for the injured plaintiff was a man who was not employed to repair a roadway which had become insecure, and to such a man, that is to say, a man who has not been employed to repair an insecure roadway, the defendants clearly do owe a duty to make the road or working place secure, and that is qualified only by the defence provided by s. 102 (8). I prefer not to hold, unless I am bound by authority, that the statute provides that there is a duty on the mineowner to make secure the roof of a working place before he sends repairers in to make secure the roof of the working place, and I think I am fortified in this conclusion by the fact that LORD ASQUITH, whose opinion I have cited, was a member of the Court of Appeal which decided *Edwards'* case (2).

C Assuming, however, that I am wrong and that the defendants were in breach of a statutory duty owed to the plaintiff under s. 49, I have further to find whether or not it has been shown that it was not reasonably practicable to prevent or avoid the breach. I take the definition of "reasonably practicable" from the judgments of the Court of Appeal in *Marshall v. Gotham Co., Ltd.* (3), and, in particular, from the judgment of JENKINS, L.J. If in the reconstruction of this roadway the defendant board has done all that is capable of being done to make the roof and sides secure within the limits of what it is reasonable to do according to the best assessment of what is necessary and sufficient that could have been made at the relevant time, then the defendants have done all that is reasonably practicable. The plaintiff has not called evidence which satisfied me that there were other means whereby the system of work could have been made safer so as to prevent or limit the risk of a fall from the roof. But on the assumption, contrary to my earlier finding, that there was a duty owed to the plaintiff to make the roof secure, the burden is on the defendant board to prove that it was not reasonably practicable to make it secure. The defendants have called only one witness, the deputy, Wilkinson. I have no evidence from any mine manager or mining engineer that no better system of preventing falls could have been devised according to the best assessment which could have been made at the relevant time. If the point arises, I am bound to find, I think, that the defendants have not discharged the burden of proving that it was not reasonably practicable to avoid or prevent a breach of s. 49, if, contrary to my view, there was such a breach.

I next consider the alleged breach of s. 51 of the statute. I doubt whether this section has any application to the facts of this case. If the section had been intended to mean that wherever the work of erecting supports of the roof and sides of a working place was being done a sufficient supply of timber should be kept at or within ten yards of the working place, it would have been easy to say so. The section says, however, that the requirement that a supply of timber is to be kept at or within ten yards applies only where the work of erecting the supports is done by the workmen employed at the working place. Obviously, in one sense, it is true that a workman who erects supports at a working place is working at the working place while he is erecting the supports. In my opinion, however, the section contemplates circumstances such as those which exist when colliers who work in the getting of coal at the coal face are required, as the coal is removed, to put in props to support the roof over the space from which the coal has been removed. I do not think the section applies to repairers in fixing arch girders and timber supports to a roadway in course of reconstruction. The

danger against which the section is intended to guard is that workmen, to whose work the setting of supports is merely incidental, may neglect to put in sufficient supports if there is not timber close at hand, for if they are employed on contract work it is unremunerative to spend their time searching further afield for timber. If a repairer, whose work consists primarily in setting arch girders and timber supports, has no arch girders or timber, his work comes to an end. Assuming, however, that the section applies, I am not satisfied that there was any breach of it, for I am disposed to accept Mr. Wilkinson's evidence that there was timber by the side of the reconstructed roadway within ten yards of the place where the plaintiff was working. In any case an adequate supply need not have included eight-foot runners, and any shorter runners would not have prevented this accident.

Lastly, as to the alleged breach of s. 52 (1), I am of opinion that the work was not such as necessitated the removal of roof supports, for the old crumpled arch girders were doing little to support the roof and in any event when the time came for their removal the roadway had been reconstructed above them and by that time they were no longer serving as roof supports.

I now turn to another matter. By their defence the defendant board charged the plaintiff with a breach of statutory duty in that, if there was not sufficient timber or other suitable material, then it was the plaintiff's statutory duty under reg. 8 of the Coal Mines General Regulations, 1913, to withdraw from the working place and report the circumstances to the deputy in charge and that it was the plaintiff's own breach of statutory duty in not withdrawing that caused this accident. Since I find that there was no breach by the defendant board, it follows that there could not have been a breach by the plaintiff of this statutory duty; but if, contrary to my view, there was a breach by the defendant board, it follows that there was a corresponding breach by the plaintiff of his duty to withdraw, but I should not be disposed to allocate to the plaintiff any material responsibility for the injury he suffered on the ground of this breach.

For these reasons my judgment in this case must be for the defendant board.

Judgment for the defendants.

Solicitors: *Raley & Pratt*, Barnsley (for the plaintiff); *C. M. H. Glover*, Doncaster (for the defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

MARTIN-SMITH v. SMALE.

[COURT OF APPEAL (Denning and Romer, L.JJ.), January 11, 1954.]

Agriculture—Agricultural holding—Notice to quit—Consent of agricultural land tribunal subject to condition—Condition not complied with—Validity of notice—Agricultural Holdings Act, 1948 (c. 63), s. 25 (5).

Agriculture—Agricultural land tribunal—Appointment of members—Delegation by Minister of Agriculture to chairman of duty to appoint other members—Agriculture Act, 1947 (c. 48), sched. IX, para. 15.

A landlord applied under the Agricultural Holdings Act, 1948, s. 24 (2), for the consent of the Minister of Agriculture to a notice to quit which she proposed to serve on the tenant of an agricultural holding. Consent was given, and under s. 25 (4) the tenant appealed to the agricultural land tribunal. The tribunal gave its consent to the notice, subject, under s. 25 (5), "to the condition that the landlord appoints a bailiff approved by the Hertfordshire Agricultural Executive Committee before taking possession." On Aug. 12, 1952, notice to quit expiring on Sept. 29, 1953, was given, and before it expired the landlord appointed P. as bailiff. The report of the agricultural executive committee on P., dated Oct. 1, 1953, was not entirely favourable, and on that ground the tenant disputed the effectiveness of the notice to quit.

HELD: even if the condition attaching to the consent of the tribunal were not complied with, that was a matter to be enforced by the Minister and not one of which the tenant could take advantage, and the notice to quit was effective.

SEMLE, the Minister of Agriculture may delegate to the chairman of an agricultural land tribunal the duty, under the Agriculture Act, 1947, sched. IX, para. 15, of appointing the other two members of the tribunal.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24 and s. 25, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 46 et seq.

APPEAL by the tenant from an order of PEARSON, J., in chambers, dated Dec. 8, 1953, dismissing an appeal by the tenant against the decision of Master DIAMOND, dated Nov. 26, 1953, giving the landlord liberty to sign final judgment against the tenant for possession of land known as Northchurch Farm, Berkhamsted, Hertfordshire, within twenty-one days, and mesne profits.

The landlord claimed possession of the land and mesne profits from Sept. 29, 1953, until possession at the rate of £200 per annum. The landlord alleged that the tenancy was duly determined by a notice to quit given on Aug. 12, 1952, and expiring on Sept. 29, 1953, but that the tenant failed to quit and deliver up possession. On June 17, 1952, the landlord obtained the consent of the Minister of Agriculture to serve the said notice to quit. The tenant appealed to the agricultural land tribunal, and on July 30, 1952, the tribunal gave its consent to the notice subject to the condition that the landlord appointed a bailiff approved by the Hertfordshire Agricultural Executive Committee before taking possession. The landlord appointed one R. N. Page as bailiff. On Oct. 1, 1953, the agricultural committee advised the landlord as follows:

"The committee has formed the opinion that although Mr. Page is young and comparatively inexperienced, nevertheless he appears to be a keen and enthusiastic young man, and it is quite possible he will manage the farm in a creditable manner although it is felt he still has quite a lot to learn concerning farm management."

The landlord applied under R.S.C., Ord. 14, r. 1, for leave to sign final judgment. The tenant in his affidavit stated that he had received no notification of the appointment of a bailiff nor of his approval by the agricultural executive committee. He contended that the agricultural land tribunal was unable in law to grant a conditional consent to the giving of a notice to quit, or, if it could do

so, that no notice to quit could operate unless the condition had to be satisfied before the notice to quit had been served.

Viscount Hailsham, Q.C., and Dare for the tenant.
E. D. Smith for the landlord.

DENNING, L.J.: In this case, the landlord of an agricultural holding of 148 acres in Hertfordshire claims possession from a farmer to whom it was let. By reason of the Agricultural Holdings Act, 1948, s. 24 (1) and (2), the landlord was not able to give an effective notice to quit unless she first obtained the consent of the Minister. She, therefore, applied for the consent of the Minister. The agricultural executive committee inquired into the matter and recommended that the Minister should give his consent. According to their findings the landlord was a lady who was relinquishing public duties and proposed to take up farming with her son. She had the farm house of Northchurch Farm, but not the land (148 acres) attached to it because it was let to the defendant. The tenant farmed a good deal of other land besides these 148 acres. The agricultural executive committee recommended that consent should be given on the ground that the tenant's general farming standard was low, and that, if he was farming a smaller area, his standard might improve. They found that the house and land of Northchurch Farm should be brought into one occupation, and that the grounds on which the landlord desired to terminate the tenancy were both desirable and in the interests of good estate management. They considered that the degree of hardship involved would be equal on each. So the agricultural executive committee recommended the Minister to give his consent, and he gave it.

Thereupon the tenant appealed (as he had the right to do) to the agricultural land tribunal. The tribunal also gave its consent. The formal decision said that the tribunal

"having satisfied itself that all parties have appeared before it or have been duly summoned to appear and having heard the case tendered by the parties and having inspected the said land hereby gives its consent to the operation of the said notice to quit intended to be served relating to the said land."

But the tribunal added this condition:

"subject to the condition that the landlord appoints a bailiff approved by the Hertfordshire Agricultural Executive Committee before taking possession."

The consent of the tribunal was given on July 30, 1952. On Aug. 12, 1952, a notice to quit was given by the owner to terminate the tenancy on Sept. 29, 1953. Shortly before the notice expired, the landlord appointed a Mr. Page as bailiff. On Oct. 1, 1953, the agricultural executive committee made a report on Mr. Page of a somewhat qualified character which was not a whole-hearted approval because of his youth. On this account it is said that the condition was not fulfilled, and that the tribunal's consent was inoperative.

In my opinion, even if this condition was not fulfilled (on which I express no opinion) it is not a matter of which the tenant can take advantage. This condition was imposed by the tribunal in the interests of the community at large, and it is the duty of the Minister to enforce it and no one else. Section 29 of the Act shows that, if a condition is not fulfilled, the Minister may take possession of the land and deal with it as he thinks fit, but it does not nullify the notice to quit or the consent to it. The tenant ought to have gone out before any question arose about the fulfilment of the condition. The landlord was not bound to appoint a bailiff until the tenant had gone out. The notice to quit was good because the tribunal had previously consented to it, and the tenant has no defence to the claim.

A There was another point which was not raised before the judge, but has been raised for the first time in this court. It is suggested that the tribunal was not properly constituted because the members of it were not validly appointed. The agricultural land tribunal is constituted under sched. IX to the Agriculture Act, 1947. Under paras. 14 (1) and 15 of that schedule there is to be a chairman of the tribunal appointed by the Lord Chancellor, and there are to be two members of it appointed by the Minister, one to be appointed from a farming panel and one from an owning panel. An affidavit was put in to suggest that the members who sat with the chairman were not validly appointed because the chairman had appointed them, and not the Minister, but when one comes to read the affidavit there is really no evidence to support the suggestion. It refers to a case which was heard by the tribunal in October, 1951,—nine months previously—
B—in which the chairman had said, in reply to a question by someone at the hearing, that he as chairman appointed the two other members of the tribunal who sat with him. The affidavit goes on to say in para. 4:

“I verily believe that the said statement of the said Sir Cecil Oakes as to procedure is a practice which operates in the eastern province of the agricultural land tribunal, and that such practice operated in this case.”

C But there is no evidence that it did operate in this case. Inquiries could have been made whether the practice did operate in this case, but the affidavit does not suggest that any inquiries were made, and in the absence of any inquiries I do not think that we should take any notice of the suggestion. I am far from saying that the Minister may not delegate to the chairman the duty to appoint the other members of the tribunal. It may be that in law he can do so, but
D it is not necessary for me to pronounce on that because the evidence here is not sufficient to raise it. It was not raised before the judge at all; it has not been raised since this matter was heard by the tribunal eighteen months ago, and in those circumstances I do not think that we should give effect to it. Accordingly, in my judgment, this appeal should be dismissed.

E **ROMER, L.J.:** I agree. Under the Agricultural Holdings Act, 1948, s. 25 (5), the tribunal had power to impose such conditions as appeared to them requisite for securing that the farm in question to which the notice to quit related would be used for the purpose for which the landlord proposed to terminate the tenancy. The purpose for which the landlord proposed to terminate the tenancy was not merely in order that she might farm the land
F in conjunction with her son, but that they might farm it in the interests of efficient farming, and that language is the language also of s. 25 (1) (a) of the Act. That was the purpose before the tribunal and in relation to which they had power to impose a condition.

G The condition which they attached to their consent to the operation of the notice to quit was that the owner should appoint a bailiff approved by the Hertfordshire Agricultural Executive Committee before taking possession. That condition was a perfectly valid one to impose having regard to the purpose for which the landlord proposed to terminate the tenancy. But whether it was a good condition (as I myself firmly believe it was) or whether it was a bad condition, I cannot see that it was a matter of which the tenant could complain. If anyone was to challenge the validity of that condition it would surely be the
H landlord, because it was not intended to operate, and, in fact, having regard to the contract between the landlord and the tenant, could not operate, until the tenancy had come to an end, and when the tenancy came to an end it follows that the tenant would have no further interest in the farm. The person who would have the sole interest in the farm would be the landlord, and, if his ownership was going to be fettered by this condition, it would be for him to complain and not the tenant. Accordingly, it appears to me that there is no ground for holding that the tenant here has any defence.

On the other point, I entirely agree with what DENNING, L.J., has said. It seems to me that there is no evidence worthy of the name—indeed, no real evidence at all—sufficient to suggest with any degree of conviction whatever that the appointment of these two independent members of the tribunal was invalid in the manner suggested, and that, therefore, the tribunal was irregular and its procedure invalid. I entirely agree that the tenant ought not to have leave to defend on that ground.

Appeal dismissed. A

Solicitors: *Lucien Fior* (for the tenant); *Sharpe, Pritchard & Co.*, agents for *Penny & Thorne*, Berkhamsted (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

WESTMINSTER BANK, LTD. AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), January 14, 15, 1954.]

Estate Duty—Allowance—Continuing annuity—Annuity to wife for life under separation deed—Liability representing annuity to be deducted from principal value of husband's estate—Method of valuation of liability. C

By a deed of separation dated Feb. 26, 1926, the deceased became liable to pay to his wife an annuity of £850 per annum during her life. The deceased died on May 10, 1947. On a summons to determine what allowance, in calculating the principal value of the deceased's estate for the purposes of estate duty, should be made under the Finance Act, 1894, s. 7 (1), for the burden of the annuity, D

HELD: the liability on the estate which the annuity represented should be regarded as the amount necessary to procure the best security with which the annuitant could be provided, and that was the cost, at the date of the deceased's death, of purchasing an annuity from the National Debt Commissioners calculated on the government tables. E

Re Castle ([1916] W.N. 195), applied.

FOR THE FINANCE ACT, 1894, s. 7 (1) and (5), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 360, 362.

Cases referred to:

- (1) *Re Castle*, [1916] W.N. 195; 39 Digest 127, 203. F
- (2) *Ford v. Bailey*, (1853), 17 Beav. 303; 23 L.J.Ch. 225; 51 E.R. 1051; 39 Digest 127, 202.
- (3) *Re Beecham's Settlement*, [1934] 1 Ch. 183; 103 L.J.Ch. 33; 150 L.T. 351; Digest Supp.
- (4) *Re Rothermere (Viscount)*, [1944] 2 All E.R. 593; [1945] 1 Ch. 72; 115 L.J.Ch. 34; 172 L.T. 98; 2nd Digest Supp. G
- (5) *Re Cottrell*, [1910] 1 Ch. 402; 79 L.J.Ch. 189; 102 L.T. 157; 39 Digest 126, 195.
- (6) *Re Ellis*, [1935] Ch. 193; 104 L.J.Ch. 53; 152 L.T. 370; Digest Supp.
- (7) *Re Bradberry*, [1942] 2 All E.R. 629; [1943] Ch. 35; 112 L.J.Ch. 49; 167 L.T. 396; 2nd Digest Supp.
- (8) *Re Hollins*, [1918] 1 Ch. 503; 87 L.J.Ch. 326; 118 L.T. 672; 39 Digest 126, 188. H
- (9) *Re Carew*, [1939] 3 All E.R. 200; [1939] Ch. 794; 108 L.J.Ch. 291; 161 L.T. 139; Digest Supp.
- (10) *Re Thomas*, [1945] 2 All E.R. 586; [1946] Ch. 36; 115 L.J.Ch. 145; 173 L.T. 365; 2nd Digest Supp.
- (11) *Re Barnes*, [1938] 4 All E.R. 870; [1939] 1 K.B. 316; 108 L.J.K.B. 232; 160 L.T. 95; Digest Supp.

A ADJOURNED SUMMONS to determine whether, in calculating the principal value of the estate of George Wolsey, deceased, for purposes of estate duty, the amount to be deducted as the amount of the burden of an annuity of £850 a year, payable to Grace Mary Eleanor Wolsey pursuant to a deed of separation made on Feb. 26, 1926, was (a) the sum which the plaintiffs, the executors of the will of the said George Wolsey, would have had to pay at the date of the deceased's death, for purchasing a British government annuity of the same amount; or (b) the sum which the plaintiffs would have had to pay at the said date for purchasing an annuity of the same amount on the basis of the price of consols at that date; or (c) the sum which the plaintiffs would have had to pay at the said date for purchasing an annuity of the same amount from a first-class British life assurance company; or (d) some, and, if so, what, other sum.

B George Wolsey, the deceased, separated from his wife, Grace Mary Eleanor Wolsey, on or about Feb. 26, 1926, and on that day a deed of separation was executed pursuant to which the deceased became liable, inter alia, to pay Grace Wolsey an annuity of £850 a year during her life. By his will, dated Aug. 3, 1940, the deceased appointed the Westminster Bank, Ltd. and Lily Rivola Wolsey, the plaintiffs, to be executors thereof. The deceased died on May 10, 1947. His C widow is still living and aged about sixty-nine years. The net principal value of his estate, subject to the deduction of the correct amount in respect of the liability represented by the said annuity, was £71,286 10s. 10d. Disagreement arose between the executors and the Inland Revenue as to the sum to be deducted, in computing the principal value of the deceased's estate, as representing the amount of the liability attaching to the estate at the date of the deceased's death by reason of the existence of the annuity, and the executors sought the determination of the court as to the correct method of ascertaining the sum to be deducted.

D HIS LORDSHIP drew attention to the fact that the summons was taken out under R.S.C., Ord. 54A, for the construction of a statute, i.e., the Finance Act, 1894, s. 7 (1), and the procedure was authorised in relation to estate duty by the Administration of Justice (Miscellaneous Provisions) Act, 1933. The summons should not, however, be entitled in the matter of any statute or estate, but should E be an ordinary originating summons inter partes entitled merely in the form A. v. B.

Mustoe, Q.C., and G. B. Graham for the executors.

Sir Lynn Ungood-Thomas, Q.C., and J. H. Stamp for the Crown.

F HARMAN, J.: The question to be determined concerns the valuation of a debt or incumbrance which falls to be deducted from the estate of George Wolsey, deceased. The debt or incumbrance in question is an annuity, and the annuitant is a creditor, or a potential creditor, of the deceased's estate, so ranking for payment before any beneficiary under the will. It follows that the provisions which the deceased made in his will as to this annuity, and, indeed, any other G provisions in the will are, in my judgment, irrelevant for the purpose of any question which I have to determine. This annuity is an incumbrance for which the whole of the deceased's estate is liable, and the assets are ample, to secure the annuitant in her rights which were given her by a separation deed made on Feb. 26, 1926, between her and her husband, the deceased.

H Only one section of the Finance Act, 1894, is involved and that is s. 7, which provides:

“(1) In determining the value of an estate for the purpose of estate duty allowance shall be made . . . (a) for debts . . . or incumbrances . . . and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable there-to . . . (5) The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased . . .”

This annuity is property and s. 7 (5) can be construed as applying to the valuation of the annuity. There is another possible view, as was pointed out by counsel for the plaintiffs, viz., that s. 7 (5) applies only to assets and not to liabilities, and that after the commissioners have reached their opinion as to the principal value of the assets of any estate, then one must deduct the debt or incumbrance under s. 7, arriving at its value as best one may, and that the opinion of the commissioners has no particular weight in the matter. I do not think I need decide which of those two views is the true one because, if it were open to the commissioners as it were to set up a *prima facie* case by their opinions, they have not elected so to do.

There have been long negotiations between the plaintiffs and the Estate Duty Office as to the method by which this annuity should be valued, but they have been unable to arrive at any conclusion. The difference lies within a narrow compass and has, before me, resolved itself largely into a dispute, first, as to the tables on which the calculation of the annuitant's expectation of life is to be based, and, secondly, as to the rate of interest the estate should be assumed to be earning for this purpose—both highly artificial matters. The considerable period which has elapsed since the testator's death has been occupied by the disagreements of two actuaries who have made it clear that neither is prepared entirely to accept the other's premises. The first difference between them appears to be that one wishes to go on the consols rate of interest and the other on the average rate of interest earned by trustee securities at the time of the deceased's death. Secondly, one wishes to use the Registrar-General's tables of mortality for the whole country and the other wishes to use the yardstick employed by actuaries in general which is a publication by the Institute of Actuaries called "The Mortality of Annuitants, 1900-1920". The result is that no decision has been reached and the summons asks

"whether, in calculating the principal value of the estate for purposes of estate duty, the amount to be deducted as the amount of the liability of an annuity of £850 a year payable to Grace Mary Eleanor Wolsey pursuant to a deed of separation made on Feb. 26, 1926, is . . .",

and then are set out three different methods of calculation.

In the course of a very long and learned argument it was rightly pointed out that this annuitant has nothing to do with the administration of the deceased's estate. If an instalment of her annuity be not paid she can bring a creditor's administration suit, but she cannot bring a suit to protect the future instalments of her annuity. On the other hand, she cannot be obliged, so far as I can see, to accept anything less than the whole estate as a satisfaction for her annuity. She is not bound either to take a lump sum or to accept an appropriated sum to answer her claims or contingent claims. The matter differs from the ordinary case of an annuitant under a will, and, therefore, also differs widely from cases where the estate is insolvent and the annuities are valued for the purpose of paying an abated sum to the annuitants on principles which the Court of Chancery has followed for a great number of years, with certain variations as required.

The valuation of this annuity is a highly artificial matter because, as I say, there is no right in anybody to force a lump sum on the annuitant. To my mind, a good practical method of making a valuation is to consider what might occur if all the beneficiaries under the will, being *sui juris*, all wishing to wind-up the estate and take what capital they could at once, called on the executors to satisfy the annuitant in order to free the rest of the estate: then, supposing that she was recalcitrant and refused to be satisfied in that way, the executors might prudently ask for the direction of the court in the matter. They might, as junior counsel for the Crown says they should, rely on their own fortitude and distribute the whole estate excepting such sum as they considered proper, but I do not think the executors are bound to take

that line. It is quite possible, if they went to the court, that, as all parties except the annuitant desired the estate to be wound-up at once, the court would say: "Give the annuitant the best security she can have for her annuity and then she cannot have any cause of complaint." If the executors set aside consols, the interest on those consols might be reduced. Whatever calculation of an actuarial kind be made, the circumstances of the future cannot be foreseen.

A But if the annuitant were provided with the best kind of annuity which society, as we know, it can provide, then she could not be heard to complain. Therefore, I think, when one is considering the burden on this estate which this annuity may be said to represent, it is the burden of procuring the best security which the annuitant can have for her money, short of preserving the whole estate until the end of her life in order to answer her claims. If that be right, the answer is that the true encumbrance to be deducted under s. 7 (1) is the cost, at the relevant date, of buying an annuity from the National Debt Commissioners on the government tables. As it seems to me, that is a convenient way of measuring this kind of liability and it prevents the sort of technical argument between actuaries which has been carried on in this deliberate manner for the last few years. It provides a rule of thumb which seems to me to be a reasonable one.

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EVE, J., took a somewhat similar view in *Re Castle* (1), where the facts were rather different. In that case there was a gift of an annuity where the annuitant elected to take payment of a capital sum and the question raised was, on what basis the capital value should be ascertained. The judge said that it was desirable that there should be a standardised rule in these matters, and he thought that a government annuity should be purchased or the capital value should be calculated by reference to the government tables and not to the price at which the annuity could be purchased from an insurance company. That, he considered, was the course an executor should follow. That seems to me to be merely a matter of convenience. In my view, in a case of this sort, where the parties have not succeeded in reaching an agreement, it provides a measuring rod of a not unsatisfactory kind. I observe that as long ago as 1853 in *Ford v. Batley* (2) SIR JOHN ROMILLY, M.R., said (17 Beav. 304):

"The annuitant is entitled to have the best security for his annuity, which is a government security. I am, therefore, of opinion that he is entitled to a government annuity."

That I quote to show that that is the best kind of security an annuitant can have. Although in law she has no right to have such an annuity, yet, as this artificial valuation has to be made, it seems to me to be a convenient way of measuring the burden imposed on the estate.

Declaration accordingly.

Solicitors: *Griffinhoofe & Brewster* (for the executors); *Solicitor of Inland Revenue*.

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

KRAKAUER v. KATZ.

[COURT OF APPEAL (Denning and Romer, L.JJ.), January 12, 1954.]

*Court of Appeal—Interlocutory appeal—Further evidence—Discretion of court—R.S.C., Ord. 58, r. 4.**Practice—Summons—Issue before service of notice of change of solicitors—Waiver of irregularity—R.S.C., Ord. 7, r. 2 (1), (6).**Practice—Want of prosecution—Dismissal of action—Unexplained delay for twelve years—R.S.C., Ord. 27, r. 1.*

In an interlocutory matter before the judge in chambers, counsel for the defendant was asked whether he required an adjournment in order to answer the plaintiff's affidavit. He said that he did not. On appeal, the defendant sought to adduce further evidence by affidavit.

HELD: R.S.C., Ord. 58, r. 4, gave an appellant in an interlocutory matter no right to adduce further evidence; the admission of further evidence was within the discretion of the court; and in the present case it would not be right to exercise the discretion in favour of the defendant.

On June 19, 1941, the plaintiff issued a writ which was duly served on the defendant, and on July 25, 1941, the defendant entered an appearance by solicitors. No action was taken by the plaintiff until Nov. 19, 1953, when notice of change of the plaintiff's solicitors was given to the defendant, followed by a notice of intention to proceed with the action. The defendant also changed his solicitors, and on Nov. 27, 1953, his new solicitors filed a notice of change and on the same date took out a summons to dismiss the action for want of prosecution. By virtue of R.S.C., Ord. 7, r. 2 (1) and (6), the change of solicitors took effect only after service of the notice of change to the other side. No point was taken before the master that the issue of the summons was irregular. The plaintiff could not explain his delay to the satisfaction of the court.

HELD: (i) the issue of the summons before the notice of change of solicitors was served on the plaintiff was an irregularity which could be waived, and the plaintiff had waived it by not raising the point before the master.

(ii) in view of his failure to take any step for twelve years, the plaintiff ought not to be allowed to proceed with the action.

PER DENNING, L.J.: I am disposed to agree that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it.

AS TO IRREGULARITY, see HALSBURY, Hailsham Edn., Vol. 26, p. 60, para. 97; and FOR CASES, see DIGEST, Practice, pp. 969-975, Nos. 5044-5090.

INTERLOCUTORY APPEAL by the defendant from an order of CROOM-JOHNSON, J., in chambers, dated Dec. 11, 1953, allowing an appeal from a decision of Master DIAMOND, given on Dec. 2, 1953, that the action be dismissed for want of prosecution. CROOM-JOHNSON, J., set aside the master's order and allowed the plaintiff to proceed with the action.

On June 19, 1941, the plaintiff issued a writ which was duly served on the defendant, and on July 25, 1941, the defendant entered an appearance by solicitors. On Nov. 19, 1953, notice of change of the plaintiff's solicitors was filed, and served on the defendant's solicitors. On Nov. 27, 1953, the defendant filed notice of change of solicitors and on the same day issued a summons to dismiss the action for want of prosecution. Before the judge in chambers it was argued that the summons should have been taken out after the service of notice of change on the plaintiff's solicitors. CROOM-JOHNSON, J., exercised his discretion in favour of the plaintiff, taking into account, inter alia, the fact that at the time when the defendant issued the summons to dismiss the action for want of prosecution he was not technically in order.

Marnan for the defendant.

Lester for the plaintiff.

DENNING, L.J.: A preliminary point has arisen whether in an interlocutory matter this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right. It is a matter of discretion in this court whether or not further evidence by affidavit should be admitted.

In exercising our discretion in this case, there is an overwhelming obstacle in the way of the defendant. At the hearing below the judge in chambers asked his counsel whether he wanted to answer the affidavit of the plaintiff and whether he wanted an adjournment so to do, and his counsel said that he did not. Counsel thus took his stand on the evidence as it then stood before the judge; and it would be contrary to the right exercise of our discretion if we were to allow counsel for the defendant to go back on that position and to introduce further evidence in this court.

We must, therefore, proceed with the case on the evidence as it stood before the learned judge.

[The court heard argument.]

DENNING, L.J.: The facts in this case are somewhat striking. On June 19, 1941, the plaintiff issued a writ against the defendant claiming damages for breach of contract, or, alternatively, an account. The writ was served on the defendant and an appearance was entered on his behalf on July 25, 1941, by his then solicitors, and the plaintiff's solicitors ought to have delivered a statement of claim within ten days thereafter. Time may not have run during the vacation, but at all events the statement of claim ought to have been delivered in due time after entry of appearance. In point of fact, the plaintiff did nothing. He did nothing for over twelve years, and in October, 1953, by his solicitors, he wrote to the defendant intimating that this claim was being revived, and eventually his solicitors gave, by letter dated Nov. 27, 1953, notice of their intention to proceed with the action. The defendant went to new solicitors, who gave notice of change and took out a summons to dismiss the action for want of prosecution. The summons came before Master DIAMOND, who took the view that after twelve years the action should be dismissed for want of prosecution. The plaintiff appealed to CROOM-JOHNSON, J., who took the opposite view and said that the action was not to be dismissed.

The learned judge was much influenced by a technical point. When the new solicitors, Messrs. Simmons & Simmons, filed notice of change at the Central Office, they issued at the same time the summons to dismiss for want of prosecution, whereas they ought to have served a copy notice of change on the plaintiff's solicitors before they issued the summons, because under R.S.C., Ord. 7, r. 2 (1) and (6), it is quite plain that the copy notice ought to be served before the change is effective. So there was an irregularity, but it caused no injury to anyone. It was merely a day wrong in the order of procedure. When the summons to dismiss came before the master no point was taken on this irregularity. The matter was argued on the merits and the master dismissed the action. I am clearly of opinion that thereafter it was not open to the plaintiff's solicitors to avail themselves of this irregularity. Order 70, r. 1, shows that non-compliance with the rules does not render the proceedings void, but they can be dealt with as the court thinks right. It is the right thing for the court to ignore that irregularity.

The real point is whether the plaintiff, having done nothing for twelve years in this action, should now be allowed to revive it. An affidavit was put in on his behalf, in which he said that his solicitors' offices were destroyed by enemy action and they could not proceed with the case, but when inquiries were made, it turned

out that his solicitors' offices were destroyed before the writ was issued. They were destroyed on May 10, 1941, and the writ was issued on June 19, 1941. There was no difficulty in proceeding with the action. The defendant's solicitors were on the record all the time. Even if the plaintiff could not proceed with the claim during the war owing to various difficulties, there was no reason why he should not have pursued it during the eight years since that time. I am disposed to agree with what counsel for the defendant suggested, namely, that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it. In this case, it is not six years, but twelve years, and I am quite clear that after this length of time the plaintiff ought not to be allowed to go on with the action. I think the appeal should be allowed, and the order of the master restored.

ROMER, L.J.: I agree. The plaintiff, in the affidavit which he swore in these proceedings on Dec. 11, 1953, made a considerable point about his alleged ignorance of the whereabouts of the defendant throughout a long period of years, but it appears that it was not until some months after the writ was issued (and after he should have delivered his statement of claim) that he heard that the defendant was interned in the Isle of Man. He knew then where the defendant was, and also he apparently knew in 1952, because he had an offer, so he says, from a man who knew the defendant. In any event, the plaintiff's knowledge of the personal whereabouts of the defendant during the whole time was a matter of little consequence, because the defendant had entered an appearance by a well-known firm of solicitors who were still carrying on their business—but that is what he says. It does not appear to be the reason which his solicitors gave in the letter which they wrote on Oct. 2, 1953. In that letter, which they wrote to the defendant, they say:

“We understand that you have full details of our client's claim and our client has delayed pressing you because at the time your financial circumstances were such that it would have been impossible for you to pay. He now understands that you are in a far easier financial position . . .”

There is not a word there about not having proceeded before because he did not know where the defendant was. There may be some cases where it would be right to allow an action to proceed even though there has been nothing done for twelve years, and where it would be right to make no order on a summons taken out by the defendant to dismiss the action for want of prosecution. There may be such cases, but I am abundantly clear in my mind that this is not one of them. This is a case where, apparently, the real cause of the plaintiff's not having proceeded with the action before is that he thought the defendant was not worth pursuing, and the action only came to life again when he discovered that the defendant's financial position had improved. I think this is a clear case where the action should be dismissed.

On the question of practice which my Lord has dealt with, I entirely agree with what he says. It seems to me quite plain that the non-compliance with the requirements of Ord. 7, r. 2 (6), which was the only provision of the rules which was not complied with in strictness in the present case, was one which it is open to the other side to waive; and I am clearly of the opinion that the plaintiff's solicitors, by appearing before the master after they had received the notice which sub-r. (6) requires to be given, and having argued the case before the master, must be taken to have waived the strict compliance with that sub-rule. Accordingly, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Simmons & Simmons* (for the defendant); *Charles Caplin & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

RABIN v. MENDOZA & CO.

[COURT OF APPEAL (Denning and Romer, L.JJ.), January 12, 1954.]

Discovery—Production of documents—Privilege—Document obtained as result of negotiations without prejudice—R.S.C., Ord. 31, r. 18.

The plaintiff claimed damages from the defendants, a firm of surveyors, for a negligent survey of a dwelling-house which the plaintiff purchased. Before the action was commenced, the parties met with a view to reaching a settlement. The interview took place without prejudice, and the parties agreed that the defendants should try to obtain insurance cover against the risk of defects developing in the plaintiff's house, and for that purpose procure another surveyor's report, which the defendants obtained. The defendants claimed privilege from production and inspection of that report on the ground that it was prepared as the result of a discussion without prejudice between the parties.

HELD: the report was obtained as the result of an express or tacit agreement that it would not be used to the prejudice of either party, and, therefore, production of it would not be ordered.

DICTUM OF LORD LANGDALE, M.R., in *Whiffen v. Hartwright* (1848) (11 Beav. 112), applied.

AS TO WHEN PRODUCTION CAN BE RESISTED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 378-402, paras. 458-483; and FOR CASES, see DIGEST, Vol. 18, pp. 120-122, Nos. 705-717.

Case referred to:

(1) *Whiffen v. Hartwright*, (1848), 11 Beav. 111; 11 L.T.O.S. 197; 50 E.R. 759; 18 Digest 143, 924.

INTERLOCUTORY APPEAL by the plaintiff from an order of PEARSON, J., in chambers, dated Dec. 21, 1953, affirming the order of Master BURNAND, who refused to order production and inspection of documents of the defendants which the defendants swore came into existence as a result of a discussion without prejudice between the parties.

Lester for the plaintiff.

Eastham for the defendants.

DENNING, L.J.: This appeal raises an interesting point on discovery. The plaintiff has brought an action against a firm of surveyors alleging negligence in the surveying of property. Before the action was commenced, the plaintiff's solicitor called on a partner in the defendant firm (who has since died) and told him that the plaintiff had had trouble about the survey which the defendants had made, because a building society had refused to lend money on the house. The interview was without prejudice. At that interview an understanding was reached that the defendants would make inquiries as to the possibility and the cost of obtaining insurance cover with a view to an insurance company giving an indemnity against any possible risk of defects developing in the house so that any litigation could be avoided entirely. After that interview the defendants instructed another firm of surveyors to make a report, with a view to putting up a proposition to the insurers so as to obtain cover. The report was obtained, but no settlement was reached. The question is whether the defendants are bound to produce the documents passing between this other firm of surveyors and the defendants, particularly the report. The defendants have scheduled the documents in their affidavit of documents, but they claim privilege from production of all the letters and reports on the ground that

"all of the said letters and reports were prepared and made as a result of and in pursuance of to the best of my knowledge and belief a without prejudice discussion between the plaintiff's solicitors and"
the partner in the defendant firm.

The question for us to decide is whether that claim for privilege from production is a good claim. This is not an ordinary case of legal professional privilege. The documents were not prepared for the purposes of litigation or for the purposes of obtaining the advice of the solicitors. They were prepared in order to avoid litigation. It is said, however, that apart from legal professional privilege, there is a separate head of privilege on the ground that the documents came into existence on the understanding that they were not to be used to the prejudice of either party. "Without prejudice" does not appear as a head of privilege in the ANNUAL PRACTICE, but in BRAY ON DISCOVERY, p. 308, it is said:

"The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement."

That proposition is founded on *Whiffen v. Hartwright* (1), where LORD LANGDALE, M.R. (11 Beav. 112), refused to order the production of letters which passed without prejudice,

"observing, that he did not see how the plaintiff could get over this express agreement, though he by no means agreed, that the right of discovery was limited to the use which could be made of it in evidence."

LORD LANGDALE, M.R., there affirms the undoubted proposition that production can be ordered of documents even though they may not be admissible in evidence. Nevertheless, if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made.

This case seems to me to fall within that principle. This report was clearly made as a result of a "without prejudice" interview, and it was made solely for the purposes of the "without prejudice" negotiations. The solicitor for the plaintiff himself says in his affidavit that at the time of the interview it was contemplated that steps such as these should be undertaken. I find myself, therefore, in agreement with the decision of Master BURNAND and the learned judge that this is not a case where production should be ordered. The appeal, therefore, should be dismissed.

ROMER, L.J.: I agree. On the first question, the question whether the report is entitled to the protection of the without prejudice quality, if I may so describe it, which characterised the interview which took place, it is, in my opinion, abundantly clear that it is. The affidavit of Mr. Manches, a partner in the firm of solicitors acting for the plaintiff, who attended the conference with Mr. Mendoza, a partner in the defendant firm, says in para. 4:

"The interview terminated upon the understanding that Mr. Mendoza would make inquiries of the possibility and cost of obtaining insurance cover and then come and see me again and let me know what he was prepared to do, after which I would take my client's instructions."

Then Mr. Hyams says in one of his affidavits that it was in pursuance of the understanding that was arrived at at that interview that they instructed Donaldson's to make an independent survey for production to the insurance company who they hoped would lend the money. In fact, a letter which Mr. Hyams wrote to Donaldson's on Jan. 24, 1952, makes it quite plain that that was so.

It seems to me plain in those circumstances that the only object of obtaining the report was to implement the understanding that Mr. Manches refers to in his affidavit, and that understanding was arrived at at the interview which was without prejudice. Therefore, in my judgment, the protection extends to the report which was obtained in pursuance of that understanding.

Then comes the question whether, notwithstanding that, it ought to be produced. I think there is no question that it ought to be disclosed in the affidavit of documents, because it relates to a matter in question in the proceedings, and the defendant has rightly disclosed it; but he has disclosed it in Part II of the schedule to his affidavit, and he claims immunity from production and inspection. I quite agree with what my Lord has said, that this claim is justified, partly on the ground on which LORD LANGDALE, M.R., decided *Whiffen v. Hartwright* (1), and partly because it is a matter for the discretion of the judge under R.S.C., Ord. 31, r. 18. It seems to me that it would be monstrous to allow the plaintiff to make use—as he certainly would—for his own purposes as against the defendants of a document which is entitled to the protection of “without prejudice” status. In those circumstances, I agree with what my Lord has said, and this appeal fails.

Appeal dismissed.

Solicitors: *Manches & Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

FISHER v. BARRETT & POMEROY (BAKERS), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, J.J.), January 20, 1954.]

Food and Drugs—Proceedings against manufacturer—Sale of food unfit for human consumption—Proceedings taken under Food and Drugs Act, 1938 (c. 56), s. 9 (1) (a), s. 9 (2), s. 83 (3).

The respondents, a firm of bakers, sold a bread roll to retailers who re-sold it to a firm for use in their canteen, where, while it was being prepared for sale for consumption, it was found to contain part of a smoked cigarette. The respondents were charged under s. 83 (3) of the Food and Drugs Act, 1938, with selling a roll which was intended for, but was unfit for, human consumption, contrary to s. 9 of the Act. The magistrate dismissed the information on the ground that where a statute contained a provision of specific application to a category of offenders—here s. 9 (2) of the Act—it was the intention of that statute that that category should be proceeded against under that provision, and that, therefore, the prosecution was misconceived.

HELD: the only question was whether the roll sold was unfit for human consumption, and, if so, whether the respondents, as manufacturers, were liable, and, accordingly, the proceedings had been correctly brought under s. 83 (3) and s. 9 (1) (a) of the Act, and the case must be remitted to the magistrate to be heard and determined.

FOR THE FOOD AND DRUGS ACT, 1938, s. 9 and s. 83 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 392, 458.

CASE STATED by the Chief Metropolitan Magistrate.

At a court of summary jurisdiction sitting at Bow Street Magistrate's Court on Sept. 17, 1953, the appellant, Stanley George Fisher, a sanitary inspector, preferred an information under s. 83 (3) of the Food and Drugs Act, 1938, against the respondents, Barrett & Pomeroy (Bakers), Ltd., alleging that in June, 1953, they sold to Leigh Bakeries, Ltd., of 165, Drury Lane, Holborn, a bread roll, which was intended for, but was unfit for, human consumption, in that it contained part of a cigarette, contrary to s. 9 of the Act, and which Leigh Bakeries, Ltd., subsequently sold to Eastern Carpets, Ltd., of 4, Newton Street, Holborn. Before the respondents were called on to plead it was contended on their behalf that the proceedings were brought “under s. 9” of the Act

which contained two sub-sections, sub-s. (1) (a) and sub-s. (2), under either of which the proceedings could be brought, and that, as the course taken by the respondents might differ according to the sub-section used, the appellant should elect whether he was proceeding under s. 9 (1) (a) or s. 9 (2). It was contended on behalf of the appellant that the prosecution was brought under s. 83 (3) of the Act, but that s. 9 (1) (a) must be relied on, being the sub-section which created the offence of selling food intended for, but unfit for, human consumption, and these words were quoted in the information. The magistrate was of opinion that the appellant should elect and that his contention should be taken as an election to proceed under s. 9 (1) (a), and the summons was, accordingly, amended.

The case proceeded and the following facts were found. The respondents sold the bread roll, with others, it being unfit for human consumption in that it contained the end of a smoked cigarette, to Leigh Bakeries, Ltd., who sold the roll, with others, to Eastern Carpets, Ltd. Eastern Carpets, Ltd. had the roll in their possession for preparation for sale at their canteen, but, on discovering on completion of the preparation that the roll was unfit for human consumption, they withdrew it from sale. The roll was intended by the respondents, by Leigh Bakeries, Ltd. and by Eastern Carpets, Ltd. at all material times up to the time of its withdrawal from sale, for human consumption by an ultimate purchaser. At the conclusion of the appellant's case it was submitted by the respondents that no case had been made out for them to answer. It was contended on behalf of the respondents that the word "sells" in s. 9 (1) (a) of the Act must be interpreted to mean "sells by retail" or, at least, "makes a sale other than the sale contemplated by s. 9 (2)" of the Act since there was a presumption that Parliament enacts nothing in vain, and, if a sale of the type described in s. 9 (2) were an offence under s. 9 (1) (a), then s. 9 (2) would be otiose and unnecessary. Inasmuch as Eastern Carpets, Ltd. had the roll in their possession for the purpose of preparation for sale, and inasmuch as the relevant food and drugs authority had made no adjudication under s. 83 (3) of the Act in respect of Eastern Carpets, Ltd., it must be taken for the purpose of proceedings that Eastern Carpets, Ltd. had committed an offence against s. 9 (1) (a) in respect of the roll. In the premises, the offence, if any, committed by Leigh Bakeries, Ltd., with which offence the respondents were charged by virtue of s. 83 (3) of the Act, was an offence against s. 9 (2) of the Act, and hence outside the provisions of s. 9 (1) (a) of the Act. The respondents were gravely prejudiced by being charged under s. 9 (1) (a) and not under s. 9 (2) in that they were deprived of the opportunity of putting forward a defence under s. 9 (3) of the Act, that defence not being available to persons charged with offences under s. 9 (1) (a).

The magistrate, without hearing the appellant further, dismissed the information on the ground that, in the premises, the prosecution was misconceived in that, contrary to the intention of the Act, the proceedings were brought under s. 9 (1) (a) instead of under s. 9 (2) and the appellant appealed.

Paul Wrightson for the appellant.

Galpin for the respondents.

LORD GODDARD, C.J., stated the facts and continued: Section 83 (3) is the sub-section which really matters in this case, and I think the mistake that has been made is that too much attention has been paid to s. 9 (1) (a). Section 83 (3) is in these terms:

"Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be

taken against that other person without first causing proceedings to be taken against the first-mentioned person. In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged."

A This court has said on more than one occasion that in the case of a manufacturer or wholesaler the mere fact that he sold the goods may be an act or default. It generally is. The offence which had been committed here by someone was selling bread which was unfit for human consumption, which is an offence under s. 9 (1) (a). Having established that that is the offence, if the local authority are satisfied that some person other than the actual seller is, in fact, responsible for the condition of the goods, they can proceed against that person, which is what was done here. It follows that the only question was whether the bread roll sold was unfit for human consumption, and whether, in those circumstances, the respondents, as the manufacturers, were liable.

B At the hearing an application was made to the learned magistrate to put the prosecutor to his election whether he would proceed under s. 9 (1) (a) or under s. 9 (2), and it was said he ought to proceed under sub-s. (2), because, if he did not, he would deprive the defendants of a defence. The prosecutor, quite rightly, took the point that he was not bound to elect, and I do not think there was any question of election. The summons charged selling; that was the offence. Sub-section (2) of s. 9 deals, I think, with an entirely different matter. It is procedural, and is in these terms:

D "Where food in respect of which an offence under para. (a) of the preceding sub-section has been committed was sold to the offender by some other person, that person also shall, subject to the provisions of this section, be guilty of an offence."

E "Subject to the provisions of this section" refers to provisions which may give that person a defence in certain circumstances. That sub-section simply means that where A. is prosecuted for the offence of selling unfit food and that offence has been proved against him, the person who supplied that food to A. may also be prosecuted, and all that it is necessary to show is that he supplied the food in respect of which A. has been convicted. It is true that he is given a defence, if, for instance, he can prove that when he sold the food to A. it was in perfectly good order. Take, for instance, fish or game. The person who supplies fish to the fishmonger may have supplied it when it was in good order, and it may not be sold by the fishmonger till it has gone bad. Then, of course, the person who supplied it would not be guilty, but that is not this case. I think that undue attention was paid to s. 9 (2) and s. 9 (3), which have nothing to do with this case, whereas all that mattered here was s. 9 (1) (a) and s. 83 (3). The case must go back to the learned magistrate with an intimation that the information was perfectly good, that the offence was proved by the prosecution under the combined sections, and, that, therefore, it is for him to proceed to hear any evidence the respondents wish to bring forward or any submissions they wish to make. The appellant must have the costs of this argument.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Case remitted.

Solicitors: *C. F. S. Chapple*, town clerk, Borough of Holborn (for the appellant); *Lethbridges* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

MONTGOMERY v. A. MONK & CO., LTD.

[COURT OF APPEAL (Somervell and Birkett, L.J.J., and Vaisey, J.), January 15, 18, 1954.]

Building—Building regulations—Guard-rails on roof—Roof under construction—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 30 (1), (5), reg. 97.

Regulation 30 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, provides that "... every accessible opening in a roof ... through which any person is liable to fall a distance of more than six feet six inches, shall be provided with—(a) a suitable guard-rail or guard-rails . . . "

The plaintiff, a workman, was employed by the defendants in constructing a flat roof on their premises. The roof was constructed of three parallel concrete cross-runners, over which were placed concrete tiles fitted into grooves in the runners. No guard-rails had been provided by the defendants. In the course of construction, one row of tiles was found to be wrongly adjusted and had to be removed. In moving his position on the roof so that a fellow workman could take up one of the tiles, the plaintiff stepped backwards on to the edge of a tile, slipped, and fell from the roof to the ground, suffering injuries. In an action for damages for personal injuries, the plaintiff alleged, inter alia, that the defendants were in breach of their statutory duty under reg. 30 (1).

HELD: (i) the provisions of reg. 30 were not applicable to cases such as this where a roof was under construction, but dealt only with openings in a constructed roof, and, therefore, the defendants were not in breach of their statutory duty under that regulation.

(ii) the provisions of reg. 30 (1) did not apply, they being excluded by reg. 30 (5), and, therefore, the provisions of reg. 97 never became applicable.

APPEAL by the plaintiff from an order of Mr. Commissioner GOODMAN ROBERTS at Liverpool Assizes, dated June 16, 1953.

The plaintiff, a workman, was employed by the defendant company in constructing a roof on their premises. The roof, which was flat, was made of three parallel concrete cross-runners, over which concrete tiles were placed, being fitted into grooves in the runners. As the tiles were placed on the runners they provided a solid structure on which the workmen could walk. No guard-rails had been provided by the defendants. On the day of the accident one row of tiles was found to be slightly out of adjustment and had to be removed. The plaintiff in moving from his position on the roof so that one of the tiles could be taken up by a fellow workman, stepped backwards on to the edge of a tile, slipped and fell off the roof to the ground below, suffering injuries.

In a claim for damages for personal injuries based on negligence and breach of statutory duty, the plaintiff alleged, inter alia, that there was, on the part of the defendants, a breach of the Building Regulations, 1948, reg. 5, or, alternatively, of reg. 30 (1) which provides that

"... every accessible opening in a roof ... through which any person is liable to fall a distance of more than six feet six inches, shall be provided with—(a) a suitable guard-rail . . . "

The plaintiff contended that, if reg. 30 (1) were inapplicable, reg. 97 was brought into operation. Regulation 97 provides:

"If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed

to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury."

A

The defendants contended that, if reg. 30 (1) were applicable *prima facie*, in the circumstances, by virtue of reg. 30 (5), they were exempted from liability to erect guard-rails. The learned commissioner found that reg. 30 (1) applied *prima facie*, but that, having regard to the nature of the work that was being done, reg. 30 (5) operated as a proviso excepting the work from the operation of the regulation altogether, and reg. 97 had no application, and, therefore, the defendants were not guilty of a breach of statutory duty.

B

Wooll, Q.C., and *Pappworth* for the plaintiff.

Antelme for the defendants.

C

SOMERVELL, L.J., stated the facts and continued: The plaintiff based his claim on negligence at common law and breach of statutory duty. It is to the latter point that the argument on the appeal was in the main directed. As to negligence at common law, the learned commissioner said:

D

"I am satisfied that the plaintiff has not shown a breach of duty, any failure to provide a safe working place in the sense of not providing guards or scaffolding or nets to prevent the plaintiff from falling as was pleaded."

With that finding I agree. It would, of course, have been quite impossible to provide guard-rails as they would have had to be moved as the work proceeded. It seems to me it is one of those cases where the work was carried on at a height, but one cannot say that it was an unsafe place.

E

As to the breach of statutory duty, in the statement of claim the plaintiff relied on reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948. The sidenote to that regulation is: "Provision of scaffolds and means of access". The regulation provides that there shall be

F

"Suitable and sufficient scaffolds . . . for all work that cannot safely be done on or from the ground or from part of the building . . ."

That regulation was not pressed in this court, and I think the finding as to negligence to which I have referred indicates that the work could be done safely from part of the building. Then reliance was placed on reg. 30, which deals with openings in roofs, floors and walls. Regulation 30 (1) provides:

G

"... every accessible opening in a roof . . . through which any person is liable to fall a distance of more than six feet six inches, shall be provided with—(a) a suitable guard-rail . . ."

Counsel for the plaintiff puts his argument in this way. He agrees that reg. 30 (1) is inapplicable and that fact, he submits, brings in reg. 97, which provides:

H

"If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable

such persons who elect to use them to carry out the work without risk of serious injury."

In answer to that argument, the defendants relied on reg. 30 (5), which says:

"Guard-rails . . . required by paras. (1), (2), (3), or (4) of this regulation may be removed or remain unerected—(a) where and when this is or becomes necessary in order to proceed with any . . . covering . . . of the opening . . ."

The learned judge said that he assumed that reg. 30 (1) applied *prima facie*. He also said that, having regard to the work which was being done, reg. 30 (5) was in the nature of a proviso excepting the work which was being done here from the regulation altogether, and, therefore, there was no room for the operation of reg. 97. There were no provisions to be complied with under reg. 30 (1) which would have been rendered impracticable by the circumstances because the regulation itself excused or excluded compliance with its earlier provision. As a matter of construction I think that is right, but, speaking for myself, I do not think that the words of reg. 30 are apt to describe the construction of a roof such as we are concerned with in this case. I should have thought it was dealing with openings in a roof and not with its construction. Counsel for the plaintiff referred us to various other regulations not relied on in the statement of claim, namely, reg. 22, reg. 24, reg. 26 and reg. 31. I do not consider them applicable, so the question whether the plaintiff should be allowed to rely on them does not arise.

That being so, I agree with the learned judge, although for slightly different reasons. I do not think reg. 30 or any other of the regulations applies at all, and, therefore, it is not a case where there are regulations which have to be modified by the operation of reg. 97. Accordingly, I think that the plaintiff fails on that basis of his claim. The learned judge did consider whether it could be said that the plaintiff had adequate handhold as well as foothold within reg. 97. I would have felt a difficulty in saying he had adequate handhold, but I do not want to give any opinion on that point because, as I have come to the conclusion that that regulation does not apply, I think it would be wrong to do so. For these reasons, I think that this appeal fails and must be dismissed.

BIRKETT, L.J.: I agree.

VAISEY, J.: I also agree.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff); *Laces & Co.*, Liverpool, agents for *James Chapman & Co.*, Manchester (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

PRACTICE DIRECTION.*Legal Aid—Costs—Costs awarded against assisted person—Form of order.*

Where an order for costs is made against an assisted person, by the Legal Aid (General) Regulations, 1950, reg. 17, and in accordance with the Legal Aid and Advice Act, 1949, s. 2 (2) (e), a judge is required to assess the amount which the assisted person is to pay and may give a direction for that amount to be payable by instalments. The successful litigant in such a case may thereafter make a subsequent application to the court under proviso (ii) to reg. 17 (1) for the order to be varied on the grounds that there has been a change in the assisted person's circumstances.

Where the judge at the trial orders the assisted person to pay, whether in one sum or by instalments, a sum which must be less than the full amount of the costs, the order should direct that the costs are not to be taxed and judgment be entered without further order for the amount of costs which has then been determined; otherwise the judgment must direct taxation and this will involve the successful party in extra and unnecessary expense.

If the judge orders payment by instalments, he should be asked also to direct that on failure to pay any instalment the whole sum should become due; otherwise there is no means of enforcing payment until the time has elapsed for the whole of the instalments to be paid owing to the rule that there can be only one execution on a judgment. So, supposing an order is made for £5 a month for six months, if a default is made in paying the first or second instalment no execution could issue until the six months had elapsed.

Fresh forms for the drawing up of orders to embody these directions are being prepared.

GODDARD, C.J.

EVERSHED, M.R.

26th January, 1954.

E SNEDDON AND OTHERS *v.* LORD ADVOCATE.

[HOUSE OF LORDS (Viscount Simon*, Lord Morton of Henryton, Lord MacDermott, Lord Reid and Lord Keith of Avonholm), November 11, 12, 16, 1953, January 25, 1954.]

Estate Duty—Gift inter vivos—Gift by way of settlement—"Property taken"—Customs and Inland Revenue Act, 1881 (c. 12), s. 38 (2) (a) (as amended by Customs and Inland Revenue Act, 1889 (c. 7), s. 11 (1))—Finance Act, 1894 (c. 30), s. 2 (1) (c).

By a deed of trust dated Dec. 19, 1946, the deceased appointed himself and others trustees and provided that the trust fund "consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes afterwritten" The trustees were given power to purchase, subscribe for, pay for and take up shares in (inter alia) C., Ltd., of which the deceased had control. On Dec. 21, 1946, the trustees applied for five thousand £1 shares in C., Ltd. On Dec. 24, 1946, the deceased paid £5,000 to the trustees, and on the same day they paid that sum to the company. The shares were allotted, and were still held by the trustees when, on Feb. 5, 1948, the deceased died. The shares were at that date valued at £9,250. The Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (c), in respect of the value of the shares.

Held (LORD KEITH OF AVONHOLM, dissentiente): the "property taken" under the disposition made by the deceased within the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), was the sum of £5,000, and, therefore, that

* Viscount Simon died on Jan. 11, 1954.

sum was liable to duty and not the shares purchased and retained by the trustees.

Re Payne ([1940] 2 All E.R. 115), overruled.

Lord Strathcona v. Inland Revenue (1929 S.C. 800), applied.

AS TO GIFTS INTER VIVOS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 237-240, paras. 227-229; and FOR CASES, see DIGEST, Vol. 21, pp. 10-13, Nos. 45-60.

Cases referred to:

- (1) *Strathcona (Lord) v. Inland Revenue*, 1929 S.C. 800; Digest Supp.
- (2) *A.-G. for Ontario v. National Trust Co., Ltd.*, [1931] A.C. 818; 100 L.J.P.C. 215; 145 L.T. 673; Digest Supp.
- (3) *A.-G. v. Oldham*, [1940] 2 All E.R. 321; [1940] 1 K.B. 599; 109 L.J.K.B. 378; *affd.* C.A., [1940] 3 All E.R. 450; [1940] 2 K.B. 485; 109 L.J.K.B. 790; 163 L.T. 113; 2nd Digest Supp.
- (4) *Re Payne*, [1939] 3 All E.R. 875; 108 L.J.Ch. 339; *sub nom. Re Payne's Declaration*, [1939] Ch. 865; 161 L.T. 254; *affd.* C.A., [1940] 2 All E.R. 115; [1940] 1 Ch. 576; 109 L.J. Ch. 369; 163 L.T. 100; Digest Supp.
- (5) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (6) *Christie v. Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; 1936 S.C. (H.L.) 20; 105 L.J.P.C. 65; 154 L.T. 441; Digest Supp.
- (7) *A.-G. v. de Préville*, [1900] 1 Q.B. 223; 69 L.J.Q.B. 283; 81 L.T. 690; 21 Digest 10, 42.

APPEAL by the taxpayers, the surviving trustees of a deed of trust dated Dec. 19, 1946, made by William Galbraith Hetherington, deceased, who died on Feb. 5, 1948, against an order of the Second Division of the Court of Session dated Oct. 10, 1952, made on an appeal by the taxpayers under the Finance Act, 1894, s. 10, against an assessment by the Inland Revenue Commissioners in respect of property held by the taxpayers as such trustees. The Court of Session by a majority (LORD MACKAY dissenting) sustained the assessment complained of.

R. P. Morison, Q.C., and *W. I. R. Fraser, Q.C.* (both of the Scottish Bar), for the taxpayers.

Solicitor-General for Scotland (W. R. Milligan, Q.C.), *J. H. Stamp* and *W. R. Grieve* (of the Scottish Bar) for the Crown.

The House took time for consideration.

Jan. 25. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, on Dec. 19, 1946, William Galbraith Hetherington executed a deed of trust whereby he nominated himself and three others as trustees "for the ends, uses and purposes after-mentioned", and declared that

"the trust fund consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes afterwritten."

Then follow trusts in favour of the truster's daughter Elizabeth for her life, with remainders over. The trust deed gave the trustees wide powers of investment, including power to purchase, subscribe for, pay for and take up any shares or stock in a number of companies, including Creamola (England), Ltd. On Dec. 21, 1946, the trustees' solicitors, on the instructions of the trustees, applied for an allotment of five thousand new £1 ordinary shares of Creamola (England), Ltd., at par. On that date, and at the date of his death, the trustee was a director of that company and had a controlling interest in it. On Dec. 24, 1946, the truster, by cheque in favour of the trustees' solicitors, paid over to the trustees the sum of £5,000 to be held by them on the trusts declared by the deed of trust. On the same date, the trustees' solicitors sent their own cheque to Creamola (England),

Ltd., in payment of £5,000 due in respect of an application by the trustees for an allotment of five thousand new £1 ordinary shares in that company. These shares were allotted to the trustees and are still held by them. They were at the time of the truster's death, and still are, the only investment held by the trustees. The truster died on Feb. 5, 1948, and thus did not live for a period of five years after the execution of the deed of trust and the payment of £5,000.

A The Finance Act, 1894, s. 2 (1) (c), as amended by Finance Act, 1946, s. 47, provides [by reference to the Customs and Inland Revenue Act, 1881, s. 38] that property passing on the death of the deceased shall be deemed to include (inter alia)

B “any property . . . taken under a disposition made by any person . . . purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made five years before the death of the deceased.”

Section 7 (5) of the same Act provides:

C “The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.”

D No one doubts that the truster made a disposition which comes within the section and that estate duty is payable on certain property which is deemed to pass on his death, but the question is: What is the property which is deemed to pass; is it the £5,000, or is it the trust fund constituted by the deed of trust, in its state of investment at the death of the truster, i.e., the Creamola shares? It is common ground that £9,250 was the value of the Creamola shares at the truster's death. Thus, no question as to value or as to the proper method of valuation arises in the present case.

E What, then, is the property which is deemed to pass? The statute says it is the “property taken” under the disposition made by the truster. My Lords, I feel no doubt that the property taken under that disposition was the sum of £5,000. That was the only property which passed from the truster, and it was the only property taken by the trustees from the truster under his disposition. They took that property, of course, as trustees for the beneficiaries under the deed of trust. The truster never owned the five thousand Creamola shares, and, therefore, those shares could not be “taken” under any disposition made by him. As soon as the trustees received the £5,000 it became in their hands a trust fund to be held on the trusts declared by the deed of trust, and it was, of course, proper for the trustees to invest that sum in some one or more of the numerous investments authorised by the trust deed. They invested it in the Creamola shares, but they did not take these shares under the disposition made by the truster; they took the shares because, in the exercise of their discretion, they decided to apply for them and because the company decided to allot them to the trustees.

G Some discussion arose in the course of the argument whether the “disposition” in the present case was the drawing of a cheque for £5,000 by the truster, coupled with the sending of the cheque to the trustees' solicitors, or was the execution of the trust deed by the truster. I think the former is the true view, because the trustees “took” nothing until the £5,000 reached their solicitors, but, to my mind, it makes no difference to the result of this appeal whether the “disposition” was made by the cheque or by the trust deed. In the former case, the disposition carried the sum of £5,000 and nothing else. In the latter case, the truster, by the trust deed, “disposed” of property which was to be vested by him in the trustees, and that property was again £5,000 and nothing else.

H At one time counsel for the Crown seemed disposed to place some reliance on the words in the trust deed:

“And I provide and declare that the trust fund consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments

representing the same, shall be held and applied for the trust purposes afterwritten”

In my view, these words are far, indeed, from helping the Crown. The trustor declares that the trust fund consists of £5,000. Must not the “property taken under the disposition” be the sum which he declares to be the trust fund? The words “and which, or investments representing the same . . .” in no way assist the Crown. They merely introduce the trusts on which the trustees are to hold the trust fund (already defined as the sum of £5,000) or the investments which the trustees decide to make with that fund. A

My Lords, if the gift of £5,000 had been made to a donee who was to retain it for his own benefit, there could surely have been no doubt that duty would have been payable, on the donor's death within five years, on £5,000 cash, even if the donee had forthwith invested the gift in Creamola shares and still held these shares at the donor's death. If authority were needed for this proposition, it is to be found in *Lord Strathcona v. Inland Revenue* (1), applied and approved in *A.-G. for Ontario v. National Trust Co., Ltd.* (2) ([1931] A.C. 822, 823): see also *A.-G. v. Oldham* (3). There is, however, one case in which a distinction appears to have been drawn between a gift to a person for his own benefit and a gift to trustees for the benefit of persons entitled in succession. That is *Re Payne* (4). The three learned judges who formed the majority in the Second Division of the Court of Session in the present case all placed some reliance on *Payne's* case (4), but, in my view, it was wrongly decided. I can see no logical distinction, for the present purpose, between any of the following cases: (i) A.B. gives cash or transfers shares to C.D. for his own benefit; (ii) A.B. declares that he will henceforth hold a sum of cash or a block of shares in trust for C.D. for life with remainder to other beneficiaries; (iii) A.B. gives cash or transfers shares to C.D. and E.F. on trust for G.H. for life with remainder to other beneficiaries. In each case the *property taken* is the cash or shares which the donor gives or transfers or whereof he declares trusts. The tax under s. 2 (1) (c) is a tax on B

“property . . . taken under a disposition . . . purporting to operate as an immediate gift *inter vivos*.” C

It is a tax on certain defined *property*, and it is necessary to look at the moment when the gift was made in order to see what that property was; it is not a tax on beneficial interests in property and it matters not whether the gift was made (to quote the sub-section) D

“by way of transfer, delivery, declaration of trust or otherwise.” E

It is noteworthy that in *Payne's* case (4), SIMONDS, J., appears to have felt some doubt whether the words of the statute entitled him to “isolate gifts by way of settlement from all other forms of gift”: see [1939] 3 All E.R. 881. I think this doubt was well founded, and I cannot find any words in the statute which justify such isolation. It is also to be noted that the three members of the Court of Appeal, though they were unanimous in dismissing the appeal, all gave different reasons for their decision. F

Counsel for the Crown submitted that what was settled was a trust fund, and that a trust fund retains its identity as a trust fund notwithstanding any changes in its investment. I agree that the £5,000 became a trust fund as soon as it passed from the settlor to the trustees, but the property which the trustees “took” from the settlor was £5,000. I agree also that a trust fund, once constituted, retains its identity as *the* trust fund held on certain trusts, notwithstanding any changes which may be made in the investments constituting it, but that fact seems to have no relevance in the present case. It was suggested by counsel for the Crown that the Customs and Inland Revenue Act, 1881, s. 39, supported the argument for the Crown, but I do not think that section throws any light on the matter. Its wording can readily be applied to the ordinary case where property actually passes on a death, but its effect becomes somewhat obscure G

when applied to property which the deceased gave away during his lifetime, but within five years of his death. If the property were given to a person beneficially entitled thereto, it is impossible to suppose that that person would deliver an account under s. 39 "upon retaining the same for his own use", for at the time when he retains it for his own use he cannot tell whether the donor will or will not live five years. If the property were given to trustees on trusts for persons entitled in succession, they might still hold it on subsisting trusts at the donor's death, or they might have "distributed" it in his lifetime to persons becoming absolutely entitled (who would then "retain the same for their own use") or they might have "disposed of" it in some manner permitted by the terms of the trust. In any of these events, the words "upon . . . distributing or disposing thereof" do not fit the case, and in each case, as it seems to me, it is necessary to fall back on the words

"in any case within six calendar months after the death of the deceased."

Trustees who no longer held the property given to them by the deceased, but who held investments representing the original property on trusts which were still subsisting at the donor's death, would have to decide whether they ought to include in the account the property which they originally "took" from the donor, or the investments representing that property at the date of the donor's death. In my view, s. 39 afforded them no assistance in making this decision.

My Lords, I fully realise that difficulties as to the method of valuation arise in some cases if the property which is to be valued as at the date of the donor's death is property taken by a donee some years before. Some of these difficulties were discussed by the Lord President (LORD CLYDE) and by LORD SANDS in *Lord Strathcona's case* (1), and they were not agreed as to how these difficulties were to be solved. In my view, however, these difficulties arise, in the case, for instance, of a gift of a racehorse, by reason of the wording of the relevant statutory provisions. It is, perhaps, surprising that gifts inter vivos should be valued as at the death of the donor and not as at the date of the gift. The latter value represents that which was withdrawn from the donor's estate, and the statute is directed to preventing the avoidance of tax by such withdrawals. Further, if the latter value were taken for the purposes of estate duty, the donee would know that he would be charged with tax on that value, and no more, if the donor died within five years, and he could make provision for that event.

As matters stand, it would appear that the donee may receive a gift, e.g., of shares or chattels worth £5,000, sell the property for £5,000, and four and a half years later be charged with duty on a much larger sum, if the subject-matter of the gift has appreciated in value in the meantime. However, your Lordships have to interpret the statute as it stands, and in the present case no difficulties can arise, on any view, as to the method of valuation of the "property taken". This being so, I shall make no observations, which would necessarily be obiter, on the difficult questions as to valuation which may arise in other cases hereafter.

I would allow the appeal.

LORD MACDERMOTT (read by LORD MORTON OF HENRYTON):

My Lords, the relevant statutory provisions have already been read and I need not repeat them. When property is made subject to estate duty by reason of these provisions, the assessment of the duty necessitates (i) the ascertainment of the property "taken" under the disposition purporting to operate as an immediate gift, whether outright or by way of settlement, and (ii) the valuation of the property as at the subsequent death of the person making the disposition. The question for determination in this appeal arises under (i) rather than under (ii), but the interval of time between the disposition and the death explains the dispute, as the amount of duty payable will be much greater if what happened during this interval respecting what was "taken" under the disposition is a

relevant consideration. Thus, if the property "taken" under the disposition was the £5,000 given by the truster to the trustees and nothing else, the duty will be payable on that sum; but if, on the other hand, the property "taken" was something which at the date of the truster's death was the Creamola shareholding acquired with the £5,000, then the duty will be payable on £9,250, the value of that shareholding at that time. My Lords, I see no escape from the conclusion that the trustees took the sum of £5,000 under a disposition made by the truster. That is what passed from the truster to the trustees and that is what the truster himself describes in the trust deed as the trust fund. So far, there seems little room for contention. It is true that the application for the allotment of the Creamola shares was made in anticipation of the truster's payment and that that payment and the trustees' payment for the shares they had applied for were both made on the same day. But there is nothing in what was thus done so expeditiously to belie the terms of the trust deed, and it seems to me that the position is in all material respects exactly the same as it would have been had the trustees held the £5,000 for a longer period, say a month, before investing as they did. But was the property "taken" under the disposition the £5,000 and nothing else? That raises the real issue. The trustees contend for an affirmative answer to this question. The Crown submits that the property "taken" was something essentially different from the £5,000; that it was a fund with an identity which continued and persisted throughout the duration of the trust and despite any change of investment, and that, as such, it was represented as truly by the Creamola shares as it had been by the money with which they were acquired.

Now, in instances of the sort under consideration, in which one has to look both to the beginning and the end of the interval I have mentioned, it seems to me that a definition of "property" which would enable a fund thus settled to be followed from mutation to mutation so that its form at any given moment became the property "taken" under the settlement would be in no way repugnant to the general scheme and policy of the enactments relating to estate duty. The conception underlying such a definition finds expression in the definition of "settled property" in the Finance Act, 1894, s. 22 (1) (h), and is, in my judgment, quite compatible with the doctrine respecting an out and out gift as enunciated by LORD SANDS in *Lord Strathcona v. Inland Revenue* (1) (1929 S.C. 808). I think there would be nothing irrational or inconsistent in treating absolute gifts and gifts in trust differently in this connection. In both cases a portion of the donor's estate is permanently alienated, but in one it is liberated so as to make its future traceability a mere matter of chance, while in the other the donor has himself done what he can to ensure traceability while the trusts he has declared endure.

In the circumstances of this appeal, however, the Crown is unable to call in aid any statutory definition. The relevant enactments do not use the expression "settled property" and the terms of the extended meaning given to "property" by s. 22 (1) (f) of the Act of 1894 are not wide enough to comprehend the investments purchased by a settled sum of money which is not the proceeds of a sale. Whether they would have been wide enough to apply had the truster transferred, say, £5,000 war loan instead of £5,000 is another question, but as it does not arise on the facts of this case I do not express an opinion on it. As matters stand, the Crown did not seek to apply these definitions, nor did it seek to found its case on the view expressed by CLAUSON, L.J., in the Court of Appeal in *Re Payne* (4), a view which, if I may respectfully say so, places more weight on the provisions of s. 39 of the Customs and Inland Revenue Act, 1881, than those provisions are capable of bearing. In its substance, the case for the Crown rested on the validity of the submission already mentioned, namely, that the "property taken" was a trust fund, a species of property in itself, distinct from, while yet embracing, such property as might from time to time be subject to the trust. This conception of a trust fund as a continuing entity and a distinct form of

property was advanced by the Crown in *Re Payne* (4), and was accepted by SIMONDS, J., who describes it in the following passage from his judgment ([1939 3 All E.R. 880):

"It is to be observed that the disposition may be by way of gift outright or by way of settlement. It is the latter class of case with which I have to deal, and I think it is the easier class of case. Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition. The claim was thus formulated on behalf of the Attorney-General, namely, that the subject-matter of the gift is in each case the settled fund, that is, in this case the property originally made subject to the declaration of trust, subject to and with the benefit of the duties and powers vested in the trustees by the trust, including the power of investing money and varying investments, and that the settled fund as it actually existed at the death of the settlor is, therefore, the property deemed to be included in the property passing on death, and the valuation as at the date of death should relate to the investments and moneys representing the corpus of the trust fund at that date."

C In the Court of Appeal SCOTT, L.J., appears to agree with this view. He says ([1940] 2 All E. R. 123) that the property given

"was simply the totality of equitable rights created by that declaration of trust in the beneficiaries under it",

and later (*ibid.*, 124) that

D "it is the settled fund, with its continuing, although changing, character under the investment trusts of the settlement, which constitutes the property charged with estate duty at the time when it passes or is deemed to pass."

But, perhaps, nowhere is the Crown's contention put more clearly than by LORD PATRICK when, in the course of his opinion in this case, he says (1953 S.C. 85):

E "The property taken is a trust fund, which from the moment of its creation has certain inherent characteristics imposed in part by the deed of trust and in part by the common law, and as such an entity it continues thereafter. It is the trust fund, in whatever form it may then happen to be, which falls to be valued at the time of the death of the donor."

F My Lords, a conception which has gained this degree of judicial support cannot be disregarded lightly. But I must confess that the more I reflect on it the more difficulty I have in seeing how it satisfies the first, essential requirement of the statute. Is a trust fund, considered in the sense of this conception, "property" as that expression is used in s. 2 of the Act of 1894? In my opinion, it is not. In the first place, such an abstraction does not seem to me to be "property" according to the ordinary meaning of the word, and there is no enactment to make that meaning inapplicable in this case. Secondly, the Act of 1894 does not appear to recognise any relevant distinction, as respects property which is subject to duty, between a trust fund and the items which happen to constitute it at any particular moment. Thus, in s. 1 of the Act of 1894 the duty is made payable on

H "property . . . settled or not settled, which passes on the death",

a provision which suggests that the creation of a trust fund was not regarded as producing a new species of property. And, thirdly, the conception, if it connotes nothing more than the property for the time being subject to the trust, has all the appearance of an attempt to harness the definition of "settled property" which is, admittedly, inapplicable; while if, in addition, it connotes the rights and obligations arising by virtue of the trust, then, as it seems to me, it necessarily involves consideration of the interests and rights of the beneficiaries;

and that is an element which, as I understand the decisions of this House in *Earl Cowley v. Inland Revenue Comrs.* (5), and *Christie v. Lord Advocate* (6), ought not to be taken into account. What passes or is deemed to pass is the property settled and not the rights or obligations attached thereto by the settlor for the purposes of the trust.

For these reasons, my conclusion is that the submission of the Crown fails. That being so, it follows, in my opinion, that the "property taken" was the property taken immediately under the disposition, the sum of £5,000 and no more, for on this view of the Crown case nothing remains to justify looking beyond that sum to the state of its investment at the time of the truster's death. I would, therefore, allow the appeal.

LORD REID: My Lords, by the Finance Act, 1894, s. 2, property passing on the death of the deceased is deemed to include, inter alia, property which would require to be included in an account under sections of earlier Acts if those sections were enacted in the Act of 1894 and were amended in certain respects. Those sections are s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, and the effect of this legislation by reference, so far as it concerns the present case, is that property passing on death is by the Act of 1894 deemed to include any property taken under a disposition, made by any person dying on or after June 1, 1881, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bona fide made twelve months before the death of the deceased. By later legislation this period of twelve months has been extended to five years, but otherwise no change has been made. It is not disputed that, in the ordinary case where a gift is made by transfer or delivery direct to the donee, the property taken is the same as the property given: it is the property which, by virtue of the disposition, ceases to belong to the donor. If the donor hands over money, that money is the property taken, and if the donor transfers shares, those shares are the property taken. But it has been held in this case by the Second Division, following the decision of the Court of Appeal in *Re Payne* (4), that that is not so where the gift is to trustees to hold for beneficiaries: in that case the property taken is said to be something different from the property which has ceased to belong to the donor.

In this case the facts are simple and not in dispute. By deed of trust of Dec. 19, 1946, the late Mr. Hetherington nominated himself and the appellants as trustees for the purposes therein stated and provided that

"the trust fund consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes afterwritten."

Those purposes were, briefly, to pay to the truster's daughter, Miss Elizabeth Jamieson Hetherington, for her life rent alimentary use altogether the income of the trust fund, on her death leaving issue to pay the trust fund to her issue, and in the event of her dying without leaving issue surviving to pay the trust fund to her sister, whom failing, to the issue of her sister, whom all failing, to the heirs in mobilibus of the truster. In addition to ordinary powers of management and investment, the trustees were given power to purchase, subscribe for, pay for and take up any shares or stock of three named companies including Creamola (England), Ltd. The truster had control of that company. On Dec. 21, 1946, the trustees applied for an allotment of five thousand new £1 ordinary shares of Creamola (England), Ltd. On Dec. 24 the truster paid £5,000 to the trustees and on the same day they paid that sum to the company. The shares were duly allotted and were still held by the trustees as the trust fund when the truster died on Feb. 5, 1948. The value of the shares at that date is agreed at £9,250.

The Finance Act, 1894, s. 7 (5), provides that the value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property

would fetch if sold in the open market at the time of the death of the deceased. If the shares then constituting the trust fund were held to be the "property taken" in this case, then the value of the gift for estate duty purposes would be £9,250.

The case of a gift direct to a donee was considered in *Lord Strathcona v. Inland Revenue* (1). At that time gifts within three years of the donor's death were deemed to pass on his death, and Lady Strathcona died within three years of making gifts to each of her four children. In each case, the gift took the form of a transfer of war loan, shares of the Anglo-Persian Oil Co., Ltd., and stock of the Canadian Pacific Railway Co., and the property taken was held to be these securities. LORD BLACKBURN dissented, holding that the subject of the gifts was really cash. One of the donees had sold part of the securities given to him before Lady Strathcona's death, but it was held in his case that this made no difference and that the value of each gift for estate duty purposes was the value at the date of Lady Strathcona's death of the whole securities which she had transferred to the donees. Different reasons were given by the Lord President and LORD SANDS, but on the particular facts they led to the same result.

The Lord President's view was that what is deemed to be included in the property passing on the death of the deceased is (1929 S.C. 805)

"... the identical subject of the former gift, just as it was at the date of the gift—and nothing other, nor more, nor less. It is therefore that subject—as it was when taken by the donee—which must, in my view, be deemed (contrary of course both to fact and to possibility) to be included in the property which actually passes on the donor's death."

If the subject of the gift was a promising young racehorse and before the death of the donor it had proved worthless or died, the Lord President thought that the Act required the commissioners to ascertain what would be the value at the date of death of an equally promising young racehorse and not to ascertain the value at that date of the horse which had in fact been given.

LORD SANDS was of a different opinion. He said (*ibid.*, 807):

"The keys to the interpretation of that legislation are the ideas of property passing, and of property being deemed to pass although it does not actually pass. These ideas have been the subject of much judicial exposition and are now familiar, so I do not dwell upon them. It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes... The theory underlying a revenue Act must bow to its express provisions, but an appreciation of the theory may sometimes help to elucidation. It appears to me that the theory of the provisions here in question was, just as in the case of the 1881 Act, that, in order to avoid disappointment of the estate duty, the property donated should be treated just as if no donation had been made, and the property in question had remained part of the deceased's estate and had actually passed upon his decease."

This passage was quoted with approval by the Privy Council in *A.-G. for Ontario v. National Trust Co., Ltd.* (2). The grounds of judgment of the Court of Appeal in *A.-G. v. de Prévile* (7) appear to me to be to the same effect. It was held in that case that where a tenant for life released his life interest in favour of the remainderman and died within twelve months of that release, no duty was payable in respect of that gift. A. L. SMITH, L.J., said ([1900] 1 Q.B. 229):

"Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or would have died possessed if they had not given it away, in my opinion it is not the true reading of s. 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within twelve months of the death. It is only to

be brought into an account if it would have had to be so brought but for the gift ”:

and VAUGHAN WILLIAMS, L.J., said (*ibid.*, 231):

“ . . . s. 38 deals with what shall be included, and says in effect that it shall include not only property forming part of the estate and effects of the deceased at his death, but also property which he has parted with within three (now twelve) months before his death. Now, must not this mean, according to the ordinary rules of construction, property of the same kind as that dealt with in the antecedent legislation? That is to say, property in which the deceased had such an interest that, if he had not parted with it by a gift within twelve months before his death, it would have been estate and effects of a deceased, and therefore have been included in the property on the value of which the duty was granted? ”

That reasoning appears to me to cover the case of the racehorse discussed in *Lord Strathcona v. Inland Revenue* (1), and to lead to the conclusion that if the racehorse had predeceased the donor no duty would be payable in respect of the gift.

I now turn to consider whether there is room for a different approach when the property is given in trust. One possible view is that one must look to see, not what passed from the donor to the trustees, but what was the property taken by the beneficiaries, they being the only donees. Another possible view which has been expressed is, if I understand it rightly, that one does look to see what is the property taken by the trustees, but that what the trustees take is not the same as what the donor gave: the trustees take in a fiduciary capacity and the rights which they take are different from those which the donor had. What they hold is a trust fund which is a continuing entity or corpus. These and other interpretations were discussed in *Re Payne* (4). The facts in that case were involved, but those parts of the judgments which it is necessary to consider do not depend on particular specialities and I think that it is enough to say that the settlor, in effect, conveyed to the trustees £10,000 and an option. The trustees exercised the option and bought shares: then there were changes of investments and receipts of bonus shares, and when the settlor died less than three years later the trust fund was worth about £50,000.

In the Court of Appeal all the lords justices held that duty was payable on the value of the fund at the settlor's death, but all for different reasons. SCOTT, L.J., said ([1940] 2 All E.R. 122):

“ The real—and, in my opinion, the only—issue on the first question is whether the property given by the settlor and ‘taken’ by the donees is in law to be regarded, as the appellants contend, as being a cheque for £10,000—that is to say, a gift to the trustees equivalent to that sum in cash—or, as the revenue contend, as being the totality of the equitable interests conferred by the declaration of settlement on the beneficiaries, covering the whole value of the settled fund and entitling them to have that fund administered as a single continuing corpus for their benefit in accordance with the trusts of the settlement ”.

SCOTT, L.J., then said that, in his view, the property given was simply the totality of equitable rights created by the declaration of trust in the beneficiaries; no other form or kind of property was the real subject of the gift, the transfer to the trustees of the legal title was mere machinery to effect the gift. I find that view at first sight simple and attractive, but for several reasons I cannot agree with it. In the first place, duty is, in general, payable on the passing of property and not on the creation of beneficial interests in it, and where something other than the passing of property, e.g., the cesser of an interest, is to attract liability, that is expressly stated. And then I do not see how to deal on this theory with a case where some of the beneficial interests do not vest immediately. The Act is dealing

with dispositions purporting to operate as immediate gifts. If the trustees are directed, say, to hold for A in liferent and on A's death to convey to X, whom failing, to Y, there is no vesting of the fee until A's death and, therefore, no immediate gift to anyone of the beneficial interest in the fee. Let me suppose that the funds were conveyed to the trustees more than five years before the donor's death: if all the beneficial interests immediately vested there could be no liability to duty, but suppose the fee did not vest until the death of the liferenter and that took place before but within five years of the death of the donor. Is it to be said that because there was no vesting of the fee until within the five years, therefore there was no gift to the fief until within the five years and therefore duty is payable? But that would seem to be the result if one has to look at the taking of beneficial interests by the beneficiaries. Later in his judgment, SCOTT, L.J., seems to modify his view because he says (*ibid.*, 124):

" . . . but it is the settled fund, with its continuing, although changing, character under the investment trusts of the settlement, which constitutes the property charged with estate duty at the time when it passes or is deemed to pass."

That appears to me to be quite a different conception, and I shall examine it later.

CLAUSON, L.J., put his judgment on a ground which, it seems to me, could be applied equally well to a direct gift to a donee, and would then lead to the conclusion that, where such a donee has sold the subject of the gift and re-invested the proceeds, he also is chargeable on what is in his hands at the donor's death and not on what he received from the donor but no longer holds. This would be contrary to the decision in *Lord Strathcona v. Inland Revenue* (1), and, I think, contrary to the terms of the Act. The ground of judgment of CLAUSON, L.J., was not supported by the respondent in argument, and I do not think it necessary to say more than that I do not agree with it.

LUXMOORE, L.J., held that the gift was not a gift of £10,000, but was a gift of certain patent rights which on realisation yielded £10,000 to the trustees. Then, having referred to s. 22 (1) (b) of the Act of 1894, he said that it was admitted that if the property taken was the patents and patent rights, then estate duty was exigible on the value of the investments for the time being representing that property. I have found no other reference in the report to any such admission, and if it was made I do not think that it was rightly made. Section 22 is the definition section and sub-s. (1) provides:

" In this Part of this Act, unless the context otherwise requires . . .
(f) The expression ' property ' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale."

The provision is not a definition of " property ": it only provides that " property " is to have an extended meaning and include " proceeds of sale ", etc., unless the context otherwise requires. It is readily applicable where the Act is dealing with the holding of property for a period, but it appears to me to be inapplicable where the Act is dealing with property to be ascertained at a particular moment of time. If one is looking for property passing or taken at a particular time, the proceeds of a subsequent sale cannot have passed or been taken at that time because they did not then exist. I, therefore, think that this provision is excluded by the context here, but if I am wrong about that and this provision is applicable, it leads to a strange result: it can only apply where there are " proceeds of sale " of the original property and there can be no proceeds of sale of money. So this provision would bring in investments held for the time being if the original gift was something other than money, but would not bring them in if the original gift had been money. This is so unreasonable that it may afford an additional reason for holding the provision inapplicable to this kind of case, and, further, if it were applicable, I do not see anything which would exclude it where the original

property was taken by an individual donee. That would mean that if he sold the original gift to him and re-invested the proceeds he also would only be liable in respect of the value of the investment held by him when the donor died. But it is, I think, settled law that an individual donee's liability is not altered by reason of his having sold the original gift before the donor's death; his liability must still be calculated with reference to the value of the original gift.

The Court of Appeal affirmed the judgment of SIMONDS, J. SIMONDS, J., having said that it was clear that what the settlor settled was £10,000 and the option and that it was also clear that the only relevant date for the purpose of valuing property which passes is the date of death, proceeded ([1939] 3 All E.R. 879):

"The question of difficulty upon which the parties are at issue is what is the property of which the value has to be ascertained at the death of the deceased. The contention of the Attorney-General has already been stated: the property which passed on the death was the trust fund as it then existed. The plaintiffs on the other hand say that it is essential to see what was on Jan. 26, 1936, taken under this disposition made on that date; it was the sum of £10,000 and an option, and it is that property so taken which must be valued at the death. Each side points to the hardships and anomalies which the other view involves."

Then, having mentioned some of these hardships and anomalies, he said (*ibid.*, 880):

"The real problem is to reconcile the two elements: (a) property taken under a disposition made in (say) 1936, and (b) a valuation to be made in (say) 1939."

If one were legislating that might well be said to be the real problem, but we must take the Act as we find it and the Act appears to me to set two quite distinct problems, the first of which must be solved before one reaches the second. The first is to determine what was the property taken, and, once that problem has been solved, the next is how to value that property. No doubt if the Act is ambiguous so as to leave open two methods of determining what was the property taken, then, if one method leads to a fairer result than the other when one comes to apply the direction of the Act as to valuation, that fact should be taken into account in solving the ambiguity, but it appears to me that that is as far as one can go in linking the two problems. I would agree that, if the statutory provisions can be so construed, it would be better that duty should be payable on the value of the investments held at the date of death of the donor than that it should be payable on the value of other investments originally held but later sold. In the present case, the investment acquired by the trustees appreciated, but in other cases it may have depreciated and then duty would have to be paid on a greater sum than the value of the trust fund when the liability arises: it would be more just that duty should be paid on the value of the investments out of which it must be paid. But I am unable to follow SIMONDS, J., in finding it possible to construe the Act so as to lead to that result. He said (*ibid.*):

"Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition."

It is with regret that I find myself unable to regard, say, securities received from the donor and sold as the same property as other securities which have been bought with the proceeds of the sale of the first.

The grounds of decision of the majority of the Second Division in the present case are, perhaps, most concisely stated by LORD PATRICK in the following passage from his opinion (1953 S.C. 84):

"I cannot regard the property taken under an immediate out-and-out

gift as being the same as the property taken under a deed of trust for the benefit of limited interests. Nor does the kind of object transferred affect the question: whether it is cash, or securities, or the rest. Let us suppose a person who owns £5,000 in cash. His rights in it are absolute. He can do what he likes with it. In particular, he can dispose of it inter vivos. If by an inter vivos transfer he conveys the £5,000 absolutely among various donees, the property taken is just what the donor had a moment before the transfer. It is £5,000 in absolute property. But, if he transfers the £5,000 under an inter vivos deed of trust for the benefit of various donees in limited interest, the property taken is something very different from what the donor had a moment before the transfer. No person and no agglomeration of persons now has the absolute right which he had to the £5,000. He has extinguished that right and created something new."

It is quite true that no person and no agglomeration of persons now has the absolute right which the donor had to deal with the £5,000. But, in my opinion, that does not mean that the rights of property in the £5,000 were diminished or altered. A thing given may pass from the donor to trustees, and then they may sell it. The buyer will have an absolute right just as the donor had, but the trustees cannot give to the buyer greater rights of property than they had themselves. The rights of property remain the same throughout, but while the thing is owned by the trustees their power to exercise those rights is limited.

I would express my conclusion in this way. The donor had certain rights of property. Either those rights must be taken or some other rights. Unless what is taken is the rights which the donor had, what has happened to the donor's rights? They have not disappeared. If, for example, trustees take a secured debt on behalf of beneficiaries, the trustees have the same rights against the debtor and the security as the donor had. What has happened is not that the property has changed, but that, by reason of their fiduciary position and of the directions of the truster, the trustees do not have the same freedom to deal with the property as the truster had: they are obliged to use the rights of property which have come to them in certain ways and precluded from using them in other ways, but the property remains the same. I agree with the opinions of LORD SANDS in *Lord Strathcona v. Inland Revenue* (1) and A. L. SMITH and VAUGHAN WILLIAMS, L.JJ., in *A.-G. v. de Prévile* (7). A gift is taxed on the footing that if the property given away had not been given the donor would still have had it at his death. Of course, he might have sold the property and spent the proceeds; but no one suggests that that can be considered. Or he might have sold the property and re-invested the proceeds: where the gift is to an individual donee no one has suggested that that can be considered. The re-investment cannot be deemed to have been in the donor's possession and to have passed on his death. I cannot see how there can be any difference where property is conveyed to trustees unless, in that case, the whole basis of liability is different.

The argument was that in all cases other than those where there is a declaration of trust it can be said that property which in fact passed at an earlier date is deemed to have passed at the donor's death, but that this cannot be said where a donor simply makes a declaration of trust with himself as the sole trustee. In that case, it is argued, no property actually passes when the gift is made and the "property taken" must be the rights conferred on and taken by the beneficiaries under the declaration of trust. But that view only leads to another difficulty. If the terms of the declaration are such that there is no immediate vesting of the fee, then on that view I do not see how there can be any immediate gift of the fee because there cannot be a gift until there is someone to take it. What happens in such a case is that, although the title to the property is still held by the donor, the property ceases to belong to him, and all beneficial rights of property pass away from the donor as an individual to himself as trustee. I think that that can be regarded as a real passing of property and, therefore, the analysis which is

valid in the ordinary case is still valid in this case. The statutory provision ties together gifts by way of transfer or delivery, and gifts by way of declaration of trust so closely that I would only accept the view that the basis of liability is quite different in the last case if that were really necessary, and I see no such necessity.

It remains to consider, in the light of the conclusions which I have already reached, what was the property taken in this case. Was it the £5,000 or was it the shares? One can figure a case where the donor hands over money with instructions to buy a particular investment with it and the taker is obliged to follow those instructions. In such a case it might be said that the real subject of the gift is that investment. But I see nothing of that kind in the present case. Under the deed of trust the trustees had full discretion as to the investment of the £5,000 and there is nothing to show that the decision to invest it in these particular shares was not their decision. I am, therefore, of opinion that the property taken was the sum of £5,000, that duty is payable on that sum, and, therefore, that the appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, the Finance Act, 1894, s. 2 (1), provides, *inter alia*, that property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, and with certain other amendments made by the Finance Act, 1894. Among property to be so included in an account under the section as amended is

“any property . . . taken under a disposition made by any person . . . purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made twelve months before the death of the deceased.”

By subsequent legislation, five years now falls to be substituted for twelve months.

In the circumstances of this case three related questions arise—What property was taken? Under what disposition? And in whose favour did the disposition purport to operate as an immediate gift *inter vivos*? The answers depend, in my opinion, on determining what was the disposition. I have reached the conclusion that the disposition here is the trust deed. I recognise that a disposition within the meaning of the statute need not involve a deed at all. It may be a simple act of delivery of a corporeal movable. A possible view could be that the disposition here was the cheque for £5,000 operating as an assignment of that amount to the trustees when presented to the drawer's bankers. For reasons that I shall state in a moment, I reject that view, and, indeed, the arguments addressed to this House by both sides in the case proceeded, I think, on the view that the disposition was the trust deed.

Looking for a moment at the trust deed, I find that it opens with a statement by the truster that, for certain reasons which I need not enumerate, he has resolved “to make a provision for” his daughter Elizabeth “in manner after-mentioned”. He, accordingly, creates a trust by appointing various persons as trustees “for the ends uses and purposes aftermentioned” and provides and declares

“that the trust fund consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes afterwritten.”

The deed is dated Dec. 19, 1946. The sum of £5,000 was paid by the truster on Dec. 24 by cheque drawn in favour of the law agents to the trust who had already, on Dec. 21, applied for an allotment of five thousand new £1 ordinary shares of Creamola (England), Ltd., *at par*. The provision that was made through the medium of this trust for Elizabeth took the form of an alimentary

liferent of the net income "of the trust fund" subject to a power in the trustees to withhold the full net income from time to time as they might consider advisable, and to form a reserve fund or to accumulate with capital any unexpended portion of income, all under certain declarations and conditions. The trustees were also given power to encroach on capital on her behalf to an extent not exceeding one fourth "of the trust fund". On her death "the trust fund" was to go to lawful issue surviving her. There are destinations over in the event of Elizabeth dying without leaving lawful issue surviving, in favour of her sister Jane or her issue, whom all failing in favour of the truster's heirs in mobilibus.

I find little difficulty in holding that by this provision for Elizabeth the truster made an immediate gift to her qualified by the powers vested in the trustees. I think he may also be said to have made an immediate gift in favour of other interests, although these were at the time unascertained or contingent. The gift would not fail because in the last resort the truster's heirs in mobilibus would take, and in the meantime the trustees would hold for the interests that would emerge. I see no difficulty in making an immediate gift for someone who is to be ascertained in a particular way at a future date so long as the donor parts with the subject of gift to a stakeholder or other person to hold for the prospective donee. The outlook of the statute, in my opinion, is merely to see whether someone has disposed of his property gratuitously during life. He could do so in two ways, by donatio mortis causa, which is revocable, or by an out and out gift, which is irrevocable. Here the truster made an irrevocable and gratuitous disposition of property during his life. If it was gratuitous, someone got a gift and, in my view, the donees here were the beneficiaries under the trust deed. They took, or the trustees took for them, but whoever took did so, in my opinion, under the trust deed. The mere passing of the cheque, as I see it, did not operate as a gift. If it did, the trustees could have put the proceeds in their pockets. The passing of the cheque was purely executorial, a piece of machinery to satisfy a trust which had already been declared.

I find confirmation for the view I have taken in the reference in s. 38 (2) (a) to disposition by way of declaration of trust. This would clearly apply to money or property belonging to a person which that person declared that he held in trust for someone whom he wished to benefit. There would be no transfer or delivery of property, but the donee would take under the declaration of trust which, as I read the statute, would be the disposition. In substance, I see no difference between such a case and a trust declared by a donor to exist over property conveyed by the donor to persons nominated by him as trustees. The machinery may be different, but in each case the donees take under a declaration of trust. I find further support for my view in the language of s. 39 of the Act of 1881. This section runs:

"Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or movable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act. Any officer authorised by the commissioners for the purpose may administer the oath."

It is clear that a person "retaining the same for his own use" must be a donee under the disposition referred to in the preceding section. A person "distributing or disposing thereof" will include, but is not necessarily confined to, a trustee of property gifted under the preceding section. When a trustee distributes or disposes of property he distributes or disposes of it, in my opinion, under the

deed or disposition by which the property was taken and in this case the trustees distribute or dispose of the property under the trust deed.

I reach the conclusion, accordingly, that the disposition here was the trust deed and that it operated as an immediate gift *inter vivos* to the beneficiaries. There remains the question—What property was taken under the disposition? In my opinion, it was the corpus of the trust estate whatever that might be from time to time. I can see no other answer to the question. The statute speaks of a disposition purporting to operate as an immediate gift. The gift operated by the trust deed is a *lifereat* and fee to certain ascertained or ultimately ascertainable persons. That cannot, as the Lord Justice Clerk said, be a gift of a talent to be buried. It is a gift that can only be made effective by investment and due administration of trust property. It is said that the subject of gift must be the same from the giver's end and from the taker's end. I agree. But I see the gift as the creation of a trust of property at the giver's end, and the receiving of the benefits of the trust at the taker's end. When I assign gratuitously a policy of life insurance payable at my death, I give the donee a right to claim from the insurance company the insurance moneys payable at my death. The value of the policy is not the same at the date of gift as it will be at the death, and it may include profits which have not been declared when the gift is made. When I create a trust, I create a right in the beneficiaries to claim against the trustees the payments or benefits due under the trust and to require of them due administration of the trust. The property taxed, of course, is the amount of the assurance moneys or the value of the trust property from which the beneficiaries' claims present or future fall to be satisfied, not the value of the beneficial interests. There are obvious differences between these two cases and I do not wish to press the analogy too far, but a disposition, whether assigning or creating a right of action against a third party is, I think, a disposition of property coming under s. 38 (2) (a) if operating as an immediate gift *inter vivos*.

A cogent consideration which seems to me to be almost conclusive is the language of s. 39 of the Act of 1881 to which I have already referred. The duty of delivering an account falls on every person mentioned under that section in respect of property covered by s. 38

“upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased . . .”

Trustees do not retain anything for their own use, and I read these words as referring naturally to an individual donee, though the duty could hardly arise until the death of the deceased. But the words “distributing or disposing thereof” are very apt to cover a trustee distributing trust property among beneficiaries. In the present case, if Elizabeth had died without issue surviving, the trustees would have had to distribute the trust estate to her sister Jane, whom failing, Jane's issue, whom failing, the truster's heirs in *mobilibus*. This duty might have arisen before the truster's death, if Elizabeth had died then. And what the trustees would have distributed would have been the corpus of the trust as it then existed. I do not see how, in any true sense, that can be said to be distributing the £5,000 of which the trustees took the possession or management some years before, and what s. 39 is referring to is

“property of a description to be included in an account according to the preceding section.”

The language of the statute appears to me to be satisfied only by treating property put in trust, not according to its original character but according to the character it had assumed by the time it fell to be distributed, or at the truster's death, whichever is the earlier. This, I think, is the line of reasoning which appealed

to CLAUSON, L.J., in *Re Payne* (4), although I do not follow him with regard to the effect of the word "taken". I regard "taken" as referring to taken by the beneficiaries, and my reliance on s. 39 has reference to the meaning to be attached to the word "property". I do not regard this point as an independent and separable ratio of decision, but rather as a consideration supporting the view I have already expressed as to the meaning of property in s. 38, when taken under a declaration of trust operating as an immediate gift inter vivos. Substantially I take the same view as that expressed by SIMONDS, J., and SCOTT, L.J., in *Re Payne* (4), and in the opinions of the majority of the judges in the Court of Session in the present case. In my view, s. 38 (2) (a) and s. 39, taken as a whole and fairly read, lead to the conclusion that property in the case of gift by an inter vivos trust means not the sum or property initially put into trust, but the corpus of the trust estate as it may exist at the death.

The principle underlying s. 38 (2) (a) is very clear. It is to prevent a person avoiding death duty on some part of his estate by giving it away within a stated period of his death. I agree with LORD SANDS in *Lord Strathcona v. Inland Revenue* (1), that we are to assume that the deceased has in fact retained the property given away until his death and have to value it as at that date. We must, I think, follow out the fortunes of the subject of gift so far as these are due to the nature of the subject. So, if a subject is capable of growth or improvement or decay or death in the natural course of things, we should allow for these in the period between the date of gift and the date of death. I say this having in mind the racehorse used as an illustration in the *Strathcona* case (1). If the racehorse died in the years after it was gifted and before the donor's death, I would, as at present advised, say that it would not fall to be valued at all at the donor's death, because, if he had kept it instead of giving it away, we must assume, I think, that it would still have died, in which case it could not appear in the estate passing at the donor's death. In the same way, if it had become better, or worse, because of the additional years it had attained since the date of gift, it should be valued as at the death accordingly. LORD SANDS' view is, in my view, more logical and more consistent with the object of the statute than the Lord President (LORD CLYDE'S) conception of assuming a horse in the state and condition and with the prospects that the actual horse had at the date of gift and valuing such a horse at the date of death. Difficult questions might arise where the horse had been realised for cash before the date of the donor's death. But it is unnecessary to follow these out here, or to consider whether they would be solved by the definition of property in the Finance Act, 1894, s. 22. I venture into this excursion, not because the *Strathcona* case (1) is in point here, but because the considerations to which I have adverted and the principle enunciated by LORD SANDS have, I think, a certain bearing on this case. Trust property has the potentiality of appreciating or depreciating with age and the state of investment and this applies whether the property with which the trust starts is cash or securities or any other kind of property. If this property with its potentialities and incidents be assumed to have been retained and administered in the hands of or for the truster, as it was in the hands of the trustees, it would have borne duty in the state in which it was at his death. It seems entirely consistent with the policy and conception of the statute to say that that is how property gifted under a trust, whether cash or other, should be treated and valued at the donor's death.

Various anomalies were referred to by counsel for the respondent as arising under the provisions of various of the Finance Acts if settled property were treated as something different from the cash with which such settled property may have originated. Such anomalies would give rise, he said, to what would seem to be double taxation of what is substantially the same property. That is,

no doubt, an important consideration, but I have not found it necessary to consider whether these anomalies would arise or whether they could be resolved. The matter will have to await an actual case giving rise to such a question. Even if such anomalies will result, they will follow from the construction put on s. 38 (2) (a) by this House as applied to dispositions of property in trust. It is not, I think, permissible to control the construction of s. 38 (2) (a) of the Act of 1881 by conceptions as to settled property in later Finance Acts. The anomalies will result from different or conflicting conceptions in different statutory provisions. It may equally be pointed out that a construction that will treat the whole corpus of a trust fund as existing at the death as property taken under s. 38 (2) (a) will in general result in a more equitable result to the beneficiaries who will have to suffer the duty than the construction contended for by the appellants. In many cases, I imagine the trust assets of an inter vivos trust will show a serious depreciation in value as compared with the sum of money originally put in trust and it will come hard on the beneficiaries to have estate duty assessed on a sum substantially higher than the value of the assets out of which it is to be paid. The statute must, however, be construed independently of such considerations. But, for the reasons I have endeavoured to state, I think the court below came to a sound decision. I would dismiss the appeal.

Appeal allowed.

Solicitors: *Martin & Co.*, agents for *Mackenzie & Black*, Edinburgh, and *Hill & Hoggan*, Glasgow (for the appellants); *Solicitor, Board of Inland Revenue, England*, agent for *Solicitor, Board of Inland Revenue, Scotland* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

MEGHJI LAKHAMSHI & BROTHERS v. FURNITURE WORKSHOP.

[PRIVY COUNCIL (Lord Tucker, Lord Keith of Avonholm and Mr. L. M. de Silva), December 1, 2, 8, 9, 1953, January 13, 1954.]

Privy Council—Eastern Africa—Appeal to Privy Council—Appeal as of right where “matter in dispute amounts to or is of value of £500 or upwards”—Calculation of value—Eastern African (Appeal to Privy Council) Order in Council, 1951, art. 3 (a).

By art. 3 (a) of the Eastern African (Appeal to Privy Council) Order in Council, 1951, an appeal to the Privy Council lies as of right from any final judgment of the Court of Appeal for Eastern Africa “where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards.”

On an appeal to the Privy Council by landlords against an order of the Court of Appeal of Eastern Africa dismissing their application for possession of a plot of land together with an adjoining building in Kenya, which had been let by them to the respondents, the premises being within the scope of the Kenya Rent Restrictions Ordinance No. 22 of 1949, leave to appeal had been granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended on a preliminary point that the true test was how much it was worth to the landlords to succeed in the appeal, and that this was to be measured by deducting from the value of the land with vacant possession its value to the landlords subject to the statutory tenancy, and that, as no evidence of this had been adduced, there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue.

HELD: it was sufficient for an appellant to show that the case came within any one limb of art. 3 (a); the case fell within the latter part of the article, on the true construction of which it was the value of the property and not the value of the claim or question which was the determining factor; and, therefore, the preliminary objection failed.

Cases referred to:

- (1) *Macfarlane v. Leclaire*, (1862), 15 Moo. P.C.C. 181; 15 E.R. 462; 17 Digest 484, 481.
- (2) *Allan v. Pratt*, (1888), 13 App. Cas. 780; 57 L.J.P.C. 104; 59 L.T. 674; 17 Digest 485, 494.
- (3) *Lipshitz v. Valero*, [1948] A.C. 1.
- (4) *Popatlal Padamshi v. Shah Meghji Hirji*, Civil Appeal No. 32 of 1952 (Court of Appeal for Eastern Africa).
- (5) *Chogley v. Bains*, Civil Appeal No. 57 of 1952 (Court of Appeal for Eastern Africa).
- (6) *Africa Boot Co. v. Morley*, unreported, 1948.

APPEAL by landlords against a judgment of the Court of Appeal of Eastern Africa, dated Mar. 18, 1952, reversing a judgment of the Supreme Court of Kenya, dated July 25, 1951. On the appeal before the Privy Council the respondents took a preliminary objection that no appeal lay as of right to the Privy Council under the Eastern African (Appeal to Privy Council) Order in Council, 1951, art. 3 (a), and this report deals only with this point.

Khambatta, Q.C., Ramsay and Amerasinghe for the appellants.
M. J. Albery for the respondents.

Jan. 13. **LORD TUCKER:** On this appeal the respondents took a preliminary objection that no appeal lay as of right under art. 3 (a) of the Eastern African (Appeal to Privy Council) Order in Council, 1951. The appeal is by the landlords against an order dismissing their application for possession of a plot of land at Thika in Kenya which had been let by them to the respondents together with an adjoining building, which premises were within the scope of the Kenya Increase of Rent (Restriction) Ordinance, No. 22 of 1949. The article provides that an appeal shall lie as of right from any final judgment of the Court of Appeal.

"where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards."

Leave was granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that, as no evidence of this had been adduced, there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue.

It is quite possible that a case may fall in whole or in part within more than one limb of art. 3 (a) and it will suffice for an appellant to show that it comes within any one. It was laid down by this Board in *Macfarlane v. Leclaire* (1) that "the value of the subject-matter in dispute", under corresponding legislation relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal. The same test was applied in *Allan v. Pratt* (2) to a case of an appeal from a judgment awarding damages for personal injuries, it being held that the value was the sum awarded and not the sum claimed. More recently, in *Lipshitz v. Valero* (3), it was held that, where a tenant appellant had been evicted from a plot of land valued at £50 on which he had constructed a building at a cost of £450, the true test was whether it was worth £500 to him that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which had cost him £450 to erect. The first two of these cases were dealing only with the value of "the subject-matter in dispute", and it would appear that in the last case also it was the first limb of the article that was, primarily at any rate, under consideration. Their Lordships have no doubt that under whichever limb of the article any case may fall the "value" must be looked at from the point of view of the appellant, with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or vice versa.

Whatever the result might be in the present appeal if the words

"where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards"

stood alone, their Lordships are of opinion that the case falls within the latter part of the article which deals with

"some claim or question to or respecting property . . . of the said value or upwards",

and that, on the true construction, it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word "indirectly" seems to require this construction. Looked at from the angle of the landlords the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis. It by no means necessarily follows that the result would have been the same if the tenants had been appellants, and their Lordships do not intend to imply any doubt as to the

correctness in this respect of the recent decisions of the Court of Appeal for Eastern Africa in the cases of *Popatlal Padamshi v. Shah Meghji Hirji* (4) and *Chogley v. Bains* (5). Their Lordships have read a transcript of the shorthand note of the proceedings before this Board on the occasion of the application for leave to appeal in the case of *Africa Boot Co. v. Morley* (6) (where, however, the respondent was not represented), from which it would appear that art. 3 (a) must have been construed in the sense indicated above.

A Their Lordships were, accordingly, of opinion that the preliminary objection failed and proceeded to hear the case on its merits.

Preliminary objection dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellants); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

B

Re GOOD'S LEASE. GOOD v. WOOD AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), January 19, 20, 1954.]

Landlord and Tenant—Lease—Forfeiture—Relief—Relief to under-lessee—

C “Under-lessee”—*Written undertaking by lessee to execute legal charge or mortgage in favour of third party as security under guarantee—Payment by third party under guarantee—Application by third party for relief against forfeiture—Law of Property Act, 1925 (c. 20), s. 146 (4), s. 146 (5) (d).*

D W., the permitted assign of a lease dated Oct. 16, 1945, for a term of twenty-one years, deposited with T., the guarantor of W.'s bank account, the lease, the assignment and a document under hand whereby he undertook to execute in T.'s favour, when called on to do so, a legal charge or mortgage of the property, as security for all moneys paid by T. under his guarantee. W. became overdrawn and T., at the bank's request, paid the bank £300 on account. Subsequently, W. was adjudicated bankrupt and the landlord issued a writ against W. and his trustee in bankruptcy, claiming possession

E of the property on the grounds of breach of covenant and non-payment of rent. T. applied for relief against the forfeiture under the Law of Property Act, 1925, s. 146 (4).

F HELD: although T. had no vested interest in the property, but only a right to call on W. to execute a legal charge or mortgage in his favour, he was, by virtue of W.'s undertaking, a person having an agreement for an under-lease within s. 146 (5) (d) of the Act of 1925; he became entitled to have an under-lease granted when he made the payment of £300 to the bank; and, therefore, he was in the position of an under-lessee within s. 146 (4), and as such entitled to apply for the relief sought.

FOR THE LAW OF PROPERTY ACT, 1925, s. 146 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 745.

G SUMMONS by an equitable mortgagee of property for relief against forfeiture under the Law of Property Act, 1925, s. 146, in an action by a landlord for forfeiture of a lease dated Oct. 16, 1945.

Martin Roth for the applicant.

O'Malley for the respondent, the landlord.

H

HARMAN, J.: This is an application by summons in an action for possession by the landlord against one Wood (whom I call hereafter “the defendant”), who was the permitted assign of the lease created by the landlord and who had been adjudicated bankrupt. The defendant's trustee in bankruptcy was also joined in the action as the person in whom the term had become vested.

The lease, dated Oct. 16, 1945, which was granted by the landlord in favour of a limited company, created a term of twenty-one years, and provided for a

rent, increasing year by year, to an ultimate sum of £550 per annum. A premium of £200 was also payable. The lease, which included the usual covenants, contained covenants not to assign or under-let without the leave of the landlord, such leave not to be unreasonably withheld, and not to carry on businesses other than those of a greengrocer or fruiterer.

On Apr. 19, 1950, the lessee, with the landlord's permission, assigned the term to the defendant. That assignment was in common form and calls for no comment. The defendant's bank account was guaranteed by the applicant in this summons, one Harold Trussell, and in consideration of that guarantee the defendant, on Apr. 19, 1950 (the day on which he took the assignment of the term), deposited the lease and the assignment with the applicant together with a document under hand whereby he undertook, in the event of being called on by the applicant to do so, to execute a proper legal charge or mortgage of the said property

"to secure all moneys for the time being paid by you under the said guarantee."

The defendant fell into arrears with his rent, and on June 27, 1953, was adjudicated bankrupt. These proceedings were commenced by a specially indorsed writ dated Nov. 3, 1953, claiming possession, arrears of rent amounting to £266 19s., and mesne profits.

Meanwhile, the defendant had been granted an overdraft at Barclay's Bank, and, on June 15, 1953, the bank called on the applicant, as guarantor, to pay them a sum of money under his guarantee. He has paid them £300 on account and has, therefore, become entitled under the instrument of charge, if he calls on the defendant, to have a proper legal mortgage. The applicant now applies by summons in the landlord's action for relief against the forfeiture, and asks for an order vesting the leasehold premises in him for the residue of the term. For that purpose, he relies on the Law of Property Act, 1925, s. 146 (4), which repeated the Conveyancing Act, 1892, s. 4. The latter enactment gave under-lessees for the first time a right of relief in forfeiture actions. Section 146 (4) provides:

"Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document . . .",

as the court thinks fit. This action is brought to enforce a right of re-entry both for breach of a stipulation and for non-payment of rent. "Under-lease" is defined by s. 146 (5) (d) as including

" . . . an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted."

It is comparatively familiar law that relief under that section or its predecessor, s. 4 of the Act of 1892, had been given to mortgagees by sub-demise. That is not surprising, because a mortgagee by sub-demise has a term of years. So far as I know, there is no authority—none has been called to my attention—for similar relief being given to a person not having a legal term or any term vested in him, and, therefore, having no estate in the property. In a sense, the applicant has an interest in the property, as having a right to a charge on it. The definition does, however, provide that "under-lease" includes "an agreement for an under-lease". That must mean that the legislature intended,

not only a person having an under-lease, but also a person having an agreement for an under-lease to be included in the operation of s. 146 (4). The right of the applicant is a right to call on the defendant to execute a legal charge or mortgage. It is said that that right is to have a charge by way of legal mortgage such as is envisaged by the Law of Property Act, 1925, s. 87 (1), which, as is well-known, does not demise a term. The effect is, however, that

A . . . the mortgagee shall have the same protection, powers and remedies . . . as if . . . (b) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee."

B Therefore, as between him and his mortgagor, he is in the same position as if he had a mortgage by sub-demise. I think, on the whole, that the case of an equitable chargee, entitled, under the covenant, to have a charge by way of legal mortgage, would be no different were he entitled to have the mortgage direct by sub-demise. Apart from that, the words of this charge are "a proper legal charge or mortgage", and I think the mortgagee could choose which form his security should take and could ask for a mortgage by sub-demise of the term from the defendant or his trustee. He has not, however, made that demand, and it is argued that, that being so, he does not come within the definition because an under-lessee is defined as a person having an agreement for an under-lease where he has become entitled to have his under-lease granted. In my judgment, he became entitled to have his under-lease granted, in effect, directly he paid the money to the bank, and the fact that he did not make a formal demand cannot make any difference to his position. It appears to me, therefore, that the applicant is a person in a position to come as under-lessee within s. 146 (4) and ask for relief.

D That, however, is not the end of the matter, because under s. 146 (4) the granting of such relief is a discretionary matter. The applicant offers to pay all the arrears of rent and to enter into direct covenants with the landlord in terms which correspond, so far as the landlord requires it, with those of the lease itself. E It is true that there was in the lease a covenant by the lessee not to assign or under-let without permission, but there is no suggestion that the applicant is not a respectable and responsible person. If the landlord had wished to say that he was not bound to assign to him or to allow him to become an under-lessee because he was not a responsible party, it is for the landlord to take that point, but he has not done so. It appears to me that, if the applicant is able and willing to pay all the arrears of rent, and to execute a proper instrument entering into the covenants in the lease of Oct. 16, 1945, in so far as the landlord requires them, it would be right to give the applicant the relief that he seeks. F

Order accordingly.

Solicitors: *Albin Hunt & Stein* (for the applicant); *Cartwright, Cunningham, Haselgrove & Co.*, Walthamstow (for the respondent).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

THE ASSUNZIONE.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), December 11, 14, 15, 16, 17, 1953.]

Conflict of Laws—Shipping—Law governing contract of affreightment—Intention of parties not expressed—Conflicting inferences—Matters to be taken into consideration.

A charterparty between French charterers and Italian shipowners was based on a uniform general charter and was in the English language. The general terms had been agreed in previous correspondence between the parties' brokers in France and Italy respectively, but the charterparty was made in Paris and was headed "Paris, Oct. 7, 1949". A supplement to it was in French and the bills of lading were in the French language, and in French form with a typical French clause binding the master, and they were issued in France. The cargo was to be carried from a French port to an Italian port, but in an Italian ship, owned by an Italian partnership, wearing the Italian flag and with an Italian master. Freight and demurrage were to be paid in Italian currency in Italy, eighty per cent. of the freight before the ship arrived at an Italian port and the balance at the port of discharge. The bills of lading were indorsed by the consignees before the arrival of the ship. The contract was entered into in pursuance of an exchange agreement between departments of the French and Italian governments, but this was not known to the Italian shipowners. In an action by the charterers arising out of the contract, in which they contended that French law, and the shipowners contended that Italian law, applied.

HELD: (i) in determining what law the parties must be deemed to have intended to apply to a contract of affreightment where conflicting inferences could be drawn from different facts, regard must be had, not solely to any presumption arising from any particular fact, such as the country in which the contract was made or the flag, but to the terms of the contract, the situation of the parties, and, generally, all the surrounding facts and circumstances, in order to ascertain on balance of all the considerations what just and reasonable persons ought to have intended, taking into account the convenience of the parties and the efficacy of the contract.

Dicta of LORD WRIGHT in *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.* ([1937] 4 All E.R. 214), of LORD ATKIN in *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* ([1937] 2 All E.R. 166), of LANGTON, J., in *The Adriatic* ([1931] P. 246) and of SIR BOYD MERRIMAN, P., in *The Njegos* ([1936] P. 106), applied.

Lloyd v. Guibert (1865) (L.R. 1 Q.B. 115), considered.

(ii) besides the country in which the contract was made and the flag, the place and form of payment were of great importance, and regard could be had to the facts that the bills of lading were likely to be indorsed before the ship arrived and to be presented by Italian holders, that any claims there were were likely to be made by such Italian holders against the Italian ship, and that, if it could not be arrested, the owners could be sued in Italy, such facts being within the contemplation of the parties, since in continental law the bills of lading constituted part of the contract. No regard could be had to the exchange agreement as involving government participation in the contract (though that would be only a factor and not conclusive as to the intention, per BIRKETT, L.J.), since one party was unaware of it.

(iii) on the facts, on balance, Italian law must be deemed to have been intended to apply to the contract.

AS TO THE LAW GOVERNING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-270, paras. 321-323; and FOR CASES, see DIGEST, Replacement Vol. 11, pp. 420-427, Nos. 715-742.

Cases referred to :

- (1) *Peninsular & Oriental Navigation Co. v. Shand*, (1865), 3 Moo. P.C.C.N.S. 272; 12 L.T. 808; 16 E.R. 103; 8 Digest 127, 854.
- (2) *Lloyd v. Guibert*, (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 122 E.R. 1134; 11 Digest, Replacement, 422, 722.
- (3) *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260; 11 Digest, Replacement, 434, 788.
- (4) *Re Missouri S.S. Co.*, (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 61 L.T. 316; 11 Digest, Replacement, 424, 728.
- (5) *The Industrie*, [1894] P. 58; 63 L.J.P. 84; 70 L.T. 791; 11 Digest, Replacement, 433, 784.
- (6) *Russell v. Niemann*, (1864), 17 C.B.N.S. 163; 34 L.J.C.P. 10; 10 L.T. 786; 144 E.R. 66; 41 Digest 409, 2544.
- (7) *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206; [1938] A.C. 224; 107 L.J.P.C. 5; 157 L.T. 522; Digest Supp.
- (8) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; [1937] A.C. 500; 106 L.J.K.B. 236; 156 L.T. 352; Digest Supp.
- (9) *The Adriatic*, [1931] P. 241; 100 L.J.P. 138; 145 L.T. 580; Digest Supp.
- (10) *The Njegos*, [1936] P. 90; 105 L.J.P. 49; 155 L.T. 109; Digest Supp.
- (11) *Smith v. Weguelin*, (1869), L.R. 8 Eq. 198; 38 L.J.Ch. 465; 20 L.T. 724; 28 Digest 484, 890.
- (12) *Goodwin v. Roberts*, (1876), 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 1 Digest 344, 561.

APPEAL against an order of WILLMER, J., dated June 11, 1953, on a preliminary point in an action (i) for damages in respect of damage to and short delivery of a cargo of wheat being carried by the Assunzione from Dunkirk to Venice; and (ii) for the proportion of a salvage award which had had to be paid in respect of the cargo. WILLMER, J., held that Italian law, and not French law, applied to the contract of affreightment. The charterers appealed.

Sir Robert Aske, Q.C., and *H. V. Brandon* for the charterers.
Mocatta, Q.C., and *Colinvaux* for the shipowners.

SINGLETON, L.J.: This appeal from an order of WILLMER, J., arises out of a claim made by the plaintiffs, the owners of cargo lately laden on board the vessel Assunzione, against the defendants, who are the owners of the ship. The plaintiffs were charterers of the Assunzione, and they claimed against the shipowners damages in respect of damage to, and short delivery of, a cargo of wheat which was being carried by the Assunzione from Dunkirk to Venice. There is also a claim to recover the proportion of a salvage award which had to be paid on behalf of the cargo. We are concerned only with a preliminary point, and that is: What is the law to be applied to the contract of affreightment which was made between the parties? Both parties were at one time prepared to put the case in the alternative, that either the law of France or the law of Italy should govern the contract, but it was ascertained that the law of Italy contained certain provisions which would react unfavourably on the charterers' claim, and they now contend that the law of France should be applied, while the shipowners say that the law of Italy should be applied.

There is an agreed statement of facts, which provides :

"1. The [charterers] are a French organization called Office National Interprofessionnel des Cereales. The [shipowners] are an Italian partnership comprising two brothers carrying on business in Genoa and Naples. The Assunzione at all material times was of Italian registry and flew the Italian flag. 2. On May 21, 1949, a written exchange agreement was made between

the High Commissioner for Food of the Italian Republic acting through Federazione Italiana dei Consorzi Agrari (hereinafter called 'Federazione') of the one part and the High Commissioner for Food of the French Republic acting through the [charterers] of the other part whereby it was agreed inter alia as follows :—(a) That the High Commissioner for Food of the Italian Republic should put at the disposal of the High Commissioner for Food of the French Republic certain quantities of grain and flour to be delivered in France by July 15, 1949. (b) That the [charterers] should subsequently make restitution of such grain and flour by delivering like quantities to Italian ports by Jan. 1, 1950. (c) That the guiding principle of the agreement should be that it should bring no profit and cause no loss to the Italian government."

That agreement was drawn up in the two languages. In art. 2 (b) it is provided:

"The restitution will take place on dates to be determined by mutual agreement between the Federconsorzi and ONIC. It shall terminate, with the grain back in Italian ports, before Jan. 1, 1950. (c) The restitution ports are limited to those on the following list :—Genoa, Leghorn, Civitavecchia, Gulf of Naples, Messina, Catania, Palermo, Cagliari. (d) The tonnage to be shipped to each of the above-mentioned ports and the dates of shipment will be determined by mutual agreement between the Federconsorzi and ONIC. ONIC reserves the right of altering the tonnage indicated above according to the capacity of the steamers in accordance with a proportion that shall not exceed ten per cent. one way or the other."

By art. 3:

"The guiding principle of the exchange operations to which the present agreement relates is that the said operations will not bring any profit, or cause any loss to, the Italian government . . ."

It was in compliance with the clause as to restitution that grain was to be shipped, and was shipped, from France to Italy in October, 1949.

Paragraph 3 of the agreed statement of facts reads:

"On Oct. 7, 1949, in Paris the [charterers], in pursuance of their obligation to make restitution under the said exchange agreement, entered into a charterparty with the [shipowners] whereby they chartered the [ship-owners'] s.s. Assunzione to carry a cargo of wheat from Dunkirk to Italy. The said charterparty was negotiated through L'Azerad & Fils, brokers, in Paris, and Ballestrero Tuena & Canepa, brokers in Genoa, as appears from the cables and correspondence constituting appendix B hereto. The [charterers] were not at any material time aware of the terms of the said exchange agreement."

I draw attention to the fact that it was common ground that the shipowners were not aware of the terms of the exchange agreement between the departments of the Italian and French governments.

The statement continues:

"The said charterparty was drawn up in the English language using the printed form of uniform general charter of the Documentary Council of the Baltic and White Sea Conference. The said charterparty, to which the parties will refer for its full terms and effect, constitutes appendix C hereto. 4. On Oct. 21, 1949, at Dunkirk there were issued two bills of lading signed on behalf of the master of the Assunzione in respect of a quantity of wheat shipped on board the said vessel at that port by Société Generale de Surveillance S.A. (hereinafter called 'Surveillance') as agents for the [shipowners] who were the owners thereof. The said bills of lading were drawn up in the French language and provided inter alia for carriage to

Venice and delivery to order on payment of freight in accordance with the said charterparty."

The bills of lading are attached.

" 5. At some time between Oct. 21, 1949, when the Assunzione sailed from Dunkirk and Dec. 10, 1949, when she arrived at Venice the bills of lading upon presentation of which the cargo was ultimately delivered were endorsed in blank by Surveillance and sent through the post to Sorveglianza S.I.P.A. in Italy (hereinafter called 'Sorveglianza'). Thereafter they were transmitted by Sorveglianza to Federazione and endorsed by the latter in Venice before presentation to the ship. 6. During the course of the voyage of the Assunzione from Dunkirk to Venice carrying the said wheat damage was sustained by and salvage services rendered to both ship and cargo. 7. On Dec. 12, 1949, in Venice a general average agreement relating to the Assunzione's said voyage was signed by Sorveglianza and the master of the said vessel. A true translation of the said agreement, to which the parties will refer for its full terms and effect, constitutes appendix E hereto. 8. On or about Dec. 24, 1949, the Assunzione completed discharge of her cargo."

The remaining paragraphs of the agreed statement of facts deal with what followed and the nature of the claims; the first claim appears to have been made by a letter dated Dec. 27, 1949. It is on that agreed statement of facts, and on the documents, that this preliminary point has to be determined.

The charterparty, to which importance is attached by counsel for the charterers is headed: "Paris, Oct. 7, 1949", and from that comes the first point made by learned counsel for the charterers. It is said that this charterparty was made in Paris between people who were in Paris, and that the fact that they put "Paris" at the head of the document shows that they attached importance to the fact that the place at which the contract was made was in France. But if one looks a little further into the matter, one finds that the signing of the charterparty followed on certain correspondence which had taken place, as shown by the documents. Ballestrero Tuena & Canepa, the Italian brokers, corresponded with L'Azerad, the French brokers, between Oct. 5 and Oct. 7, and in general the terms of the charterparty were agreed in that correspondence before the actual charterparty was signed. I wholly agree with the submission of counsel that the parties contemplated that there should be a charterparty and that the negotiations which they had were leading up to that end. But, none the less, it is not a case of two parties who are resident, or whose headquarters are, in Paris. One party has its headquarters in Paris, but the other has its headquarters in Italy. After this correspondence the brokers finally signed the charterparty in Paris on Oct. 7.

The charterparty provides that the vessel being so laden

"shall proceed to one good and safe port west coast Italy including Sicily or at charterers' option, one good and safe port Adriatic coast Italy, amongst Bari, Ancona or Venice as ordered on signing bills of lading or so near thereunto as she may safely get and lie always afloat and there deliver the cargo on being paid freight—on intaken quantity—as follows 1,980 Italian lire per metric ton if west coast Italy, 2,205 Italian lire per metric ton if Adriatic coast Italy."

The cargo which she was to take on board was

"7,000 metric tons five per cent. more or less, quantity at master's option, wheat in bulk, ten per cent. in bags."

The provision as to payment, which is to be made in Italian lire, was relied on by counsel for the shipowners in support of his submission.

In the original form of the charterparty the payment of freight was covered by cl. 4. That clause is struck out, and in place of it reference has to be made to cl. 16, above which is the heading:

"Supplementary clauses of the charterparty for s.s. Assunzione dated Paris Oct. 7, 1949—Dunkirk/Italy."

Clause 16 reads :

"The freight is to be paid in Italian currency to the credit of Fratelli Rizzuto, Naples. Eighty per cent. (80) of the freight, after deduction of advances made at loading port, if any, will be paid by charterers within eight days after reception by 'L'Azerad, Paris' of the master's telegram mentioning date of sailing, and amount of disbursements at loading-port if any. Balance of freight to be paid after discharge of the cargo, within eight days after reception by charterers of the freight account duly visé by their local representative at discharging port. In any case, freight payable discountless, considered earned on signing bills of lading and non-returnable, ship and/or cargo lost or not lost."

Counsel for the shipowners attaches importance to the fact that the freight was to be paid in Italian currency; that it had to be paid to the credit of Fratelli Rizzuto, Naples; that eighty per cent. of it was to be paid by the charterers eight days after reception by "L'Azerad, Paris" of the master's telegram mentioning date of sailing, and that the balance of the freight was to be paid at the discharging port. Those are all factors which he contends go towards supporting his case that the parties, if ever they thought about this matter, would have regarded Italian law as the law which they would apply.

Two other clauses of the charterparty are important :

"7. Demurrage. Demurrage at the rate of 180,000 Italian lire per day or pro rata for any part of a day, payable day by day, to be allowed merchants altogether at ports of loading and discharging over-time, if any, to be for charterers. 8. [Shipowners] shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight, dead-freight, and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the [shipowners] have been unable to obtain payment thereof by exercising the lien on the cargo. 9. Bills of lading. The captain to sign bills of lading at such rate of freight as presented without prejudice to this charterparty, but should the freight by bills of lading amount to less than the total chartered freight the difference to be paid to the captain in cash on signing bills of lading."

The cargo was received, and bills of lading were issued on Oct. 21 at Dunkirk. The bills of lading are in the French language and in French form, but there is stamped on each a marginal note bringing in the provisions : "Both to blame collision clause" and the "General average and the new Jason clause." The bills of lading themselves show that a parcel of wheat was received on board and the destination was Venice, with delivery to order following the charterparty of Oct. 7 according to the York and Antwerp Rules, and it ends:

"... L'accomplissement de ce que dessus j'ai obligé et oblige ma personne, mes biens et mon dit bâtiment avec toutes ses dépendances..."

That, as counsel for the charterers pointed out, is a typical French clause by which the master binds his body, his goods and his ship in the fulfilment of his duty. I have already referred to the exchange agreement as far as is necessary.

WILLMER, J., came to the conclusion that the law of Italy should be applied to this contract. I should say that the charterers arrested the ship, and an action was brought in this court. The action was by writ issued on Oct. 27, 1950, and there have been various amendments of the pleadings.

Many authorities have been cited to us on the question of what law should be applied. The parties did not state their desire, or their intention, on the subject.

It has been said that when that happens one must endeavour to find what the intention of the parties was on the matter. That does not appear to be to me very helpful, for in most cases neither party has given it a thought, and neither has formed any intention on it. Still less can it be said that they have any common intention. Authorities cited to us go back to 1865. Counsel for the charterers relies on what he described as the general rule, i.e., that the law to be applied should be the law of the country in which the contract was made.

A *Peninsular & Oriental Navigation Co. v. Shand* (1) was an appeal to the Privy Council from the Supreme Court of Mauritius. The facts as stated in the headnote are (3 Moo. P.C.C.N.S. 272):

B “A passenger by an English vessel belonging to an English company from Southampton to Mauritius via Alexandria and Suez, took and signed a ticket, in the body of which the engagement of the company was stated to be subject to the conditions and regulations indorsed thereon; among which was this clause—‘the company do not hold themselves liable for damage to, or loss, or detention of passengers’ baggage.’ A package of baggage being lost during the voyage, the passenger sued the company in the Supreme Court at Mauritius for damages for the loss. That court held that the contract was governed by the French law in force in Mauritius, and held that the company were liable.”

C The Privy Council reversed that decision. I find it difficult to imagine how anyone travelling from this country to Mauritius on a ticket issued by the Peninsular and Oriental line could expect the law of France to be applied to that contract, which he, an English subject, made with an English company

D in this country for the carriage of himself and his personal baggage in a British ship. None the less, the court in Mauritius came to the conclusion that the law of France, which ran in Mauritius, ought to be applied. Giving the judgment of the Board, TURNER, L.J., said (*ibid.*, 290):

E “The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its actions upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any

F contrary rule defeats the intention of the parties, as well as neglects to observe the recognised comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties. This is a contract made between British subjects in England, substantially for safe

G carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the appellants frame and issue, they have introduced for their own

H protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them.”

On those facts it was held by the Privy Council that the law of England applied, and counsel for the charterers placed reliance on the words which I have read as to the general rule. There is no doubt of the strength of it in some cases. If two people resident in this country enter into a contract of carriage or of affreightment

by which goods are to be carried to various quarters of the world in a ship belonging to one of the contracting parties, it might well be said that they both intended that the law of the country in which the contract was made should apply. In the case cited it was the law of the ship as well.

Another view was expressed in *Lloyd v. Guibert* (2). The headnote reads (L.R. 1 Q.B. 115):

"Where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. The plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc in Hayti, to Havre, London, or Liverpool, at charterer's option. The charterparty was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea damage and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship, freight and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so as that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master:—*Held*, that the parties must be taken to have submitted themselves, when making the charterparty, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred."

That was a decision on the facts of the case, but the headnote gives support to the submission of counsel for the shipowners that one must look, in the first instance, to the law of the country to which the ship belongs. I do not think it is any more accurate to say that than it is to say that the law of the country where the contract is made must govern. The report says later (*ibid.*, 118):

"The Court of Queen's Bench gave judgment for the defendants, on the ground that the power of the master to bind his owners personally is but a branch of the general law of agency, and that the flag of the ship was notice to the plaintiff, that the master's authority to bind his owners was subject to the limitation stated in the plea to be imposed by the law of France."

In the Exchequer Chamber the judgment of the court was given by WILLES, J., who said (*ibid.*, 118) that "the plaintiff must have known that the ship was French." The arguments adduced on the two sides are set out (*ibid.*, 119, 120):

"Upon these facts, it was insisted for the plaintiff that the decision ought to proceed upon either what was called the 'general maritime law', as regulating all maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made ('*lex loci contractus*'); the Portuguese law, because the bottomry bond, which in one sense caused the question to arise, was given in a Portuguese port, and the rule that the place governs the act ('*locus regit actum*') was supposed, therefore, to furnish a solution: or the English law, as being that of the place of the final act of performance by the delivery of the cargo ('*quasi lex loci solutionis*'), in either of which alternatives the liability of the defendants was established. And it was argued, that, the charterparty having been entered into bona fide in the ordinary course of business by the master, within the scope of his ostensible authority to

contract for the employment of the vessel, which the owner, by appointing a master and sending him abroad in command, allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him than by secret instructions from the owners, which would clearly be inoperative—a proposition which needs no authority in our law, and for which French authorities will be found in Pailliet's edition of the 'Code de Commerce,' art. 216, in the note. For the defendants, it was answered, that by the French law they are absolved; and that that law, as being that of the ship, governs the case, either because the character of the transaction itself, showing that the plaintiff impliedly submitted his goods to the operation of the law of the ship, or because the master, who entered into the contract (although his doing so was within the scope of the authority which he was allowed by the owners to assume), was disabled by the French law from binding his owners, otherwise than with the exception expressed or implied of exemption from liability by abandonment, and that of such disability, or lack of authority, his flag was sufficient notice."

Thus, the argument for the defendants was "the flag", and on the other side there were several differing submissions. The court decided on the facts in favour of the flag. WILLES, J., said (*ibid.*, 129):

"Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce."

It is in that case in the year 1865, the same year as the *Peninsular & Oriental* case (1), that the doctrine of convenience is first mentioned, so far as I have seen. In *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (3), the Court of Appeal had to consider this question on an appeal from an order of the Queen's Bench Division in favour of the plaintiffs. The headnote reads (10 Q.B.D. 521):

"The plaintiffs shipped goods on board the defendants' vessel, the Crown Prince, under a bill of lading, which contained exceptions of, amongst other things, 'collision', and 'accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company, in navigating the ship.' In the course of the voyage the Crown Prince came into collision with another vessel of the defendants, the Atjeh. The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the Atjeh was mainly in fault; but the Crown Prince also was in some degree to blame:—*Held*, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of a failure to perform the undertaking therein contained to carry the goods safely upon the voyage."

The important part of the report for the purpose of this case is in the judgment of LINDLEY and BAGGALLAY, L.JJ., delivered by LINDLEY, L.J., in which he said (*ibid.*, 540):

"The decision of the court below as regards the law applicable to the case appears to me correct. The parties to the contract were English, although the master who signed the bill of lading was a Dutchman. The contract was in the English language, and was made at Singapore, which is an English port, and where English law prevails. The ship sailed under the

Dutch flag, and was bound to a Dutch port, and was commanded by a Dutch captain. As regards the privileges of trade which the ship might enjoy as a Dutch ship in Dutch ports, the parties no doubt relied on the Dutch law, but as regards the construction and effect of the contract itself as between the plaintiffs and the defendants there can I think be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd v. Guibert* (2), but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated."

I pause there to say that it was for that reason, because of the passage in the judgment of LINDLEY, L.J., that I read earlier the arguments as adduced and as stated by WILLES, J. (L.R. 1 Q.B. 119, 120), in *Lloyd v. Guibert* (2). LINDLEY, L.J., draws attention (10 Q.B.D. 540) to the fact that in *Lloyd v. Guibert* (2) there was really no other law which could be applied on the argument except the law of the flag.

The lord justice continued (*ibid.*):

"The plaintiff there was English, the defendant French; the *lex loci contractus* was Danish; the ship was French; her master was French and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different and so is the inference to be deduced from them. The *lex loci contractus* was here English and ought to prevail unless there is some good ground to the contrary. So far from there being such ground the inference is very strong that the parties really intended to contract with reference to English law."

That judgment is claimed by counsel for the charterers as support for his general proposition, but equally it may be said that there is a strong presumption, or strong inference, that the parties intended the contract to be on the basis of English law.

In *Re Missouri Steamship Co.* (4) the headnote reads:

"When a contract is made in one country to be performed wholly or partially in another, *prima facie* the contract is to be construed and enforced according to the *lex loci contractus*; but the court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law. A contract was made in Massachusetts, U.S., between an American citizen and a British company of shipowners, by which the company undertook to carry certain cattle from Boston to England in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause is valid by English law, but void by the law of Massachusetts as being against public policy. The cattle were lost by the negligence of the master and crew, and the shipper claimed against the company for the loss. *Held* (affirming the decision of CHITTY, J.), that the contract itself showed that the parties intended it to be governed by English law, and that the stipulation exempting the company from liability through the negligence of their master and crew, not being immoral or forbidden by positive law but only void under the law of Massachusetts as being against public policy, would be enforced by an English court; and the claim was dismissed."

LORD HALSBURY, L.C., said (*ibid.*, 336):

A “Now this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship by a British company whose domicile is in England. Those circumstances, though very strong, would perhaps not be conclusive. But when I look at the contract itself and find that the ordinary exceptions to the bill of lading are the Queen’s enemies and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by English law in their contracting relations. If I am to assume that the law of the United States is that this particular stipulation now in dispute is of no validity in the United States and cannot be enforced, when I find that both parties to the contract make this stipulation a part of the contract into which they enter which is of validity in England and can be enforced, and cannot be enforced in the United States, it seems to me to follow irresistibly that the contract relations into which the parties entered were such that they intended to be governed and regulated by English law; and if that is so the question is free from doubt.”

B FRY, L.J., said (*ibid.*, 341):

C “Now, in the first place, the ship was an English ship; the owners were an English company; England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms”,

D and the learned lord justice was satisfied that the parties must be taken to have intended that English law should be applied to the determination of any question which might arise under that contract.

In *The Industrie* (5), the Court of Appeal reversed a decision of GORELL BARNES, J., and said that the intention of the parties was to make an English contract. LORD ESHER, M.R., said ([1894] P. 71):

E “This case turns entirely on the one question whether the defendants are liable to pay certain freight. The charterparty, which is the contract of carriage, is in writing, and, therefore, it is for the court to construe it; and the court, under one set of circumstances, must construe it according to one set of canons of construction, and, in another set of circumstances, according to another set. If a foreign contract is brought before an English court, the court has to construe that foreign contract, which is in writing, just as it is the court which has to construe an English contract; but if it is a foreign contract which has to be construed, it must be construed according to the canons of construction used in the country to which the contract belongs, or, as we say, according to the place where it is made. Therefore, the first question is this: Is this contract, as a matter of construction, to be construed according to the canons of English construction, or according to the canons of German construction? It is a contract made for the carriage of goods on board a German ship. Is that conclusive to show that it is to be construed according to German canons of construction? It seems to me that that is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied. The mere fact of its being written in English will not enable the court to say that it is not a German contract. It might be made with the master abroad for the use of his ship from one foreign country to another foreign country, so as to have nothing to do with England at all. If it were so, and the only fact to rely on was that the contract was written in the English language, I should think it would be construed according to the canons of the law of the country of the ship. It would be made under the flag, just as if it were made in the country to which the ship belongs. But where you find a great many

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other matters come in you have to consider them. This is, no doubt, a contract in regard to carriage on board a German ship, but it is made between a German owner and the proposing English shipper, and it is made by means of a charterparty in writing, the instrument being headed with the English words 'charter party'. It is made in London, the contract is negotiated between two English houses, the English brokers authorized by the German owner and the defendants, the shippers, who are English merchants. It is made on an ordinary English form of charterparty. Whether an ordinary German charterparty is at all in the form of an English charterparty I do not know. But this is on an ordinary form of English charterparty, and every stipulation in it is an ordinary stipulation in an English charterparty. The words or phrases used are peculiar to England. One has been particularly noticed—namely, 'the Act of God'. That is an English phrase, and has an English meaning. I care not whether there are words in a German charterparty agreeing with that; but it seems almost agreed that there are not. In the same way there are the words 'the Queen's enemies.' If this was a German charterparty, I do not doubt that 'the Queen' would mean 'the Emperor of Germany', in accordance with the decision in *Russell v. Niemann* (6). But it is a thing to be taken notice of when you are trying to determine whether the document is an English or a German document; and then, when you find the terms used are applicable to England and not applicable to Germany, it goes a great way to show that the document is to be construed as English. It is not, therefore, on any one of the facts I have stated that reliance is to be placed, but on all of them together. What is the true inference? In order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together show that the intention was to make an English contract, and that is all we want."

Dealing with the question of freight, the Master of the Rolls said (*ibid.*, 74):

"Counsel for the plaintiff wishes to read it thus: 'Payment to be made on right delivery of cargo, if discharged in the United Kingdom'; in other words, 'if discharged nowhere else'. I cannot read it so. I do not think that is the right construction. It is freight to be paid on right delivery of cargo, wherever the destination is. But as to the mode in which it is to be paid, if discharged in the United Kingdom it is to be paid in cash as customary, and if discharged elsewhere in cash at the exchange of the day. That is to say, the freight when due is to be paid in English money. If it is paid in England it is to be paid, of course, in cash, and if it is to be paid abroad the payment is to be equal to cash in England, by reason of its being at the exchange of the day. Therefore you have now, if that be the true construction, to construe according to the canons of English construction the phrase 'freight to be paid on right delivery of the cargo.'"

The lords justices concurred.

Those are all the older authorities to which I think it necessary to refer. In two more recent cases the principles are stated in a way which appears to me to make it unnecessary to refer to many of the earlier authorities. I have thought it right to deal with some of them partly out of respect for the argument

addressed to the court, and partly because it does seem desirable to show, if it be the fact, that no one of the tests which have been mentioned can, taken by itself, provide a complete answer in all circumstances.

In *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (7), in the Privy Council, LORD WRIGHT, in giving the judgment of the Board, said ([1937] 4 All E.R. 214):

A “The proper law of the contract means that law which the English or other
 court is to apply in determining the obligations under the contract. English
 law, in deciding these matters, has refused to treat as conclusive rigid or
 arbitrary criteria, such as *lex loci contractus* or *lex loci solutionis*, and has
 treated the matter as depending on the intention of the parties, to be
 ascertained in each case on a consideration of the terms of the contract, the
 situation of the parties, and generally on all the surrounding facts. It may
 B be that the parties have in terms in their agreement expressed what law
 they intend to govern, and in that case *prima facie* their intention will be
 effectuated by the court. But in most cases they do not do so. The parties
 may not have thought of the matter at all. Then the court has to impute an
 intention, or to determine for the parties what is the proper law which, as
 just and reasonable persons, they ought to or would have intended if they had
 C thought about the question when they made the contract. No doubt there
 are certain *prima facie* rules to which a court, in deciding on any particular
 contract, may turn for assistance, but they are not conclusive. In this branch
 of law, the particular rules can only be stated as *prima facie* presump-
 tions. It is not necessary to cite authorities for these general principles.
 Sometimes their application involves difficulty; but not in this case. It has
 D been already pointed out that there are, in their Lordships’ opinion, such
 circumstances as lead to the inference that, in the present case, the proper
 law of the contract is the law of New Zealand, and, accordingly, that that
 law should *prima facie* govern the rights and obligations to be enforced under
 the contract by a court before which the matter comes, a *fortiori* a New
 Zealand court.”

E I take a few lines from the middle of that passage, and omit certain words
 (ibid.):

“Then the court has . . . to determine for the parties what is the proper
 law which, as just and reasonable persons, they ought to . . . have intended
 if they had thought about the question when they made the contract.”

F That, I believe, is the duty on us, and in seeking to determine the question we
 must have regard to the terms of the contract, the situation of the parties, and
 generally all the surrounding facts.

The other case is *R. v. International Trustee for Protection of Bondholders
 Aktiengesellschaft* (8), a case of a different nature, but one in which a like question
 arose. LORD ATKIN in the House of Lords, said ([1937] 2 All E.R. 166):

G “The legal principles which are to guide an English court on the question
 of the proper law of a contract are now well settled. It is the law which the
 parties intended to apply. Their intention will be ascertained by the inten-
 tion expressed in the contract, if any, which will be conclusive. If no
 intention be expressed, the intention will be presumed by the court from the
 terms of the contract and the relevant surrounding circumstances. In
 H coming to its conclusion, the court will be guided by rules which indicate
 that particular facts or conditions lead to a *prima facie* inference, in some
 cases an almost conclusive inference, as to the intention of the parties to
 apply a particular law, e.g., the country where the contract is made, the
 country where the contract is to be performed, if the contract relates to
 immovables the country where they are situate, the country under whose
 flag the ship sails in which goods are contracted to be carried. But all these

rules only serve to give prima facie indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such."

I do not think that for this purpose any distinction is to be drawn between what LORD WRIGHT spoke of as a prima facie presumption and what LORD ATKIN described as a prima facie inference.

On the authorities counsel for the charterers submitted that it was not possible to spell out of the cases any rule other than that of the place where the contract was made. Counsel for the shipowners claimed that no stronger inference could be drawn from the place where the contract was made than from the flag of the country under which the ship sailed. Indeed, he submitted that one ought, in the circumstances of this case, to have regard first to the flag which the ship wore, and he relied on the decision in *Lloyd v. Guibert* (2). His main contention was that this was not a case of an inference to be drawn one way or the other, but one in which the facts should be weighed, and that, if they were weighed, those pointing towards the application of Italian law weighed down any pointing the other way.

Without doubt some features in this case point one way, and others in another direction. When a number of circumstances has to be considered in deciding which system of law applies, a presumption or inference arising from one alone becomes of less importance. In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself. When such a position arises, all the relevant circumstances must be borne in mind, and the tribunal must find, if it can, how a just and reasonable person would have regarded the problem. No good purpose is served by saying that the French charterers would never have agreed to the application of Italian law, or by saying that the Italian shipowners would never have agreed to the application of French law, for that would have meant that there would have been no contract, and there is a contract.

The charterers, who were also shippers under the bills of lading, were a French organisation; the contract was entered into by a charterparty which was made in France, after discussions to which I have referred, and the bills of lading were issued in France. The language of the charterparty is English, but no one contends that English law is to be applied. Some support is given to the argument of counsel for the charterers by the bills of lading which are in French, and which contain the particular terms which I have mentioned. Those matters support the contention of the charterers. Counsel for the charterers relies, too, on the exchange agreement, on the fact that, in making arrangements for the carriage of the wheat from Dunkirk to an Italian port, the charterers were acting in pursuance of what had been agreed between two government departments. I do not see, in the circumstances of this case, that great help is given by that fact, if it be a fact. WILLMER, J., said:

"It was contended in those circumstances that that assisted to raise the inference that French law was intended to be applied. With regard to that latter point, I am not at all satisfied as to what in fact the status of the actual charterers was; and if it was intended to rely on their being in effect the French government, it seems to me that that is a fact which ought, if not agreed, to have been proved before me. Nor do I think very much of this point when I bear in mind that, according to the agreed statement of facts, the whole of the background of circumstances, of which this contract of affreightment merely forms a small part, was quite unknown to the defendant shipowners. I refer to the fact that this was all part of an international transaction providing for a loan of grain between the French and Italian governments. But, as I say, that was entirely unknown to the defendant shipowners, and I do not see, if it be the fact that the charterers are in a sense some organ of the French government, how the shipowners

were to be expected to know that; and if they did not know of it I do not see how that fact can have had any influence at any rate on their intentions."

With that I agree, and I do not think that any question of a sovereign State being a party to the contract comes into this case.

A The circumstances which support the shipowners' contention that Italian law should be applied include these. The ship was an Italian ship owned by two Italians in partnership, and a ship wearing the Italian flag. The master was an Italian. The contract was for carriage from a French port to an Italian port and the cargo was to be delivered at an Italian port. It is right to say that loading was at a French port and discharging at an Italian port, and one may appear to cancel the other, but there are further considerations. The charterparty provided that freight and demurrage should be paid in Italian currency. Eighty per cent. of the freight had to be paid in Italy before the ship arrived at an Italian port, and the balance had to be paid at the discharging port. Clause 7, as to demurrage payable in Italian lire, too, is of importance on this part of the case. The bills of lading were indorsed by Italian consignees before the arrival of the ship at Venice. The judge thought that that must have been in the contemplation of the parties, as the bills of lading were made out to order, by which it must be assumed that endorsement was contemplated.

B It is seldom, if ever, that one will have one of the elements or tests, and nothing else. It might be right to apply the test as to the place of the contract, if one was left with that alone, or that the flag would be the proper test if one had that alone. WILLMER, J., said:

D "I have given the best consideration I can to the various authorities to which I have been referred, and it seems to me that both parties in putting forward their respective contentions have stated their case too high. It is undoubtedly the fact that the place where a contract is made is a point of very great importance in considering any contract, whether it be a contract of affreightment or any other kind of contract. It is equally clear, I think, that the nationality of the ship concerned (and by that I mean the real nationality of the ship) is a matter which is obviously of considerable importance in dealing with the proper law governing a contract of affreightment. But it seems to me that it is putting it too high to say that the place where the contract is entered into is the fact which promotes the 'primary inference', which was the expression used by counsel for the charterers in his argument on behalf of the charterers. Equally, I doubt whether it is possible to say in these days that the flag of a ship, or, indeed, the nationality of the ship, raises anything in the nature of a presumption."

F It may be that in the words the learned judge used in the last line he overlooked the tests stated both by LORD WRIGHT ([1937] 4 All E.R. 214) and by LORD ATKIN ([1937] 2 All E.R. 166) in the passages that I have read, that you must come down on the side of the flag if there is nothing pointing in an opposite direction. It is a position which can seldom arise. In the case of a contract of affreightment made in one country for shipment of goods in a ship wearing the flag of another country, different considerations arise at once, the place where the contract was made and the flag of a different country. Those are matters for consideration, and so are the terms of the contract. Though I believe it to be impossible to state any rule of general application, I feel that matters of very considerable importance are the form of, and place of, payment. In this case payment had to be made in Italian lire, and in Italy. In the circumstances of this case I regard it as a very important feature, coupled as it is with the facts that the ship was an Italian ship and that the destination was an Italian port.

H We were referred to two other authorities of recent date, one a decision of LANGTON, J., *The Adriatic* (9), in which he put forward convenience as a test, and the other a decision of SIR BOYD MERRIMAN, P., in *The Njegos* (10), in which he placed emphasis on a decision according to business efficacy. It

seems to me that both those decisions are completely in line with the general proposition which I have sought to state, and which is taken from the words of LORD ATKIN ([1937] 2 All E.R. 166) and of LORD WRIGHT ([1937] 4 All E.R. 214). One must look at all the circumstances, and one must seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in a way in accordance with business efficacy.

Applying the rule I have stated, and if I am right in my view, weighing all the facts to which attention was directed, I am satisfied that the scale comes down in favour of the application of Italian law, and that the decision of WILLMER, J., was right. In my opinion, the appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. The issue in this appeal was: What was the law to be applied to this particular contract of affreightment?, the charterers contending that the law applicable should be French law and the shipowners that it should be Italian law. The principle on which that kind of question has to be determined has been laid down in a long line of cases. If the intention of the parties is not expressed in the contract itself, the court must ascertain as best it can what is the implied or the presumed intention to be gathered from the whole of the facts. The real controversy in this appeal has centred, not on the question of principle, but on the method to be employed in applying that principle to the facts of this case. It has been said that, in the course of time, and certainly from 1865, certain rules have been evolved by which this kind of question is to be determined, and we have been referred to those rules and to many cases on them—rules applying the law where the contract is made, the law of the flag, the law of immovables, the law of the place of performance, and so on. In this case it has really been a contest between two of those, the rule founded on the law of the place where the contract is made, and the rule founded on the law of the flag. From a consideration of all the cases, many of them cited by my Lord, it is clear that none of those rules is in any sense conclusive of itself. They may be displaced by a clear intention to be gathered from an examination of the facts and the circumstances of the particular case. And, if in such examination the test is how just and reasonable mean would be supposed to declare their intention, the facts assume the greatest possible importance.

Counsel for the charterers placed the greatest reliance on the first fact, that the charterparty bears on its face the words "Paris, Oct. 7, 1949". Among all the facts in the case, he said that the facts that the contract was made in France and that the charterparty bore the word "Paris" was of supreme importance and should be the chief, the dominant, and the primary consideration in the case. Counsel for the shipowners attacked that proposition with force. He said (and I was inclined to agree with him) that it could not be said in any true sense of the words that the contract was made in France. The fact that the charterparty bore on its face the word "Paris" was a long way from showing that the contract was made in France, and he referred to the correspondence which my Lord has dealt with, in which the French and Italian brokers were discussing the terms. It is significant that one of the terms inserted in the correspondence, when the parties were negotiating, was that the contract should be in the form of the uniform general charter approved by the Documentary Council of the Baltic and White Sea Conference, the "Gencon" as it is termed. And it is quite clear from the charterparty which bears the name of Azerad, that the Gencon form was a common form employed obviously in charterparties of this nature. But I think counsel for the shipowners was right in saying that it is too much to say that the contract was made in France, because the correspondence would seem to indicate that all the material matters—though not all the matters

—were negotiated by letters and by telegrams passing between Genoa and Paris.

A The matters of controversy in this case could never have arisen had there not been the exchange agreement, which is headed "Rome-Paris", and which, according to my copy, is a translation from the Italian. That agreement refers to the governments, and art. 6 states how differences of opinion or conflict are to be dealt with. If they are of a technical and material order they are to be settled amicably between ONIC and Federazione, and, if an amicable agreement is not possible, the parties will accept arbitration, but any difference not foreseen is to be settled through diplomatic channels. The parties certainly had in mind the possibility that difficulties might arise, but they never gave attention to the question of the law applicable in the event of differences. The force of counsel's argument about "Paris" appearing on the charterparty is greatly weakened if the history leading up to it is looked at. I accept fully his submission that there is no complete and binding contract until one has the charterparty, but having regard to the correspondence which passed between Genoa and Paris, it is almost an accidental circumstance that the word "Paris" appears on the charterparty. I do not think that it plays the dominant part counsel claimed for it. This was his first point, that the law of the place of the contract, the *lex loci contractus*, governed the matter.

B Counsel for the charterers said further that, unless one found in one's examination of all the facts something to displace that primary presumption, the conclusion must be that the law of France should apply. As to those facts, he said that, while the charterparty was in English an important supplement was in French, and that the bills of lading were in French and the sentence which my Lord has emphasised was peculiarly French phraseology. He then raised a point which struck me as being of very great importance, that this was a contract made by a sovereign State, and it would be a strong thing to presume an intention that that sovereign State, when entering into a contract, would be content to be bound by a law other than its own, when it is clear that the charterers, as the agreed statement of facts says, on Oct. 7, 1949, in Paris agreed, in pursuance of their obligation, to make restitution under the exchange agreement. The people who were to make restitution were, of course, the French government. The Italians had sent over their wheat, and it was part of the bargain that the French government in their turn would make restitution without profit or without loss. But in the agreed statement of facts the words appear

E " . . . the [charterers], in pursuance of their obligation to make restitution under the said exchange agreement, entered into a charterparty ",

F and so on. Whatever the solution of that matter may be, certain words of LORD ATKIN in the *International Trustee* case seem to me to bear very strongly on this matter. After the passage which my Lord cited LORD ATKIN continued ([1937] 2 All E.R. 166):

G "The principle of law so stated applies equally to contracts to which a sovereign State is a party as to other contracts".

Then LORD ATKIN considered *Smith v. Weguelin* (11) and *Goodwin v. Roberts* (12), by which BRANSON, J., and the Court of Appeal had considered themselves bound on this very matter of the sovereign State and the law to be applied. I do not need to read it or to analyse it, but after discussing those cases at some H little length, LORD ATKIN continued (*ibid.*, 167):

"It would appear, therefore, that these cases afford little authority for the proposition. In principle it must be ill-founded. It cannot be disputed that a government may expressly agree to be bound by a foreign law. It seems to me equally indisputable that, without any expressed intention, the inference that a government so intended may be necessarily inferred from the circumstances, as where a government enters into a contract in a

foreign country for the purchase of land situate in that country in the terms appropriate only to the law of that country, or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or employs in a foreign country foreign labour, in circumstances to which foreign labour laws would apply. It appears, therefore, that in every case, whether a government be a party or not, the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances, and, in the latter case, the inference may be drawn that the parties intended a foreign law to apply."

A

The circumstance that a government is a party is entitled to great weight in drawing the proper inference, but it is not conclusive, and it is only one factor in solving the problem. So, even if the charterers, whatever be the true answer, were agents acting for a sovereign State, I think the principle of law laid down by LORD ATKIN is applicable, and the fact that one of the parties is acting for a foreign State, though a factor of importance, is only a factor in considering the final decision to be made.

B

Counsel for the shipowners first attacked the weight of the facts set up by the charterers, and then he raised facts of his own, which, he said, pointed to Italian law as being presumed to be intended by the parties. He relied first on the fact that this ship, the *Assunzione*, was a bona fide Italian ship. It had an Italian master, and, although there was no real evidence about it, it was said presumably it had an Italian crew. He put that in the forefront of the facts to be considered. Then he said (I did not think this had the weight of some of the other considerations) the contract was to carry French goods from a French port to an Italian port, and to discharge the goods at the Italian port. The Italian ship carrying French goods under this contract of affreightment naturally loaded the goods in France, and naturally discharged them in Italy.

C

D

He then said (and I respectfully agree with my Lord that this is a factor of importance) that the charterparty provided that the freight and the demurrage charges (if any) should be paid in Italy at Naples, and my Lord read cl. 16 of the supplementary clauses of the charterparty. These clauses did not form part of the standard form Gencon. Moreover, the charterparty itself provided:

E

" . . . and there deliver the cargo on being paid freight—on intaken quantity—as follows: 1,980 Italian lire per metric ton if west coast Italy, 2,205 Italian lire per metric ton if Adriatic coast Italy."

The charterparty itself laid down Italian money as the means of paying for the freight, and my Lord has already referred to the fact that cls. 5, 6 and 7 of the charterparty have some bearing on that matter, cl. 5 dealing with the question of loading, cl. 6 with the discharge of the cargo and cl. 7 with demurrage, while cl. 8 was the lien clause.

F

Then counsel for the shipowners, in answer to the submission of counsel for the charterers based on the fact that the charterparty bore the words "Paris, Oct. 7, 1949"—and the supplementary clauses, being added to the charterparty for the s.s. *Assunzione* dated Paris, Oct. 7, 1949, must be read in the same way—points out that those words appear in such circumstances that the ordinary presumption, which might in proper circumstances arise really does not arise in the light of the history of the negotiations which led up to the signing of the charterparty. He said further that, though the bills of lading were indorsed by the Italian holders before being presented to the ship, that must reasonably have been in the contemplation of the parties at the time of the signing of the charterparty. That met with the severest condemnation by counsel for the charterers, who said it was quite inconceivable, in the circumstances, that any such thought would be in the minds of the people preparing this contract.

G

H

Perhaps I have said enough to show that there were many facts and surrounding circumstances, some pointing in one direction and some in the other. Counsel for the charterers said that the governing factor is always the *lex loci contractus*, shown in the words "Paris, Oct. 7, 1949", and there being nothing to disturb the primary inference, the answer ought to be that French law applies. Counsel for the shipowners said there is an Italian ship, with an Italian master, payment in Italian money, and the prospect of disputes arising being settled in Italy, or fought in Italy, and, therefore, the conclusion ought to be in favour of the law of the flag—Italian.

In this case of many facts, and conflicting inferences, the duty of the court is to examine all those facts and arrive at the presumed intention of the parties. It is said that if the facts are evenly balanced, so that those on one side really cancel out those on the other, the law of the flag should be applied, and counsel for the shipowners even said: "They are evenly poised". But counsel for the charterers persisted that one must start with the presumption of *lex loci contractus* and then do the balancing to see if that primary presumption is displaced. I think on balance that the indication is that Italian law must reasonably be supposed to have been in the minds of the parties if they had ever considered the matter.

I have been confronted from the very beginning of this case with a sense of unreality. If, as in this case (and as, I rather gather, in the majority of cases), no thought whatever has been given to the law by which the contract is to be governed—and certainly there is no indication here that the parties ever considered it; there is no clause in the charterparty dealing with it—a court requiring to determine what it would have been if it had been considered may be met with counsel for the charterers saying with great force: "I cannot conceive the charterers agreeing to Italian law in any circumstances", and counsel for the shipowners saying with equal force: "I cannot conceive the shipowners every accepting French law". In the face of that the court has to examine the facts, to consider what inference or presumption arises from those facts, and then, regarding the parties as just and reasonable people, to say what is the reasonable inference to be drawn and what was the probable intention of the parties. Although I differ in some small matters from the judgment of WILLMER, J., which are immaterial for this purpose, on the whole I think that that judgment ought to be affirmed.

HODSON, L.J.: I agree with the conclusion of the learned judge that the proper law of the contract to be applied in this case is Italian law, having regard to the terms of the contract and the relevant circumstances. The facts of the case are contained in an agreed statement of facts and in a number of documents attached to it, and the learned judge, having considered those facts, based himself on certain salient matters, putting in the forefront that the ship in question was a genuine Italian ship in the full sense of the word, that she was engaged in pursuance of a charterparty on a voyage to an Italian port, and that by the charterparty freight and demurrage, if any, had to be paid in Italy and in Italian lire; and he relied on the facts that, on the arrival of the ship at Venice, there was a likelihood that the bills of lading would be presented by Italian holders, which, indeed, was what happened; that any claims likely to arise would probably be claims by Italian holders of the bills of lading against the Italian ship, and that Italy was the place in which the owners could be found if the ship could not be arrested, so that Italy was the place where the owners could be sued.

The charterers have criticised the judgment, not only because the learned judge treated as negative such inference as ought to be drawn from the place where the contract was made, namely, France, but also because he left out of account the exchange agreement which had been entered into by a department of the French government and a department of the Italian government preceding the charterparty. I think the learned judge was right in excluding the exchange

agreement from consideration in the construction of this contract on the ground which he stated, namely, that, in order to arrive at the mutual intention of the parties to a contract it was not legitimate to look at a matter which was outside the knowledge of both parties and only within the knowledge of one, it being common ground that the shipowners were unaware of the exchange agreement.

Counsel for the charters has complained that the learned judge wrongly took into account the rights of third parties, namely, the holders of the bills of lading. In my judgment, the learned judge was right on that for a reason which applies, perhaps, only to this particular case, namely, that it was contended by both parties that, according to continental law, either French or Italian, the contract in this case was not contained in the one document, namely, the charter-party, as it would be under English law, but was, for the purpose of either law, enshrined also in the bills of lading. That being the case, it is surely legitimate to look at what is likely to happen to the bills of lading as being in the contemplation of the parties, and putting out of mind the provisions of the exchange agreement (as I think one is bound to do) I take the view that it must have been contemplated that the bills of lading would be presented to the ship by some Italian organisation on her arrival in Italy. In my judgment, the learned judge did not leave out of account anything he ought to have taken into account, or take into account any matter which he should not have taken into account in arriving at his conclusion. A

Battle was joined here on a familiar academic field, one party contending for the *lex loci contractus*, namely, France, and the other party contending for the law of the flag, which was Italian. The learned judge felt himself able to come to his conclusion without reliance on any presumption raised by either side. On the one hand, he rejected the argument of the charterers that the place where the contract was entered into promotes a primary inference. On the other hand, as to the presumption said to be raised by the law of the flag, he said: B

“ . . . I doubt whether it is possible to say in these days that the flag of the ship, or indeed the nationality of the ship, raises anything in the nature of a presumption. The authorities in support of any such proposition are old, and, as I have said, they are mostly concerned with cases arising from acts of the ship's master in a port of distress.” E

As to the rival contentions jointly the learned judge said:

“ It seems to me, therefore, that the ship's flag or nationality, and the place where the contract is made, are no more than circumstances which the court must take into consideration, together with all the other circumstances of the case, in order to arrive at the right inference as to what intention ought to be imputed to the parties.” F

The question has been argued fully before us, and I have come to the conclusion, as the authorities stand, that it is not right to treat the law of the flag in connection with contracts of affreightment as if it were obsolete. In *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (8) the legal principles which are to guide an English court on the question of the proper law of the contract are set out by LORD ATKIN as follows ([1937] 2 All E.R. 166): G

“ In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried.” H

Since every contract must be made in a place, the references to the country where the contract is to be performed, if the contract relates to immovables to

the country where they are situate, and to the country under whose flag the ship sails in which goods are contracted to be carried, would appear to me to indicate that, in the opinion of LORD ATKIN, these are exceptions to the general law of contract, that the *lex loci contractus* ought to prevail. In my judgment, this understanding of LORD ATKIN's speech is consistent with the authorities. In *Lloyd v. Guibert* (2) WILLES, J., laid down the rule as to the law of the flag in no uncertain terms. It is unnecessary for me to read again the well-known passage (L.R. 1 Q.B. 129), but WILLES, J., was purporting to lay down a rule, and he pointed out (*ibid.*, 123) that the intention is to be inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract. He went on to say (*ibid.*):

A "The present question does not appear to have ever been decided in this country",

That question is the question now under consideration, and further (*ibid.*, 128):

C "The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience and even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to."

A little further on WILLES, J., set out the rule which he sought to lay down in full. No qualification is made to the rule, which is said to be based on convenience, perhaps because on a round voyage, where cargo is being picked up at various ports and a contract may spring up at a number of places, the law of the flag which the ship wears is more obviously appropriate than any other. Counsel for the charterers sought to deal with the authority of *Lloyd v. Guibert* (2) in two ways. First, he said, it was one of those cases which arise out of the acts of the master when the ship is in distress, and the law of the flag admittedly applies where the master is authorised to deal with the cargo and ship in the interests of one or both, but in other cases the rule has no application. I do not think the consequences of the decision in *Lloyd v. Guibert* (2) can be avoided in that way. It is quite true as part of the history of the case that there was such an incident. The master had entered into a bottomry bond, but the actual decision in the case was given on a contract of affreightment and had nothing to do with the agency or necessity of the master, and I cannot take such a limited view of the decision in *Lloyd v. Guibert* (2), nor, indeed, do I think it has been so treated in later authorities.

F Secondly, counsel for the charterers, as part of his argument, relied on a dictum of LINDLEY, L.J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (3), which was read in full by my Lord (10 Q.B.D. 540):

G "The *lex loci contractus* was here English and ought to prevail unless there is some good ground to the contrary"

H That is strongly relied on, and, taken out of its context, does, at first sight, seem to be inconsistent with the rule laid down in *Lloyd v. Guibert* (2), but I do not think that that dictum ought to be treated as throwing any doubt on the validity of the rule. It is quite clear that LINDLEY, L.J., was not seeking to impugn the validity of the opinion expressed in *Lloyd v. Guibert* (2), a decision which was binding on the Court of Appeal then and is binding now. Moreover, as WILLMER, J., pointed out, in that case there was really not room for any other decision than that the ship in question, although wearing the Dutch flag, was in fact the property of an English company composed of English nationals, and there is nothing in the decision in that case which throws any doubt on the validity of the rule. It is only that dictum taken in isolation, especially by such a master

of the law, that really lays any foundation for an attack on the rule. There was no reality about the Dutch nationality of the ship in that case, whereas in the case now under consideration the vessel was in all respects an Italian vessel and not merely a ship wearing the Italian flag. There is nothing, I think, in the judgments of the other members of the court, only one of whom, BRETT, L.J., delivered a separate judgment, which casts doubt on the existence of the rule.

Attention was drawn to *Peninsular & Oriental Steam Navigation Co. v. Shand* (1). I propose to say no more about it than this, that it was noted in *Lloyd v. Guibert* (2), and not regarded by WILLES, J., as an authority, or even a persuasive authority, which prevented him from laying down the rule which he did. Moreover, it was a case in which the law of the flag was applied as well as the law of the place of the contract, and, indeed, I confess it does seem to me as if it should be treated as if it did not deal with a contract of affreightment at all.

SCRUTTON, L.J., in his book on "CHARTERPARTIES" 15th ed., p. 1, defines a contract of affreightment as follows:

"When a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a contract of affreightment and the sum to be paid is called freight."

It seems a little strange, in the light of this definition, to regard the contract which a passenger enters into with a company for the carriage of his luggage as a contract of affreightment. The same view of the matter seems to have been taken by PROFESSOR DICEY, who included in his *CONFLICT OF LAWS* a separate rule, which now appears as r. 148, dealing with a contract for the carriage of persons or goods from a place in one country to a place in another, which is presumably governed by the law of the place where it is made. That is how the rule stood originally, but the editors of the recent edition have added the words:

"but this does not apply to contracts of affreightment",

drawing a distinction between such cases as the *Peninsular & Oriental Steam Navigation Co. v. Shand* (1) and ordinary contracts of affreightment.

Other decisions of the Court of Appeal, namely, *Re Missouri S.S. Co.* (4) and *The Industrie* (5), were relied on, but neither of those cases casts doubt on the existence of the rule in *Lloyd v. Guibert* (2) as such, and in the former case LORD HALSBURY, L.C., used language which tends to support it, and which, indeed, is relied on by the shipowners in this case. He said (42 Ch.D. 336):

"Now this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship by a British company whose domicile is in England."

In that case at first instance CHITTY, J., based himself on the law of the flag, the contract having been made in Massachusetts and the ship being an English ship, and the Court of Appeal unanimously upheld his decision, although they did not in terms refer to the law of the flag. They said nothing to indicate that CHITTY, J., was wrong, and, as I have already remarked, the Lord Chancellor, who delivered the leading judgment, put in the forefront the passage which I have quoted. COTTON, L.J., ended his judgment by saying (*ibid.*, 340):

"In my opinion the judgment of CHITTY, J., was right, and the appeal fails."

FRY, L.J., said (*ibid.*, 341):

"Now, in the first place, the ship was an English ship"

No doubt there are dicta in this case which can be used by counsel for the charterers to support his contention that the law of the place, *lex loci contractus*, prevailed; but, as I have said, I see nothing in that case, as I read it, to weaken my belief that the rule which is under discussion still exists.

As far as *The Industrie* (5) is concerned, the same comment applies. LORD ESHER, M.R., after discussing the circumstances in which a foreign contract is brought before an English court, and the duty of the court in those circumstances, said with regard to the contract in that case ([1894] P. 72):

A “It is a contract made for the carriage of goods on board a German ship. Is that conclusive to show that it is to be construed according to German canons of construction? It seems to me that that is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied.”

B That seems to me to be the result of all the authorities, and that paragraph certainly does nothing to destroy the view that the fact that the goods were to be carried on a German ship raised a presumption, not a conclusive presumption, but one which could be rebutted, and was, indeed, held to be rebutted in that case. At first instance GORELL BARNES, J., had applied the law of the flag, the ship being a German ship. He held that German law applied, but the Court of Appeal arrived at a different conclusion, having given great weight to a particular circumstance which differentiates *The Industrie* (5) from this case. In many respects *The Industrie* (5) was like this case, but it was unlike this case in one significant respect. The contract was not only made in London; it was also negotiated in London between the English brokers authorised by the German owners, and the defendants, the shippers, who were English merchants. The contrast with this case is that here, although the contract was made in France, it was negotiated at the one end in Italy, and at the other end in France. There seems, accordingly, to be a very marked distinction on the facts between the two cases.

D The next case, *The Adriatic* (9), a decision of LANGTON, J., is, I think, of considerable interest. LANGTON, J. ([1931] P. 246), cited from PROFESSOR DICEY'S *CONFLICT OF LAWS*, 4th ed., p. 644, r. 166b:

E “Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (i.e., a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag. Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply.”

F LANGTON, J., continued:

G “Now that is a statement as to a presumption that the law of the flag will apply unless the evidence shows that the parties intended something else . . . That, I think, states the presumption of law as accurately as it can be stated, and what I have to determine here is whether in all the circumstances (and I am entitled and indeed bound to look at all the surrounding circumstances) there is evidence to show that the intention of the parties was to displace that prima facie presumption.”

H Attention has been drawn to the rule as it now stands (it has been altered) in which the emphasis has been shifted, but which is to the same effect. That rule follows preceding rules dealing with other contracts of a special nature as exceptions to the general rule of contract, the general rule being that the law of the place where the contract is made prevails.

The other case, a modern case, to which reference has been made, was *The Njegos* (10), a decision of SIR BOYD MERRIMAN, P., in which he also clearly recognised the existence of that rule. After referring to *The Industrie* (5) he said ([1936] P. 106, 107):

“LORD ESHER's judgment in this last case seems to me to be particularly valuable as showing what are the real limits of the presumption in favour of

the law of the flag in connection with a contract of affreightment. It seems quite plain that, in connection with such contracts as the master may be driven to make by necessity in the course of the voyage, the law of the flag should prevail, for it is that law which governs his relations with his owners; but that, as is pointed out by LORD ESHER, is by no means inconsistent with the proper law of the contract of affreightment being a different law. In my opinion all these cases show very clearly that, as regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies."

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I emphasise the word "necessary", for in no way did the President deny the existence of the presumption. He noticed the necessity of applying the rule in cases where ships were in distress, and considered that there was a lesser weight to be attached to it in other cases.

With regard to *The Adriatic* (9) and *The Njegos* (10), I would add that both judges used expressions which have been commented on in this case. LANGTON, J., referred to convenience ([1931] P. 251, 253), and SIR BOYD MERRIMAN, P., to business efficacy ([1936] P. 107), which seems to me to amount to very much the same thing, and it was suggested that this was a new departure and something which could not be justified on the authorities. In my opinion, this is not so, and the doctrine of convenience as a guide and help in these matters traces back to *Lloyd v. Guibert* (2) itself (L.R. 1 Q.B. 129), which is the fount of so much discussion and learning on this subject.

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In my judgment, the position is that the rule or presumption must, indeed, often be of little importance in the decision of cases, because the court addresses itself, and always must, to the presumed intention of the parties to the contract, and will act on the evidence before it and will naturally be loath to depend on presumptions which necessarily vary in weight, some being more easily overcome than others. This is not, however, to say that a particular rule or particular presumption has ceased to exist, and, in my opinion, the presumption contended for by the shipowners is available to them, if only as a last resort, when the evidence is so evenly balanced that the court cannot otherwise reach a fair and just conclusion. For these reasons, therefore, in addition to those given by the learned judge and my Lords, I think WILLMER, J.'s conclusion was right, and that the appeal should be dismissed.

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Appeal dismissed.

Solicitors: *Clyde & Co.* (for the charterers); *Crawley & de Reya* (for the shipowners).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. WILSONS (DUNBLANE), LTD.

[HOUSE OF LORDS (Viscount Simon*, Lord Reid, Lord Normand, Lord MacDermott and Lord Keith of Avonholm), November 9, 10, 1953, January 25, 1954.]

A *Income Tax—Wear and tear—Machinery and plant—Sale by person having control over buyer—Sale at open market price—Application of limit of re-charge—Income Tax Act, 1945 (c. 32), s. 59 (2), s. 59 (3) (b).*

For some thirty years prior to 1944 W. carried on a business of wool spinner as sole proprietor. On Nov. 16, 1944, he took his two sons into partnership, bringing into the partnership at the same time the whole

B assets of the business, including the machinery and plant. At Nov. 15, 1944, in the balance sheet of W.'s business, the machinery and plant appeared at a written-down figure of £8,000, and this formed a starting figure in the partnership's books for machinery and plant for the partnership year commencing Nov. 16, 1944. On Nov. 16, 1945, the respondent company took over the business of the partnership, the whole of the issued shares of the

C company being allotted to the former partners. The assets of the partnership were bought by the respondent company in accordance with an agreement of sale under which the price paid for machinery and plant was £17,554, which was the price the machinery and plant would have fetched if sold in the open market on that date. On their assessments to income tax made on them under the Income Tax Act, 1918, Case I of sched. D, for the years

D 1946-47 to 1950-51 the respondent company claimed that the wear and tear allowances for the machinery and plant subsequent to Apr. 6, 1946 (the "appointed day" for the Income Tax Act, 1945), should be made on the cost to it of £17,554 paid for the machinery and plant. The Crown contended that these allowances should be made on the figure of £8,000, the cost to the partnership of the machinery and plant at the date of the sale, which became the "limit of re-charge" under s. 59 (3) (b) of the Act of 1945.

E HELD: section 59 (3) (b) of the Income Tax Act, 1945, directed the substitution of the limit of re-charge for the open market price in the concluding and operative part of s. 59 (2) only; s. 59 (2) only applied if the condition "where the property is sold at a price other than that which it would have fetched if sold in the open market" was satisfied,

F and s. 59 (3) (b) only applied if the condition "if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller" was satisfied; the proper application of s. 59 (3) (b) was limited to cases where both these conditions had been satisfied and here only the second condition was satisfied; and, therefore, s. 59 was inapplicable as the facts of the case took it outside the opening words of

G s. 59 (2) and the appeal must fail.
FOR THE INCOME TAX ACT, 1945, s. 59 (2), (3) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 664.

Cases referred to:

- H (1) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 1 K.B. 64; 90 L.J.K.B. 113; *affd.* C.A., [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
(2) *Canadian Eagle Oil Co., Ltd. v. Regem*, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 2nd Digest Supp.

* VISCOUNT SIMON died on Jan. 11, 1954. LORD NORMAND delivered as his own the opinion which LORD SIMON had written in the present case: see p. 305 post.

APPEAL by the Crown from an interlocutor of the First Division of the Court of Session sitting as the Court of Exchequer, dated June 25, 1952, made on a Case Stated by the Special Commissioners of Income Tax.

The Special Commissioners held that the Income Tax Act, 1945, s. 59 (3) (b), modified the provisions of s. 59 (2) so as to make it apply to the circumstances of the case and that the wear and tear allowances should be computed with reference to the sum of £8,000 which was the cost to the seller, i.e., the partnership, of the machinery and plant, and was defined as being the amount of the limit of re-charge. The First Division of the Court of Session held that s. 59 of the Act of 1945 did not apply to the case since the machinery and plant were not sold to the respondent company at a price "other than that which it would have fetched if sold in the open market", and that, consequently, the wear and tear allowances for the years in question should be calculated on the sum of £17,554, the price which the machinery and plant would have fetched if sold in the open market.

The Solicitor-General for Scotland (W. R. Milligan, Q.C.), Sir Reginald Hills and W. R. Grieve (of the Scottish Bar) for the Crown.

R. P. Morison, Q.C., and D. J. Watson, Q.C. (both of the Scottish Bar), for the respondent company.

The House took time for consideration.

Jan. 25. The following opinions were read.

LORD REID: My Lords, during the hearing by the Appellate Committee of this case and *Sneddon v. Lord Advocate* (ante, p. 255) **VISCOUNT SIMON** took the chair. It would be presumption on my part to seek to add to the tributes so recently paid to him in this House, but I may, perhaps, be permitted to put on record our gratitude for his wise leadership in our discussions and our deep regret that he is not here to express the views which he had formed in each of these cases before his last illness. I desire further to express on behalf of all Scots lawyers our acknowledgement of the debt which Scots law owes to him for the many contributions which he has made in this House to the clarification and development of our law.

My Lords, after carrying on the business of wool spinning for many years, Mr. A. B. Wilson in 1944 took his two sons into partnership and brought into the partnership the whole assets of the business at the figures which then appeared in his accounts. The machinery and plant stood in his balance sheet at a written-down value of £8,000. On Nov. 16, 1945, the partners formed the respondent company to take over the business, all the shares being allotted to the partners. The company bought the machinery and plant for £17,554. It has been found by the Special Commissioners that this was the price which they would have fetched if sold in the open market at that date. The question in this case is whether allowances in respect of wear and tear of that machinery and plant from 1946 onwards should be calculated with reference to the sum of £8,000 or the sum of £17,554. It is admitted that before the Income Tax Act, 1945, came into operation the proper basis was the cost to the company, £17,554.

The Income Tax Act, 1945, contained a new and elaborate scheme for determining allowances: obviously this was designed at least in part to meet the situation at the end of the war when prices had risen steeply and new equipment was scarce. The Act covered other types of equipment besides machinery and plant, and various initial allowances, annual allowances, balancing allowances, and balancing charges were introduced: one difference between machinery and plant and other equipment is that allowances for other equipment are, in general, based on cost of construction, whereas allowances for machinery and plant are based on its cost to the trader seeking the allowances. In the case of a trader buying second-hand machinery or plant, the cost to him might far exceed the original cost of construction. In that case, he would get allowances much

greater than those available to the trader who sold the plant or machinery to him. It was plain that this might possibly lead to arrangements between traders whereby machinery or plant changed hands in order to get increased allowances at the expense of the revenue, and s. 59 of the Act prevents this result in certain cases.

Section 59 (as amended by the Finance (No. 2) Act, 1945, s. 58 (2)), so far as relevant to this case, is as follows:

- A " (1) The provisions of this section shall have effect in relation to sales
of any property where either—(a) the buyer is a body of persons over whom
the seller has control, or the seller is a body of persons over whom the buyer
has control, or both the seller and the buyer are bodies of persons and
some other person has control over both of them; or (b) it appears with
B respect to the sale or with respect to transactions of which the sale is one,
that the sole or main benefit which, apart from the provisions of this section,
might have been expected to accrue to the parties or any of them was the
obtaining of an allowance or deduction under any of the following enact-
ments, that is to say, any of the provisions of this Act or of r. 6 or r. 7 of
the Rules Applicable to Cases I and II of sched. D or of s. 19 of the Finance
C Act, 1941, or of Part IV of the Finance Act, 1944. References in this
sub-section to a body of persons include references to a partnership.
(2) Where the property is sold at a price other than that which it would have
fetched if sold in the open market, then, subject to the succeeding provisions
of this section, the like consequences shall ensue for the purposes of the
enactments mentioned in sub-s. (1) of this section other than the said s. 19,
D in their application to the income tax of all persons concerned, as would
have ensued if the property had been sold for the price which it would have
fetched if sold in the open market. (3) Where the sale is a sale of machinery
or plant—(a) no initial allowance shall be made to the buyer; and (b) subject
to the provisions of the next succeeding sub-section, if the price which the
property would have fetched if sold in the open market is greater than the
limit of re-charge on the seller, the last preceding sub-section shall have
E effect as if for the reference to the price which the property would have
fetched if sold in the open market there were substituted a reference to
the said limit of re-charge: Provided that this sub-section shall not apply
in relation to a sale of machinery or plant which has never been used if the
business or part of the business of the seller was the manufacture or supply
of machinery or plant of that class and the sale was effected in the ordinary
F course of the seller's business; Provided also that where the sale is one to
which para. (a) of sub-s. (1) of this section applies and took place before the
appointed day, and the seller acquired the machinery or plant on or after
Apr. 6, 1944, para. (a) of this sub-section shall not apply. In this sub-section
the expression ' the limit of re-charge ' means, in relation to a person who
G sells machinery or plant—(i) if he provided that machinery or plant for him-
self before the appointed day, the actual cost to him of the machinery or
plant, including in that actual cost any expenditure in the nature of capital
expenditure on machinery or plant by way of renewal, improvement or
reinstatement; (ii) if he provided the machinery or plant for himself on or
after the appointed day, the expenditure incurred by him on the provision
thereof."

- H This section only applies where either there was an ulterior object behind the
sale (sub-s. (1) (b)) or the buyer and seller were not independent (sub-s. (1) (a)).
There is no suggestion in this case of any ulterior object, but the fact that the
partners controlled the respondent company which bought from them admittedly
brings the case within sub-s. (1) (a) and so brings the rest of the section into opera-
tion. Sub-section (4) has no application to this case: the question at issue
turns on the proper interpretation of sub-s. (2) and sub-s. (3).

Sub-section (2) applies to sales of all kinds of equipment dealt with in the Act, but sub-s. (3) only applies to sales of machinery or plant. The only part of sub-s. (3) which directly affects this case is sub-s. (3) (b), which provides that, if the price which the property would have fetched if sold in the open market (in this case £17,554) is greater than the limit of re-charge on the seller (in this case £8,000), sub-s. (2) is to have effect subject to a certain modification set out in the latter part of sub-s. (3) (b). In order to discover the meaning of this latter part of sub-s. (3) (b) it is necessary to examine closely both the terms of sub-s. (2) and the terms of sub-s. (3) (b). I think it helpful to begin by noting the structure of sub-s. (2). It begins by stating a condition which must be satisfied before the sub-section can have any operative effect—the property must have been sold at a price other than the market price. If that condition is satisfied “then subject to the succeeding provisions” of the section certain consequences are to ensue. That structure, in my view, indicates that the initial condition must first be satisfied in every case and that only then are the “succeeding provisions” to be looked at: if they do not apply, then the consequences set out in sub-s. (2) itself will follow, but if any of the succeeding provisions apply, then the consequences enacted by that provision will apply instead of the consequences enacted in sub-s. (2). The modification of sub-s. (2) which is directed by sub-s. (3) is that the former sub-section is to

“ . . . have effect as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge.”

I turn to look for the reference to that price in sub-s. (2) and I find at the end of sub-s. (2) a clear reference to that price, and at the beginning of sub-s. (2) words which might or might not be interpreted as a reference to that price. Neither the words at the beginning of sub-s. (2) nor the words at the end of it correspond exactly with the words in sub-s. (3). The words in sub-s. (3) (b) are “the price which the property would have fetched . . .”, those at the end of sub-s. (2) are “the price which it would have fetched . . .”, and the words at the beginning of sub-s. (2) are “that which it would have fetched . . .”. But the words “it” and “that” in these contexts plainly represent “the property” and “the price” respectively, and I cannot regard these changes as of any importance. The difficulty about the first reference in sub-s. (2) is of a different character. What is there being denoted is

“a price other than that which it would have fetched if sold in the open market”,

and it is, I think, a nice question whether a statement about a price other than X should be held to be a reference to X. The answer may depend on the context.

In sub-s. (3) (b) the words used are not “as if for any reference to the price”, or “as if for references to the price”, but are “as if for the reference to the price . . .” in the singular. When the draftsman of this section intended to refer to “references” in the plural he did so: at the end of sub-s. (1) I find

“references in this sub-section to a body of persons include references to a partnership.”

So the change from the plural in sub-s. (1) to the singular in sub-s. (3) (b) must be taken to have been deliberate and, therefore, significant.

It is plain and not disputed that sub-s. (3) (b) directs the substitution of the limit of re-charge in one place—in the latter part of sub-s. (2). The question in this case is whether it also directs that substitution in another place—in the initial condition of sub-s. (2). If it does, it is agreed that the application of sub-s. (2), so altered, reduces the sum on which the respondent company is entitled to allowances for wear and tear to £8,000 and the appeal succeeds. But if it does not, then, as the price paid by the company was the price which the machinery and plant would have fetched if sold in the open market and not “a price other

than " that price, the condition for the application of sub-s. (2) is not satisfied, the price paid by the company stands, and the appeal fails. If the opinions which I have already expressed are correct, there are two strong indications that sub-s. (3) (b) only directs the substitution of the limit of re-charge in one place—in the latter part of sub-s. (2). These are the use of the singular " the reference " in sub-s. (3) (b) and the structure of sub-s. (2). And there is no real difficulty in holding that the phrase

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" a price other than that which it would have fetched if sold in the open market "

is not a reference to

" the price which the property would have fetched if sold in the open market."

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Therefore, simply taking the words which Parliament has used in s. 59, the appeal must fail.

But the appellants found on more general considerations to show that the respondents' interpretation leads to results which are quite unreasonable and contrary to the general policy of the Act. I doubt whether s. 59 is sufficiently

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ambiguous to make it right to take account of such matters, but I need not decide that because I cannot accept this argument on its merits. The argument in what seems to me its most attractive form is this. Sub-section (3) in its unaltered form directs that, if property is not sold at the market price, consequences shall ensue as if it had been sold at the market price. If the respondents are right, sub-s. (2) in its altered form will direct that, if property is not sold at

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the market price, consequences shall ensue as if it had been sold for the amount of the limit of re-charge. This is an unreasonable provision and the only reasonable provision would be that if property is not sold at the amount of the limit of re-charge then consequences shall ensue as if it had been sold at that amount. This is the appellant's interpretation: the words of the section make it possible to adopt it and it should be adopted. I reject the argument because the result

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of the respondents' interpretation does not seem to me to be absurd or wholly inexplicable. When buyer and seller are at arm's length, the purchase price which they agree to stands as the basis for allowances and that purchase price will normally be the market price. When buyer and seller are not at arm's length, the sale is suspect, and s. 59 rejects the agreed purchase price, perhaps because it is likely to be something different from the market price. If that is

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so, it would not be altogether unreasonable to say that, although the sale is of the suspect class, yet, if it is in fact made at the market price, it shall be treated as a genuine sale. I am far from saying that that was in fact the intention: we are not concerned with intention except in so far as it can be deduced from the words of the Act. The argument I am dealing with is that the altered form of sub-s. (2) as the respondents would have it is so unreasonable that any possible alternative should be preferred, and it is enough to meet that argument to show that it is not impossible to suppose that it could have been intended.

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I, therefore, move that this appeal should be dismissed.

LORD NORMAND: My Lords, before LORD SIMON's lamented death I had intimated to him that I would concur with an opinion prepared and finally revised by him in this appeal. In these circumstances, I am to deliver his opinion as my own. I shall thus have the privilege of preserving his judgment on one of the last Scottish appeals heard by him. Before I read it, I may be allowed to associate myself with the words of my noble and learned friend on the Woolsack about LORD SIMON. It is, indeed, true that Scottish lawyers share with their English brethren the grievous sense of loss that his death has brought to all of us. Here, then, is his opinion which I adopt as my own.

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The Income Tax Act, 1945, provided for a series of "allowances" which could be claimed from the revenue authorities and enjoyed by taxpayers owning

certain property (including machinery and plant) used in their business. These provisions were obviously intended to assist or give encouragement to trade after the war, and came into force on an "appointed day", which was Apr. 6, 1946. These allowances were not deductions to arrive at assessable income, such as could be subtracted from gross income, but were treated separately, and operated to reduce the taxpayer's liability to tax until the relief they gave from tax on the allowances was completely enjoyed. Thus, if assessable income in a given tax year was £5,000 and the allowances amounted to £2,000, income tax fell to be paid on £3,000. But if assessable income for the year was less than £2,000, while there would be no income tax to pay in that year, the balance of the allowance remained available to be used to reduce tax in a future year.

The statute provides for "initial allowances", "annual allowances", "balancing allowances", and "balancing charges", the last-named operating to increase the total tax due above the tax on assessable income. This might arise, for example, if the value of second-hand plant rose and it was sold at a figure above the price paid for it when it was new, or above the price to which it had been written down by wear and tear allowances made by the revenue authorities for the purposes of income tax. In such a case, the sum total of such allowances would manifestly be more than was justified. To take figures: if an item of plant cost £1,000 and sufficient annual allowances for depreciation had been given by the tax authorities to reduce the balance of cost to nil, and if the plant were then sold at a figure equal to, or in excess of, its original cost, the seller would have to bear a "balancing charge" which would result in his paying tax on the £1,000. If, however, the allowances had only amounted in all to £600, the balancing charge would be £600 and tax would be borne on this figure.

The question of law to be decided in the present appeal arises on a Case stated by the Special Commissioners sitting in Edinburgh. It is a question of construction of s. 59 (3) (b) of the Act—a question easy to state, but involving a close reading of the words to answer. The appeal is against the interlocutor of the Court of Session which reversed the decision of the Special Commissioners in favour of the Crown.

Section 59 (as amended), so far as relevant, runs as follows:

"(1) The provisions of this section shall have effect in relation to sales of any property where either—(a) the buyer is a body of persons over whom the seller has control, or the seller is a body of persons over whom the buyer has control, or both the seller and the buyer are bodies of persons and some other person has control over both of them; or (b) it appears with respect to the sale or with respect to transactions of which the sale is one, that the sole or main benefit which, apart from the provisions of this section, might have been expected to accrue to the parties or any of them was the obtaining of an allowance or deduction under any of the following enactments, that is to say, any of the provisions of this Act or of r. 6 or r. 7 of the Rules Applicable to Cases I and II of sched. D or of s. 19 of the Finance Act, 1941, or of Part IV of the Finance Act, 1944. References in this sub-section to a body of persons include references to a partnership. (2) Where the property is sold at a price other than that which it would have fetched if sold in the open market, then, subject to the succeeding provisions of this section, the like consequences shall ensue for the purposes of the enactments mentioned in sub-s. (1) of this section other than the said s. 19, in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the price which it would have fetched if sold in the open market. (3) Where the sale is a sale of machinery or plant—(a) no initial allowance shall be made to the buyer; and (b) subject to the provisions of the next succeeding sub-section, if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller, the last preceding sub-section shall have effect

as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge: Provided that this sub-section shall not apply in relation to a sale of machinery or plant which has never been used if the business or part of the business of the seller was the manufacture or supply of machinery or plant of that class and the sale was effected in the ordinary course of the seller's business; Provided also that where the sale is one to which para. (a) of sub-s. (1) of this section applies and took place before the appointed day, and the seller acquired the machinery or plant on or after Apr. 6, 1944, para. (a) of this sub-section shall not apply. In this sub-section the expression 'the limit of re-charge' means, in relation to a person who sells machinery or plant—(i) if he provided that machinery or plant for himself before the appointed day, the actual cost to him of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on machinery or plant by way of renewal, improvement or reinstatement; (ii) if he provided the machinery or plant for himself on or after the appointed day, the expenditure incurred by him on the provision thereof . . . (5) As respects r. 6 and r. 7 of the Rules Applicable to Cases I and II of sched. D, the provisions of this section shall have effect as respects tax for the year of assessment in which the appointed day falls and any subsequent year of assessment . . .”

The precise question is as to the proper interpretation and application of the words in sub-s. (3) (b).

The facts which give rise to this question are as follows. For some thirty years up to Nov. 15, 1944, the business now carried on by the respondent company had been conducted by Mr. Alexander B. Wilson as sole proprietor, trading as Alexander Wilson and Co. On Nov. 16, 1944, Mr. Alexander Wilson took his two sons into partnership, himself taking a one-half share and each son taking a one-quarter share in the profits. Mr. Alexander Wilson brought into the partnership firm on Nov. 16, 1944, the whole assets of the business, including the machinery and plant then belonging to him which had been acquired by him from time to time in the course of his business. These assets were taken into the accounts of the partnership firm at the figures at which they appeared in the accounts of Mr. Alexander Wilson immediately before the partnership firm acquired them. The aggregate figure for these assets was £28,764 15s. 8d. At Nov. 15, 1944, in the balance sheet of Mr. Alexander Wilson's business, the machinery and plant appeared at a written-down figure of £8,000, and this formed a starting figure in the firm's books for machinery and plant for the partnership year commencing on Nov. 16, 1944. Following the transfer of Mr. Alexander Wilson's business to the partnership, application was made under s. 32 of the Finance Act, 1926, requiring that the tax payable for all years of assessment should be computed as if the trade carried on by Mr. Alexander Wilson had been discontinued at Nov. 16, 1944, and a new trade had then been set up or commenced. The assessments on Mr. Alexander Wilson down to Nov. 15, 1944, and those on the partnership from Nov. 16, 1944, were respectively dealt with under the "cessation" and "new business" provisions of the Income Tax Acts. On Nov. 16, 1945, the business of the partnership was transferred to the respondent company, which had been incorporated for this purpose on Oct. 4, 1945, the whole of the issued shares of the company being allotted to the former partners in the proportion of fifty per cent. to Mr. Alexander Wilson and twenty-five per cent. to each of his sons. The assets of the partnership as at Nov. 16, 1945, were bought by the respondent company in accordance with an agreement of sale, under which the price paid for machinery and plant was £17,554. This was the price which the machinery and plant would have fetched if sold in the open market on that date. The buyer, i.e., the respondent company, was a body of persons over whom the seller, i.e., the partnership, had control, and,

therefore, s. 59 of the Income Tax Act, 1945, could apply in relation to the sale. The actual question, however, now to be decided between the parties is whether sub-s. (2) and sub-s. (3) of s. 59 can, on a sound construction, be held to apply to the circumstances of this case. The commissioners held that they could so apply. The Court of Session held that they could not. If the commissioners' view were right, the annual allowance would be calculated on a figure of £8,000: if the Court of Session is right, the calculation would be on a figure of £17,554.

It will be seen that the expression "the limit of re-charge" is defined as meaning, in relation to a person who sells machinery or plant, if he provided it for himself before the appointed day (which is this case), the actual cost to him of the machinery and plant, plus expenditure on it in the nature of capital expenditure. The revenue authorities contend that the limit of re-charge was £8,000, but, even so, the application of sub-s. (3) (b) to sub-s. (2) is a question of some nicety.

Sub-section (3) (b) directs us to look at sub-s. (2) to find in it

"the reference to the price which the property would have fetched if sold in the open market"

and to substitute a reference to the limit of re-charge. Where, then, do we find, in sub-s. (2), a reference to the price which the property would have fetched if sold in the open market? There is plainly a reference to this price in the concluding words of sub-s. (2), but counsel for the Crown contends that there is also a reference to this price in the opening words of sub-s. (2), and that the phrase in that sub-section,

"Where the property is sold at a price other than that which it would have fetched if sold in the open market"

is such a reference. This amounts to saying that a reference to a figure which is greater or less than X is a reference to X. I do not think that this is so. Moreover, the direction in sub-s. (3) (b) is to search for "the reference" to the open market price which is to be found in the previous sub-section, and the inference from the language is that this is to be found in one place only in sub-s. (2) and not in two, for sub-s. (3) (b) speaks of "the reference", not of "any reference" or of "references". At the end of sub-s. (1) there is a contrasting phrase,

"References in this sub-section to a body of persons include references to a partnership",

and in sub-s. (1) (a) there are no less than three references to "a body of persons".

There is a further consideration. When the structure of sub-s. (2) and sub-s. (3) is considered, it is to be observed that sub-s. (2) lays down the condition that it applies

"where the property is sold at a price other than that which it would have fetched if sold in the open market",

and it is only if this condition, which I will call condition A, is satisfied that sub-s. (2) has any application at all. "Property" is not limited to plant and machinery, but would include buildings. Sub-section (3), on the other hand, is limited to the case where the sale is a sale of one kind of property, viz., "machinery or plant", and sub-s. (3) (b) can only have an application in this case. Moreover, sub-s. (3) (b) only applies if the price which the machinery or plant would have fetched if sold in the open market is greater than the limit of re-charge on the seller. This I call condition B. It seems to me that the proper application of sub-s. (3) (b) is, therefore, limited to the case where both condition A and condition B are satisfied, and sub-s. (2) cannot have effect unless this is so. In the present case, condition B is satisfied, but condition A is not.

For the above reasons, I have come to the conclusion that the contention of the Crown fails and that the view taken by the Court of Session is right.

The statutory provisions under consideration, including the awkward and

obscure modification of what is in sub-s. (2) by what is in sub-s. (3) (b) are copied into the consolidating Income Tax Act, 1952, without alteration (s. 327 and sched. IV). And so the problem of interpretation remains. But your Lordships are not engaged in framing income tax proposals. That is the task of the legislature. We, as a judicial tribunal, are concerned only with the proper interpretation and application of the language which Parliament has employed. If the result is unsatisfactory, it is for the legislature to correct it.

At that point the opinion prepared by LORD SIMON ends. I add only that I have had the advantage of reading the opinions of the other learned and noble Lords who took part in the hearing of the appeal, and that I agree with their reasoning as well as with their conclusion that the appeal fails.

LORD MACDERMOTT (read by LORD KEITH OF AVONHOLM): My Lords, the question for determination is whether s. 59 of the Income Tax Act, 1945, applies to the computation of the wear and tear allowances of the respondent company in respect of certain plant and machinery for the fiscal years 1946-47 to 1950-51. This turns entirely on the true construction of sub-s. (2) (as amended) and sub-s. (3) of that section which, omitting what is not material, read thus:

"(2) Where the property is sold at a price other than that which it would have fetched if sold in the open market, then, subject to the succeeding provisions of this section, the like consequences shall ensue for the purposes of the enactments mentioned in sub-s. (1) of this section other than the said s. 19, in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the price which it would have fetched if sold in the open market. (3) Where the sale is a sale of machinery or plant— . . . (b) . . . if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller, the last preceding sub-section shall have effect as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge."

On the facts as found, the sale relevant to this appeal was the sale to the respondent company of machinery and plant, the price paid therefor was £17,554, and this was the price which the said machinery and plant would have fetched if sold in the open market. The "limit of re-charge" mentioned in sub-s. (3) was, in the circumstances and according to the statutory definition of the term, the sum of £8,000, that being the actual cost to the sellers of the machinery and plant sold.

In the course of the debate three different ways of reading sub-s. (2) and sub-s. (3) of s. 59 were canvassed before your Lordships in relation to a sale of machinery and plant in which (as in this case) the open market price exceeds the limit of re-charge and the condition of para. (b) of sub-s. (3) is, therefore, satisfied. For brevity, I shall refer hereafter to these facts—that is to say, the fact that what was sold was machinery and plant and the fact that the open market price was more than the limit of re-charge—as "the relevant facts."

The substance and effect of these three constructions may be stated as follows:—*Construction I.* On the relevant facts, para. (b) of sub-s. (3) directs the application of sub-s. (2) after modification at two points, so that (i) its opening and conditional words are changed from

"Where the property is sold at a price other than that which it would have fetched in the open market "

to

"Where the property is sold at a price other than the limit of re-charge ", and (ii) its concluding and operative words are changed from

"the like consequences shall ensue . . . as would have ensued if the

property had been sold for the price which it would have fetched if sold in the open market ”

to

“ the like consequences shall ensue . . . as would have ensued if the property had been sold for the limit of re-charge ”.

This construction was placed by the appellants in the forefront of their case. If it is sound, the appeal succeeds, as s. 59 then applies to the annual wear and tear allowance of the respondent company, with £8,000, the limit of re-charge, and not £17,554, the sale price, as the amount by reference to which such allowance should be calculated.

Construction II. On the relevant facts, para. (b) of sub-s. (3) directs the application of sub-s. (2) after modification at one point only, namely, by substituting a reference to the limit of re-charge for the reference to the open market price in the concluding and operative part of that sub-section. This is the same as the second of the modifications required by construction I, the difference between these two constructions being that in construction II the opening and conditional words of sub-s. (2) remain unaltered. This construction was submitted on behalf of the respondent company and was upheld by the First Division. If it is sound, the appeal fails and s. 59 is inapplicable, as the facts then take the case outside the opening words of sub-s. (2).

Construction III. This construction was advanced by the appellants as an alternative to construction I. It accepted the view that the only modification worked by sub-s. (3) (b) in the text of sub-s. (2) was that of construction II, namely, the substitution of the limit of re-charge for the open market price in the operative and concluding part of sub-s. (2); but it added that, on the relevant facts, the words “ the last preceding sub-section shall have effect ”, in sub-s. (3) (b), were mandatory and amounted to a direction that sub-s. (2), as so modified, was to become operative regardless of the terms of its condition. On this interpretation the whole emphasis is placed on the expression “ shall have effect ”. The relevant facts having occurred, the operative part of sub-s. (2) is to come into force with a reference to the limit of re-charge inserted in lieu of the reference to the open market price. If this construction is sound, the appeal succeeds and £8,000 becomes the material “ starting ” figure instead of £17,554.

My Lords, these three constructions appear to cover the possibilities of the situation and it is now necessary to choose between them. I must confess that in this task I find no guidance in the general policy or intentment of the Income Tax Acts or in the scheme of the Act of 1945. This is not to say that guidance of this kind is never available in this particular legislative field. For example, if, of two possible constructions, one would impose a tax on income and the other a tax on capital, the golden rule that income tax is a tax on income and not on capital would supply a solution. But the complicated subject of allowances for wear and tear does not seem to present any certain aid of this nature, at all events as respects the present question. Here I find no current of legislative purpose capable of carrying the issue one way or the other. Nor is any one of the possible interpretations to be preferred on the ground that it, unlike the others, avoids some manifest absurdity, some palpable injustice, or some gross anomaly. Speculation is possible, but it leads nowhere. At the end of the day there remains, so far as I can discern, no good reason for asserting that any of the constructions enumerated would conflict with the general scheme and purpose of the legislation. In these circumstances, all one can do is to take the statute and see what it says according to the ordinary and everyday meaning of the language used.

Proceeding thus, my choice falls at once on construction II. More than the others it seems to me to reflect the natural meaning of sub-s. (3) (b). Given the relevant facts, what that paragraph says is that sub-s. (2) shall have effect as if for “ the reference ” to the open market price there were substituted “ a reference

to the said limit of re-charge". Now that, with its use of "the reference" in the singular, appears to me to be an apt way of altering the concluding and operative part of sub-s. (2), but not of altering both that part and the opening and conditional part as well. And that aptness is, I think, emphasised by the way in which sub-s. (2) is drafted, for the expression "subject to the succeeding provisions of this section" which occurs therein qualifies only the concluding and operative part, and suggests that it, rather than the opening part, may be subject to later modification. Construction I, on the other hand, involves applying "the reference" to the open market price to both parts of sub-s. (2) and reading the words in the opening part of that sub-section

"at a price other than that which it would have fetched if sold in the open market"

as including a reference to the open market price. "Reference" is a comprehensive expression, and modifying enactments which operate, not by substituting one set of words for another set of words, but by substituting a reference to one subject-matter for a reference to another subject-matter, will not necessarily be ineffectual merely because of some descriptive variation, as a pronoun for a noun, the plural for the singular, or such as may be entailed by the use of shortened forms. I do not, therefore, say that construction I is bound to fail because the word "reference" is used in the singular in sub-s. (3) (b), or because the subject-matter of "open market price" cannot be spelt out of the wording of the opening part of sub-s. (2); what I hold is that, when every aspect is considered, this construction is markedly less apt and rests less easily on the language of the statute than construction II. Moreover, the position of the words "subject to the succeeding provisions of this section" in sub-s. (2) points as much against construction I as it points in favour of construction II. If construction I had been the intention of the legislature, I cannot but think that these words would have been found at the very beginning of that sub-section. Construction III must, in my opinion, also be rejected, though on somewhat different grounds. The words "shall have effect" do not appear to have a constant meaning when used in relation to statutory provisions. They may signify that the provision to which they relate is to apply and become operative, or they may be used to signify that, if and when it becomes applicable, it is to operate in a particular way. When used, as they are in sub-s. (3) (b), with respect to a conditional enactment, the latter seems to be the appropriate meaning. To read these words in that sub-section according to construction III would be to ignore the condition in sub-s. (2) altogether. I cannot believe that such a drastic treatment of the text was ever intended. To hold that it was would be to disregard completely a condition depending on the facts of the actual sale and to substitute a condition which related only to open market value and the limit of re-charge and had nothing to say to the price obtained on the sale with which s. 59 is primarily concerned.

For these reasons I am of opinion that the First Division was right and that the appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, the respondents are entitled to allowances in respect of machinery and plant used by them in their business of wool spinners, under r. 6, as amended by subsequent legislation, of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918.

The question raised in this appeal by the revenue is what is the figure on which these allowances are to be calculated. This depends on whether or not s. 59 of the Income Tax Act, 1945, in some of its provisions, applies to the circumstances in which the machinery and plant were acquired by the respondents. Section 59 of the Income Tax Act, 1945, is a section hedged round by conditions and qualifications. To bring the section into operation at all it is necessary that either sub-s. (1) (a) or sub-s. (1) (b) shall apply to the transaction in question here. It is common ground that sub-s. (1) (a) does apply. We are entitled thus to

look at sub-ss. (2) and (3) of the section and see whether these sub-sections are applicable in the circumstances of the present case.

The material facts are that on Nov. 16, 1945, the respondents in the present appeal (whom I shall call "the company") took over from a partnership the business of wool spinners carried on by the partnership and the whole assets of the business. The assets included machinery and plant for which the price of £17,554 was paid, and this price, it is found, was the price which the machinery and plant would have fetched if sold in the open market on Nov. 16, 1945. The Income Tax Act, 1945, did not come into operation until the appointed day, which was later fixed as Apr. 6, 1946, and the present case is concerned with what are the proper allowances to be made to the company in respect of wear and tear of machinery and plant subsequent to the Act of 1945 coming into operation. The company says that the wear and tear allowances should be made on a cost to it of £17,554, paid for the machinery and plant. The revenue say that these allowances should be made on a figure of £8,000 which they say was the cost to the seller (the partnership) of the machinery and plant at the date of the sale and which, according to them, becomes "the limit of re-charge" as that phrase is defined in s. 59 (3) of the Income Tax Act, 1945. The exact significance of this phrase will become clearer when I come to refer more particularly to the language of sub-s. (3).

To succeed in their appeal the revenue must show that s. 59 (3) can in some way be invoked as applicable to the circumstances of this case. It is conceded that sub-s. (2), taken by itself, cannot assist them. To make the position clear I quote sub-s. (2):

"Where the property is sold at a price other than that which it would have fetched if sold in the open market, then, subject to the succeeding provisions of this section, the like consequences shall ensue for the purposes of the enactments mentioned in sub-s. (1) of this section . . . in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the price which it would have fetched if sold in the open market."

My Lords, I said at the outset that the provisions of s. 59 were hedged round with conditions. The condition in sub-s. (2) is that the property is sold at a price other than that which it would have fetched if sold in the open market. That is not this case, for it is agreed that the machinery and plant were sold at the open market price. Accordingly, it is recognised that sub-s. (2), by itself, does not help the revenue's case. But it is said the sub-section is substantially modified, and, as so modified, fits the present case by invocation of the language of sub-s. (3) (b). I quote sub-s. (3) (b) so far as relevant:

"Where the sale is a sale of machinery or plant— . . . (b) subject to the provisions of the next succeeding sub-section, if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller, the last preceding sub-section shall have effect as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge: . . . In this sub-section the expression 'the limit of re-charge' means, in relation to a person who sells machinery or plant— (i) if he provided that machinery or plant for himself before the appointed day, the actual cost to him of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on machinery or plant by way of renewal, improvement or reinstatement . . ."

Counsel for the appellants submitted two separate and, I think, mutually exclusive arguments as to the effect of this provision. First, by a process of substitution of words from sub-s. (3) (b) he sought to read sub-s. (2) as if it commenced: "Where the property is sold at a price other than the limit of

re-charge, etc.” Starting thus, he would be well on the road to invoking sub-s. (2) in his favour, because, if £8,000 is the limit of re-charge, there is no doubt that the machinery and plant were sold to the company at a price greater than the limit of re-charge. But I have come to reject this contention because, in my opinion, the opening words of sub-s. (2) are not a reference to

A “the price which the property would have fetched if sold in the open market ”

but the very opposite, a reference to a price which the property would not have fetched in the open market. There is a reference in the concluding words of sub-s. (2) to the price which the property would have fetched if sold in the open market, but if “limit of re-charge ” is substituted here, it does not aid the revenue, for the whole sub-section is still qualified by the opening words of the sub-section.

B The second contention for the revenue is more subtle and, I think, more difficult. Their first contention involved taking sub-s. (2) and modifying it by the substitution of words taken from sub-s. (3) (b). Their second contention proceeds rather on taking sub-s. (3) (b) and reading into it words taken from sub-s. (2). It is to be noticed that sub-s. (3) (b) is again dependent on a condition, namely,

“if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller.”

D This, the revenue say, is the case here. The sum of £17,554, the open market price, is greater than the sum of £8,000, the limit of re-charge. They then say this is a new and independent condition which takes the place of the condition precedent with which sub-s. (2) opens. They, accordingly, ignore this condition in sub-s. (2), and on a combined reading of sub-s. (2) and sub-s. (3) (b) read the statutory provision as if it ran as follows :—

E “(3) Where the sale is a sale of machinery or plant— . . . (b) subject to the provisions of the next succeeding sub-section, if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller the like consequences shall ensue for the purposes of the enactments mentioned in sub-s. (1) of this section in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the limit of re-charge.”

F My Lords, this reading is attractive, but it takes certain liberties in the matter of re-writing the terms of the statutory provisions. It assumes, for instance, that the opening condition of sub-s. (2) falls to be deleted, or at least ignored. But that is not to give sub-s. (2) effect with the substitution merely of limit of re-charge for open market price. It may be that the legislature intended both the opening condition of sub-s. (2) and the condition precedent of sub-s. (3) (b) to operate. To illustrate. It might be that machinery or plant was sold at a price greater or less than the open market price. This would satisfy the condition in sub-s. (2). The open market price then becomes the datum line for the purposes of sub-s. (2). But assume that the open market price is greater than the limit of re-charge on the seller. Under sub-s. (3) (b) this introduces a new datum line, viz., the limit of re-charge. To say, however, that, if the machinery or plant is, in fact, sold at the open market price and this is greater than the limit of re-charge, the limit of re-charge is to be substituted for the open market price seems to me to be pure speculation as to the intention of the legislature. The statute nowhere says so. The words in sub-s. (3) (b)

“if the price which the property would have fetched if sold in the open market ”

are, I think, important. They seem to be a reference back to the concluding

words of sub-s. (2) and these in turn are dependent on the opening words of the sub-section :

“ Where the property is sold at a price other than that which it would have fetched if sold in the open market.”

My Lords, I think I have said enough to show that, in any event, the meaning of this statutory provision is surrounded with much doubt and confusion. It is impossible, in my opinion, to say that there is any of the relevant and material provisions of s. 59 which clearly and unambiguously operates to deprive the taxpayer, in the circumstances of this case, of the right to have his wear and tear allowances based, as would normally be done, on the cost to him of his machinery and plant. That is in this case on the sum of £17,554. I draw no distinction between a statutory provision invoked as a taxing provision and a statutory provision said to deprive, or restrict, the taxpayer in the matter of some established taxation allowance or relief. In each case, the impact of the statute on the taxpayer must be clear on a fair reading of the statute. The language of ROWLATT, J., in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (1) ([1921] 1 K.B. 71), as approved by my late noble and learned friend, VISCOUNT SIMON, L.C., in *Canadian Eagle Oil Co., Ltd. v. Regem* (2) ([1945] 2 All E.R. 507) is, in my opinion, here very apt. I would only say that when ROWLATT, J., says, “ There is no room for any intendment ” I think he means there is no room for any presumption of intention, and I would go no further than this. It may often be the case that, from a reading of the language of a statute, or a particular provision of a statute, it is not difficult to extract the policy or intention of the legislature. But that is not so in this case. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor for Scotland of the Board of Inland Revenue* and *Solicitor for England of the Board of Inland Revenue* (for the Crown); *Peacock & Goddard*, agents for *Tho. & J. W. Barty*, Dunblane, and *Fraser, Stodart & Ballingall*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

DALY v. CANNON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 19, 20, 1954.]

Public Health—Rag collection—Delivery of “article” to person under age of fourteen years—Goldfish—Public Health Act, 1936 (c. 49), s. 154 (1).

A

By the Public Health Act, 1936, s. 154 (1): “No person who collects . . . rags . . . shall . . . (b) while engaged in collecting . . . sell or deliver, whether gratuitously or not . . . any article whatsoever to a person under the age of fourteen years,” the penalty, by sub-s. (2), being a fine of £5.

HELD: the word “article” was apt to describe an inanimate, but not an animate, object, and, therefore, a goldfish was not an “article” within the meaning of s. 154 (1).

B

West Ham Corpn. v. Markham (1953) (117 J.P.Jo. 24), approved.

FOR THE PUBLIC HEALTH ACT, 1936, s. 154 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 19, p. 415.

Cases referred to:

C

(1) *Llandaff & Canton District Market Co. v. Lyndon*, (1860), 8 C.B.N.S. 515; 30 L.J.M.C. 105; 2 L.T. 771; 25 J.P. 295; 141 E.R. 1267; 33 Digest 556, 380.

(2) *West Ham Corpn. v. Markham*, (1953), 117 J.P.Jo. 24.

(3) *R. (U.D.C. of Portadown) v. Armagh Chairman & Justices*, [1931] N.I. 209; Digest Supp.

(4) *M'Intyre v. M'Intee*, 1915 S.C. (J.) 27.

D

CASE STATED by Essex justices.

On July 29, 1953, at a court of summary jurisdiction sitting at Stratford, the appellant, Sidney Richard Daly, the chief sanitary inspector for Ilford Corporation, preferred an information against the respondent, William James Cannon, charging that he, on Apr. 29, 1953, being a person who collected rags and was then engaged in collecting such articles in Uphall Road, in the borough of Ilford, did deliver a certain article, namely, a goldfish, to Lesley Cullen, being a person under the age of fourteen years, contrary to s. 154 of the Public Health Act, 1936. It was proved or admitted that on the date specified the respondent was a person who collected rags; that on the date and at the place specified he was engaged in collecting rags and delivered to Lesley Cullen a live goldfish; and that Lesley Cullen was then a person under the age of fourteen years.

E

F

On behalf of the appellant it was contended that a live goldfish was an “article” within the meaning of s. 154 (1) of the Public Health Act, 1936. The respondent did not attend before the justices. He sent them a letter in which he stated that he wished to plead Guilty, but he had been unaware that it was an offence to give away a goldfish. The justices were referred to *Llandaff & Canton District Market Co. v. Lyndon* (1) and *West Ham Corpn. v. Markham* (2).

G

The justices were of the opinion that a live goldfish was not an article within the meaning of s. 154 (1) of the Act of 1936, and they dismissed the information.

A. E. Holdsworth for the appellant.

The respondent did not appear.

H

LORD GODDARD, C.J.: Section 154 (1) of the Public Health Act, 1936,

under which the respondent was summoned is in these terms:

“No person who collects or deals in rags, old clothes or similar articles, and no person assisting, or acting on behalf of, any such person as aforesaid, shall—(a) in or from any shop or premises used for, or in connection with, the business of a dealer in any such articles as aforesaid; or (b) while engaged in collecting any such articles as aforesaid, sell or deliver, whether gratuitously or not, any article of food or drink to any person, or any article whatsoever to a person under the age of fourteen years.”

That sub-section replaced s. 73 (1) of the Public Health Act, 1925, which made it an offence to give to a person

“ in connection with the business of a rag and bone merchant any article of food or any balloon or other toy ”.

Section 154 (1) of the Public Health Act, 1936, appears in Part V of the Act, which is headed “ Prevention, notification and treatment of disease ”. No doubt, the object of the legislature was to prevent as far as possible infected articles being passed from hand to hand so that disease might be spread. It is not what I may call a police section, like a section introduced for the purpose of preventing the receiving of stolen goods or matters of that sort. It concerns simply the prevention or spread of disease.

It seems that in this case a boy under the age of fourteen years took some rags to the respondent and received in return a live goldfish. We are told, and I daresay it is the fact, that goldfish are found to be an inducement to boys to bring rags, and if the rag and bone man gave a boy a goldfish in a bowl, the bowl would, no doubt, be an article. In the present case the boy brought a bowl for the goldfish to be put in. The question is: Is a goldfish an article? The respondent wrote a letter to the court and said that he was very sorry if he had done anything wrong, but that he understood that a magistrate had held that it was not wrong as a goldfish was not an article. On Dec. 11, 1953, the stipendiary magistrate at West Ham gave a considered, and, in our opinion, extremely sensible, judgment in *West Ham Corpn. v. Markham* (2) when he said that he saw no reason why the word “ article ” should not be construed in its popular sense and that no ordinary person would call a goldfish an article.

Section 154 (2) provides a penalty of £5 for breach of the section. It is a well-known canon of construction that if you have an ambiguity or something which is capable of two constructions, you always apply the construction which is most favourable to an accused person and will not involve the imposition of a penalty. Would anybody in ordinary common parlance talk about a goldfish as an “ article ”? I do not think he would. If the statute had said “ article or thing ”, as some statutes have provided, there could be no doubt, I think, that a goldfish would be a “ thing ”. That point came before the High Court of Northern Ireland in *R. (U.D.C. of Portadown) v. Armagh Chairman & Justices* (3) where MOORE, C.J., having to construe a section which dealt with “ article ” and “ thing ”, said ([1931] N.I. 212) he thought

“ ‘ article ’ is appropriate to inanimate chattels; ‘ things ’ both to animate and inanimate.”

I think it is a difficult point in some respects, and, if it is thought that goldfish spread disease—I do not know whether or not they do so—it would be easy for Parliament to alter the law. But, bearing in mind that, if there is a doubt as to the construction, we ought to prefer the construction which is against the imposition of a penalty, I think it is a straining of language to say that a goldfish is an article. Accordingly, I think the judgment, to which I have referred, of the West Ham magistrate was right and I should be prepared to adopt it as my own. In these circumstances, I think the justices came to a right decision in point of law that a goldfish is not an article, and, accordingly, this appeal should be dismissed.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitor: *K. F. B. Nicholls*, town clerk, Ilford (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PEOPLE'S REFRESHMENT HOUSE ASSOCIATION, LTD. v.
JONES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 19, 20, 1954.]

Master and Servant—Wages—Regulation—Catering worker—Minimum remuneration—“Benefits or advantages . . . in connection with any employment”—Payment by worker deemed deduction from remuneration—Manager of licensed premises—Right to carry on catering business—Payment to employer in consideration of grant of right—Catering Wages Act, 1943 (c. 24), s. 10 (3).

By an agreement in writing the appellants, owners of licensed non-residential establishments, employed a manager at one of their establishments at a salary to be paid in accordance with the scale laid down by the Catering Wages Act, 1943, and any order made thereunder. By a separate agreement in writing made on the same day the appellants allowed the manager during the term of his service agreement to carry on a catering business at the said establishment and retain for himself the profit arising therefrom in consideration of paying a weekly sum of £3 (in practice paid at the rate of £13 per month) to the appellants out of the profits of such catering business. It was expressly provided that both agreements should be read together. On an information preferred by the respondent against the appellants for their failure to pay the manager the applicable statutory minimum remuneration, it was contended for the respondent that the payment of £13 by the manager in respect of an advantage or benefit in connection with his employment which, by s. 10 (3) of the Catering Wages Act, 1943, was to be “deemed . . . to have been deducted by the employer from his remuneration,” that after deduction of the £13 the manager had received less than the statutory minimum wage, and that, therefore, the appellants had committed an offence under s. 9 (2) of the Act.

HELD: the test whether a payment by a worker to an employer should be treated as a deduction under s. 10 (3) of the Act of 1943 was whether it was provided in connection with the employment or formed an entirely separate and independent transaction; that was a question of fact; in the present case it was provided that both agreements should be read together; and, therefore, the benefit under the catering agreement was conferred in connection with the employment as manager, and the appellants had committed an offence under the Act.

Long Eaton Co-operative Society, Ltd. v. Smith ([1949] 1 All E.R. 633), applied.

FOR THE CATERING WAGES ACT, 1943, s. 9 (2), s. 10 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 111, 112.

Cases referred to:

- (1) *Williams v. Smith*, [1934] 2 K.B. 158; 103 L.J.K.B. 421; 151 L.T. 112; 98 J.P. 231; Digest Supp.
- (2) *Long Eaton Co-operative Society, Ltd. v. Smith*, [1949] 1 All E.R. 633; [1949] 2 K.B. 144; [1949] L.J.R. 837; 113 J.P. 185; 2nd Digest Supp.
- (3) *Wrottesley v. Regent Street Florida Restaurant*, [1951] 1 All E.R. 566; [1951] 2 K.B. 277; 115 J.P. 185; 2nd Digest Supp.

CASE STATED by Southampton justices.

At a court of summary jurisdiction sitting at Romsey on June 26, 1953, the respondent, Freda Ella Jones, on behalf of the Minister of Labour and National Service, preferred an information against the appellants, People's Refreshment House Association, Ltd., that they on or about Dec. 1, 1952, being employers of workers to whom the Wages Regulation (Licensed Non-Residential Establishment) (Managers and Club Stewards) Order, 1952 (S.I., 1952, No. 205), applied,

at the Horns Inn, Nursling, unlawfully failed to pay to Leonard Thomas Anderson, one of the said workers, remuneration not less than the statutory minimum remuneration, clear of all deductions, contrary to s. 9 (2) of the Catering Wages Act, 1943, and the said order.

It was proved or admitted that: (i) Anderson was at all material times employed by the appellants as manager (category A) at the Horns Inn, Nursling, Southampton, which was a licensed non-residential establishment within the meaning of the order. Anderson's wife was required by the appellants to assist in the work of the establishment, and both persons were provided by the appellants with accommodation as defined in para. 26 of the order, but not with full board. In respect of their said employments, Anderson and his wife were workers to whom the schedule to the order applied. (ii) Anderson had been employed by the appellants at the Horns Inn as manager since April, 1946. On Apr. 17, 1952, two agreements in writing were entered into, and these agreements were in operation in November, 1952. The first, referred to as the "Agreement for service" was between the appellants and Anderson and his wife, and the second, referred to as the "Catering agreement" was between the appellants and Anderson. Clauses 5 and 7 of the second agreement provided that it was to be read with the first agreement and should terminate with it. (iii) By cl. 20 of the "Agreement for service" the appellants could terminate it by one month's notice, and pursuant to that clause the appellants did terminate the agreement by giving one month's notice to Anderson in the early part of November, 1952, and, accordingly, both the "Agreement for service" and the "Catering agreement" were due to terminate in the early part of December, 1952. (iv) By cl. 14 of the "Agreement for service" the appellants settled with Anderson monthly in arrear, crediting him with his salary and other moneys due to him, the sum so credited in respect of his salary being in accordance with the scales laid down by the Act of 1943 and the order of 1952. Anderson was also entitled to one-half of the rent received from lodgers and 3d. per dozen on aerated waters sold, plus £1 15s. a week towards help. By cl. 23 provision was made for Mrs. Anderson's wages in accordance with the Act and the order, and, if no part of the Act or order provided for her wages, they were to be 30s. per week, payable to her by Anderson on behalf of the appellants. (v) By cl. 4 of the "Catering agreement", in consideration of the appellants allowing Anderson to carry on a catering business at the Horns Inn and receive and retain for himself the profits arising from such business (but not profits arising from the sale of mineral waters or packed goods) and in consideration of the appellants paying for the lighting and heating, and providing the utensils and use of the dining rooms, Anderson agreed to pay to the appellants the sum of £3 a week out of his profits from the said catering business. (vi) According to the usual course of business between the parties, Anderson performed his obligation to pay the sum of £3 a week by paying to the appellants a sum of £13 in respect of each month. He paid this sum to the appellants at the same time as he paid to them the takings for the first week of the next following month. (vii) For the month of November, 1952, Anderson furnished the appellants an expenses sheet on their printed form, and credited them with £13 under the heading of "rent". On receipt of this document the appellants wrote a letter to him on Nov. 21, 1952. Anderson then paid the appellants the sum of £13 in a cheque for a larger amount. (viii) Anderson was paid by the appellants the sum of £46 0s. 8d. shown in the amended expenses sheet. Of that sum, £8 11s. 3d. was for repayment of his expenses as shown, £29 13s. 6d. represented the wages of himself and his wife (after deducting £1 4s. in respect of their share of the sums to be paid in respect of the National Insurance (Industrial Injuries) Act, 1946, and subject to a further deduction of 5s. in respect of income tax), £7 11s. 8d. represented the monthly total of the weekly sum of £1 15s. referred to in cl. 14 of the "Agreement for service", which sum was retained by the said Anderson and was remuneration received by him

as were the sums of 6s. in respect of his share of the rent received from lodgers and 3s. 3d. in respect of aerated waters sold, which sums were also paid in respect of the matters set out in the said para. 14. Before deductions in respect of national insurance and income tax were made, the minimum sum payable to him under the Act and order was £24 7s. 6d. and the minimum sum payable to his wife under the Act and order was £6 10s. (ix) Under the "Catering agreement" he had to pay out of the profits of the catering business the sum of £3 per week or £13 for the month of November. He and his wife gave evidence that, in their opinion, the profits from that business for that month were very small and probably not more than £1 13s., but they kept no books and were unable to give the figures of their receipts or takings. (x) Anderson paid to the appellants in accordance with the "Catering agreement" the sum of £13 for the month of November in respect of the catering business, and, if this sum could properly be set off against his remuneration, his remuneration would be reduced to £21 1s. 5d., thus being below the statutory minimum. Neither when making this payment nor at any other time did Anderson inform the appellants that it was not paid out of the profits of the catering business, nor did he inform them what were the profits of the catering business. (xi) On May 24, 1953, the respondent sent to the appellants a letter attaching a statement setting out what she alleged were the details of the remuneration of Anderson in the month of November, 1952. This statement also showed that, if the said sum of £13 had to be debited to Anderson to arrive at his wages for the purposes of the said Act and order, there was a deficiency of £3 6s. 1d., save as to any deductions properly to be made in respect of national insurance and income tax.

On behalf of the appellants it was contended: (a) that the respondent's statement referred to in para. (xi) was incorrect in that the charge of £13 made under the "Catering agreement" was incorrectly included in the calculation of "remuneration" because it was, not a deduction from remuneration, but a separate payment to be made out of the profits of the catering business and was in fact paid separately and on a different date from the said remuneration; (b) that the two agreements should not be read together, but were separate agreements; (c) that the appellants had the right to assume that the profits of the catering business amounted to at least £13; (d) that, if the profits of the catering business should be included in the calculation of remuneration, the appellants could not be convicted of an underpayment under the Act and order on a mere estimate confined to the opinion of Anderson and his wife that they made very small profits in the month of November, 1952, but had no books and did not know what their expenditure or their takings were in that month, particularly as Anderson had paid the £13 to the appellants and had never mentioned this alleged deficiency of profits until the hearing before the justices; (e) that Anderson had received the remuneration due to him under the said Act and order in respect of the month of November, 1952.

On behalf of the respondent it was contended: (a) that the object of the Act was to ensure that the net remuneration received by a worker from his employer was not less than the statutory minimum remuneration; (b) that, in determining the remuneration paid to a worker, one must have regard to the arrangement between the employer and the worker as a whole and see what the final effect of it was; (c) that any system of payment which finally resulted in a worker receiving as wages a net sum less than that fixed by the appropriate wages regulation order was a contravention of the Act; (d) that the arrangement between the employer and the worker in this case, though dual in form, was single in substance; (e) that the sum of £13 a month which was paid by Anderson and accepted by the appellants in respect of the "Catering agreement" was, in the circumstances of the case, a sum which should be deducted in arriving at the net remuneration paid by the appellants to Anderson in respect of his employment at the Horns Inn; (f) that in the circumstances the appellants were

under a duty to ascertain the amount of profits resulting from the catering business in order to ensure that Anderson received at least the statutory minimum remuneration.

The justices were referred to *Williams v. Smith* (1) and *Long Eaton Co-operative Society, Ltd. v. Smith* (2) and were of the opinion that: (i) the two agreements should be read together; (ii) the sum of £13 paid for the month of November, 1952, to Anderson in respect of the catering business should be deducted in arriving at the remuneration received by him from the appellants; and (iii) in the premises Anderson had not received the remuneration due to him under the Act and order in respect of the month of November, 1952. They, accordingly, convicted the appellants of the offence charged, and ordered them to pay a fine of £10 and ten guineas costs.

The appellants appealed. In the Divisional Court the respondent relied on s. 10 (3) of the Act of 1943 and contended that the payment of the £3 under the catering agreement was to be deemed to be a deduction from the wages.

Beney, Q.C., and *C. J. A. Doughty* for the appellants.
S. B. R. Cooke for the respondent.

LORD GODDARD, C.J.: On Apr. 17, 1952, one Anderson was employed under an agreement in writing to serve as the manager of the licensed premises known as the Horns Inn, Nursling, Southampton. The agreement—and no one suggests that it is otherwise than a bona fide agreement—provided in cl. 14:

“ . . . the manager's salary under this agreement shall be payable monthly and in accordance with the scales laid down by the Catering Wages Act, 1943, and/or any order made thereunder. The manager shall be entitled to and shall be credited with one half the rent received from lodgers and with 3d. a dozen on aerated waters sold. £1 15s. per week allowed towards help.”

The appellants are one of the associations conducted to encourage the sale of aerated waters rather than alcoholic liquors, and, therefore, the manager is given an inducement to sell non-alcoholic beverages. Provided he is lucky enough to get lodgers from time to time and to sell some aerated waters, he is going to get more than the minimum wage. Some managers of those houses like to do the catering themselves and others prefer that they should simply act as managers and not have a direct interest in the catering, and so a second agreement was made on the same day and recited:

“ Whereas the [appellants] are the proprietors of the property goodwill and utensils of a catering business carried on or to be carried on in the licensed premises known as the Horns Inn situate at Nursling in the county of Hampshire. And whereas the caterer has been appointed manager of the same premises under an agreement which is called ‘the principal agreement’ and is anxious and willing to carry on a catering business at the said premises and the association are willing for him so to do.”

Then it provides:

“(1) The caterer shall have the sole and exclusive right at all times during the continuance of this agreement to supply to customers good and well prepared food either hot or cold according to demand and also tea coffee cocoa and all other articles of food that are usually supplied in a well-ordered eating-house or coffee tavern. (2) The [appellants] will provide all trade utensils furniture crockery and glass for the purpose of carrying on the said business and the caterer will at his own expense replace or repair all such articles as are damaged or destroyed (damage to articles of crockery or glass broken or worn out by fair wear and tear excepted). The caterer shall also be entitled to have the use without any charge thereof of the dining room or rooms in the said licensed premises for the purpose of

carrying on the said catering business. The [appellants] will also provide without expense to the caterer the heating and lighting of the said dining room or rooms and the heating necessary for cooking the food for the said business."

By cl. 3 it is provided that the caterer should purchase on his own account the provisions, except those excluded. Then comes cl. 4 which is said to amount to a breach of the Catering Wages Act, 1943:

"In consideration of the [appellants] allowing the caterer to carry on the said catering business and receive and retain for himself the profits arising from such business (but not profits arising from the sale of mineral waters or packed goods) and in consideration of the [appellants] paying for the lighting and heating, providing the utensils and the use of the room or rooms specified in cl. 2 hereof the caterer agrees to pay the [appellants] the weekly sum of £3 for the said catering business out of his profits therefrom."

Clause 5 reads as follows:

"This agreement shall be read with the principal agreement but is subsidiary thereto and nothing in this agreement shall qualify or prejudice the provisions of cl. 11 of the principal agreement."

Clause 11 of the principal agreement is the one under which the manager is obliged to keep proper books and accounts, and so forth. Then it is also provided by cl. 7:

"If for any reason the principal agreement becomes determined this agreement shall immediately become and be determined save only for the validity of acts done and obligations acquired during its currency."

I do not think I need go into the various facts relating to the accounts which were drawn up at the end of the employment, but the fact remains that the manager did pay to the appellants £3 a week, and at the close of his employment he sent them a cheque for that amount, although he said that he had not made £3 a week.

He was only bound to pay £3 a week under the agreement if he made a profit. If he chose to pay them that sum, though he had not made any profit, it would be difficult to see, if it were otherwise permitted by the Act, that the appellants would commit an offence because he paid a sum which amounted to £3 a week, but that is not the point we have to decide.

The point arises under the Catering Wages Act, 1943, s. 10 (3), which provides:

"Where any benefits or advantages are provided, in connection with any employment, by the employer or by some other person under arrangements with the employer, then, whether or not the benefits or advantages are authorised to be reckoned as payment of wages in lieu of payment in cash, any sum paid by the worker in respect of those benefits or advantages shall be deemed for the purposes of this Act to have been deducted by the employer from his remuneration."

One of the objects of the Act is to provide that the payments shall be in cash, and the sub-section is similar to the provisions of the Truck Acts, 1831 to 1940, namely, deductions are not allowed to be made from a worker's remuneration except in so far as the wages regulation order may provide that certain sums shall be deducted. Our attention has been called to the Wages Regulation (Licensed Non-Residential Establishment) (Managers and Club Stewards) Order, 1952 (S.I., 1952, No. 205), schedule, Part I, para. 7, which provides that, if board is provided, a certain sum may be deducted in respect of that board. I have no doubt that s. 10 (3) was put in by Parliament to prevent evasion. In the present case I do not think there has been any attempt to evade the Act. It was provided that the manager should be, and he was, paid a minimum wage. So far as I can see, he was generally paid rather more than the minimum wage,

but it is said that what has happened here is caught by the words of s. 10 (3) and, if so, we are bound to give effect to it.

In my judgment, it is impossible to say that this catering agreement did not confer on the manager a benefit or advantage. It gave him the benefit of carrying on a catering business, keeping for himself the profits less £3. I cannot see that that benefit or advantage was not provided in connection with the employment. It clearly was. The agreement under which he was appointed catering manager was not only made on the same day as the principal agreement which appointed him manager, but the principal agreement is referred to in the catering agreement, cl. 5 of which provides that the catering agreement is to be read with the principal agreement, though it is said to be subsidiary thereto. Under the catering agreement he is to pay £3 a week to his employers, not in any circumstances but provided he makes profits, and he did pay £3 a week. But the Act of 1943 provides in s. 10 (3):

“ . . . any sum paid by the worker in respect of those benefits or advantages [the £3] shall be deemed for the purposes of this Act to have been deducted by the employer from his remuneration.”

In the present case I think it works a hardship on the appellants, although there has been no evasion of the Act. Indeed, we were told by counsel who appears for the Ministry of Labour and National Service in these cases, and it is conceded, so far as I can see, rightly (though I am not deciding this point because the Minister might take some different view and might consider it hereafter), that, if this agreement were worded that the manager was to pay over all the profits of the catering business to the appellants who were then to return the profits to him less £3, that would not be caught by the Act. If that is so, it seems an unfortunate situation, which, possibly, the Minister might think fit to remedy by altering the wages schedule. We are not criticising the action taken by the respondent because it is the duty of the Ministry to see that this Act is obeyed, or the provisions of s. 10 (3) because we can see that it is often necessary to have such a provision to prevent evasion. I am only pointing out that in this particular case it seems that the manager was getting not only his minimum wage in cash, but more than his minimum wage. But, on account of the way this sub-section is worded, the transaction is caught by the concluding words.

The test in the present case must be whether or not the catering agreement was a separate and independent agreement—whether or not the two documents could be looked at as entirely separate contracts. That was the view of the Court of Appeal in *Long Eaton Co-operative Society, Ltd. v. Smith* (2). That case dealt with agricultural wages, and in the Agricultural Wages (Regulation) Act, 1924, s. 7, there were not such strong words as there are in the Catering Wages Act, 1943. In that case an agricultural worker was engaged at a minimum wage and was paid the right wage, but he also asked to be accepted by his employers as the tenant of a cottage. It was not a cottage in the ordinary sense of a tied farm cottage, but was a cottage independent of the farm which he asked to be allowed to take, and for it he agreed to make a weekly payment. The Court of Appeal held that that payment could not be looked on as a deduction from his wages because they regarded the contract of tenancy of the cottage as entirely separate from the contract of employment. I feel that I cannot take that view of the two agreements in the present case. I think they are really one and the same agreement although they are contained in two different documents. Those documents must be read together. Although, I daresay, it is possible to have an independent caterer in a refreshment house of this sort carrying on an independent business, in the present case I am clearly of opinion that the manager was carrying on this business qua manager. He was the manager, and, as manager, given the benefit of providing the food and taking the profits less £3. But, by reason of the words of sub-s. (3), the fact that he pays the £3 must, I think, be treated as a deduction from his minimum wage, although, as I say,

it seems to be conceded that the same transaction could well be carried out in another way. In these circumstances, I think the justices came to a right decision, and this appeal fails.

BYRNE, J.: I agree.

A PARKER, J.: I agree. The short point is whether the undoubted benefit
with which the manager was provided by the appellants was in connection with
his employment. It seems to me that whether or not in any particular case a
benefit is provided in connection with the employment or forms part of an
entirely separate bargain must be a question of fact. One of the contentions
raised before the justices by the respondent was that, in determining the remuneration
paid to a worker, one must have regard to the arrangement between the
B employer and the worker as a whole and see what is the final effect of it. It
seems to me perfectly clear from the findings of the justices that they came to
the conclusion that these two agreements were not separate bargains, but were
part and parcel of one single transaction. Accordingly, that being a finding
on a question of fact, it cannot be challenged unless it is shown that they have
C misdirected themselves in law or there was no evidence on which they could so
find. So far from that being the case, it seems to me when one looks at these
agreements and sees that the second, catering, agreement was made subsidiary
to the principal agreement, when one sees that the appellants were not content
for this man to remain as caterer once he ceased to be manager, and when one
appreciates that the offer of becoming caterer was really an inducement to
D become manager, it seems to me impossible to say that the benefit provided was
not in connection with his employment.

Appeal dismissed.

Solicitors: *Faithfull, Owen, Wright & Armstrong* (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

NORRIS v. WILLIAM MOSS & SONS, LTD.

[COURT OF APPEAL (Somervell and Birkett, L.J.J., and Vaisey, J.), January 12, 13, 25, 1954.]

Building—Building regulations—Scaffolding—Standard out of vertical—Negligence of workman in correcting fault—Cause of accident—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 10 (1) (a).

The plaintiff was employed as a scaffold erector by the defendants who were engaged in building a brick ventilating shaft. The defendants' foreman noticed that one of the standards of the scaffolding erected on the building was out of the vertical and leaning slightly away from the wall of the shaft, but he failed to remedy the fault or inform the plaintiff of its existence. On Aug. 15, 1950, the foreman instructed the plaintiff to erect an additional platform on the scaffolding, and the plaintiff, having reached the existing platform, noticed the fault in the standard and attempted to correct it by unfastening the couplings on the platform and proceeding to try to place the standard back into the vertical without having unfastened the couplings at the base and in the centre. As the plaintiff pulled a bend was created in the standard, and when he released the pressure on it, it sprang back into position dragging the "putlogs" which secured the scaffolding to the wall, out of the wall. The platform on which the plaintiff was standing collapsed and he fell and suffered injuries. In a claim for damages for personal injuries, based on negligence at common law and breach of reg. 10 (1) (a) of the Building (Safety, Health and Welfare) Regulations, 1948, the court found that the plaintiff's method in trying to correct the fault was "fantastically wrong".

HELD : although at the time of the accident there was a breach by the defendants of reg. 10 (1) (a) in that the standard was out of the vertical, the real cause of the accident was the plaintiff's negligence in employing an unsuitable method of trying to correct the fault ; neither the breach of statutory duty nor the failure of the foreman to warn the plaintiff of the fault contributed to the accident ; and, therefore, the defendants were not liable.

Sexton v. Scaffolding (Great Britain), Ltd. ([1952] 2 All E.R. 1085), considered.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 10 (1) (a), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 214.

Case referred to :

(1) *Sexton v. Scaffolding (Great Britain), Ltd.*, [1952] 2 All E.R. 1085 ; [1953] 1 Q.B. 153.

APPEAL by the plaintiff from an order of STABLE, J., at Manchester Winter Assizes, dated Mar. 25, 1953.

The plaintiff was employed as a scaffold erector by the defendants, William Moss & Sons, Ltd., who were a firm of builders and contractors, engaged in building a brick ventilating shaft. Scaffolding had been erected to provide working platforms for the bricklayers, and on Aug. 15, 1950, the work on the shaft had reached such a stage that it became necessary to add another platform at a higher level. At that time one of the tubular standards was out of the vertical and leaning slightly away from the wall of the shaft, a fact which had been noticed by the defendants' foreman during his inspection, but which he failed to remedy or communicate to the plaintiff. The foreman instructed the plaintiff to add the platform at the higher level, and when the plaintiff reached the existing platform he saw that the standard was out of the vertical. He, therefore, decided to correct the fault himself, and before he had inserted a safety strut into the wall, he unfastened the couplings of the platform on which

he was standing and proceeded to try to place the standard back into the vertical without unfastening the couplings at the base and in the centre. A bend was created in the standard as he pulled and when he released the pressure, the standard sprang back and dragged out of the wall the "putlogs" which secured the scaffolding to the wall. The platform collapsed, and the plaintiff fell to the ground, thereby suffering injuries. In a claim for damages for personal injuries the plaintiff alleged negligence at common law and breach of reg. 10 (1) (a) of the Building (Safety, Health and Welfare), Regulations, 1948, on the part of the defendants. Regulation 10 (1) provides:

"Standards or uprights of scaffolds shall be—(a) where practicable vertical or slightly inclined towards the building."

On the issue of negligence, STABLE, J., found that the failure of the foreman to communicate the existence of the fault to the plaintiff had not, in the circumstances, contributed to the accident, and held that the defendants were not in breach of their common law duty. He held, further, that reg. 10 (1) (a) of the Building Regulations was inapplicable, and, that, therefore, the defendants were not in breach of their statutory duty.

Atkinson, Q.C., and *L. J. Antelme* for the plaintiff.
Nicklin and *R. L. Ward* for the defendants.

Cur. adv. vult.

Jan. 25. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from a decision of STABLE, J., in an action in which the plaintiff claimed damages against his employers for personal injuries. He alleged a breach of the defendants' duty at common law, and also a breach under the Building (Safety, Health and Welfare) Regulations, 1948. The case concerns scaffolding. The defendants were erecting a new building and put up their own scaffolding, and this was the type which had to be rigidly connected with the building. There were vertical and cross pieces and the pieces affixed to the building were known as "putlogs". The regulation mainly relied on is reg. 10 (1) (a) which provides that the standards or uprights of scaffolds shall, where practicable, be vertical or slightly inclined towards the building.

A few days before the accident the defendants' foreman, in the course of his duty, noticed that one of the uprights was out of the vertical leaning, not towards the building, but away from it. He took no action, believing that from a safety point of view it did not matter. On the day of the accident the plaintiff and two men were ordered to put on another lift or storey to the scaffolding. When the plaintiff went to the place where this work was to be done he noticed, as the foreman had, that this upright was out of the vertical and leaning away from the building. He decided to put it right himself and the learned judge has found that this was a proper decision for him to take. He was an experienced man, competent in the work. There was, on the learned judge's finding, no difficulty about it and if the correct procedure had been followed there would have been no danger to anyone concerned. The learned judge set out the proper procedure and proceeded as follows:

"Instead of that, before this safety strut was inserted, for some inexplicable reason he [the plaintiff] unfastened the couplings of the first platform, on which he was standing, and proceeded to try to place this standard back into the vertical without having unfastened the couplings at the base and middle. The result was as he pulled it towards him that inevitably there was created a sort of bend in this standard and when the pull was released it shot back dragging the putlogs out of the support of the brick wall and thus causing the platform to collapse and the plaintiff to fall."

The learned judge describes this method as "fantastically wrong". When he was dealing with the issue at common law he referred to the fact that the

foreman had noticed this upright and done nothing about it. He held that the foreman should have had the standard attended to before sending people up to raise the lift. He added:

"But this omission on the part of the foreman had nothing to do with this accident but it so happened that the plaintiff observed the position of the standard and was proceeding to do that very thing though in the wrong way which he would have been doing had the foreman done his duty and directed him to do it."

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The judge was finding, and I agree, that the cause of the accident was the method by which the plaintiff set about this work and not the failure of the foreman to take steps.

As I have said, the claim was based on an alleged breach of the regulations and I have recited the most important. The defendants' primary defence, we are told, was based on causation. It was submitted that the departure of the standard from the vertical was not the cause of the accident for the purpose of liability: it was merely the occasion of the work which the plaintiff took upon himself to do. During the course of the hearing below reference was made to the decision of this court in *Sexton v. Scaffolding (Great Britain), Ltd.* (1). In that case an accident had happened while some scaffolding was being dismantled and this court held that the regulation relied on did not apply to the work of dismantling as at the time when the accident occurred. The principle is easily illustrated. Regulation 9 provides that all scaffolds shall be kept secure or placed in position so as to prevent, so far as is practicable, accidental displacement. An occupier clearly could not be convicted of a criminal offence on the ground that the scaffold or part of a scaffold had not been so secured if he was in process of erecting it and in doing, at the proper time, that which the regulation says is to be done. As HOBSON, L.J., put it ([1952] 2 All E.R. 1092), certain of the regulations are only applicable to a scaffold in use and cannot be applied to the process of erection so as to comply with the regulations, or to dismantling. The learned judge thought that that case covered the present circumstances.

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I have come to the conclusion that the claim fails on the point of causation. On the learned judge's findings of fact it seems to me plain that the sole cause of the accident was the method which the plaintiff unfortunately adopted in carrying out the work. With regard to the principle of *Sexton's* case (1), it seems to be clear that it could and would apply in some cases to the process of keeping the scaffolding in accordance with the regulations in between erection and dismantling. I will assume, and this may be the case here, that scaffolding properly erected, as a result of the weather or inevitable wear and tear, requires attention in order to bring it back into a state in which it accords with the regulations. As soon as the defect appears men are no longer allowed to use it as a scaffold and a proper repairing squad is sent up to deal with it. I cannot think it could be said that a criminal offence had been committed.

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I feel, however, some difficulty about the present case, and I would, therefore, wish to make no concluded observations on the application of the principle in *Sexton's* case (1) to the circumstances here. If that had been the only point I think the fact that the foreman had noticed the defect and done nothing, and knowing of the defect had sent the plaintiff up on a job on which he would have had to use this piece of scaffold as a scaffold, might have been relied on as I may put it in this way, as ousting the application of the principle in *Sexton's* case (1). It was suggested that one sentence of the learned judge's judgment indicated that, apart from his application of *Sexton's* case (1), he would have held the defendants liable to some extent with a substantial contribution from the plaintiff due to his negligence. There is a sentence that supports that suggestion. On the other hand, having regard to what the learned judge said about the common law liability, I think he would probably have come to the same conclusion as I have on the question of causation if he had felt it necessary to decide the point with

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reference to the alleged breach of regulations. I, therefore, would dismiss the appeal.

A BIRKETT, L.J., stated the facts and continued: The learned judge had to decide whether the defendants were liable to the plaintiff either at common law or because of some breach of their statutory duty. He decided there was no liability at common law because the foreman's omission to tell the plaintiff of what he had discovered a few days before Aug. 15 had no bearing on the accident, and the plaintiff had discovered the same thing for himself. If the plaintiff had not discovered it and had gone on to erect the higher platform and an accident had occurred because of the leaning standard, then it would appear that the learned judge would have found the defendants to blame both at common law and for breach of statutory duty. But the plaintiff, having discovered the fault for himself, was in fact engaged in repairing it, although in an improper way, when the accident occurred; and the silence of the foreman had nothing to do with the accident at all.

B With regard to the alleged breach of statutory duty, the learned judge on the authority of *Sexton v. Scaffolding (Great Britain), Ltd.* (1), decided that reg. 10, which was relied on by the plaintiff, did not apply, and he, therefore, dismissed the plaintiff's claim. The learned judge added:

C "I think in any event there was substantial negligence on the part of the plaintiff in the way he set about this particular job."

D It seems to me that this appeal can be decided if a clear answer can be given to the question: What was the cause of this accident? The evidence points unmistakably to the cause of the accident being the improper manner in which the plaintiff endeavoured to straighten the leaning standard. Had he performed that work in the natural and proper manner, there would have been no accident at all. If that is right, can it be said that the leaning standard, which constituted a breach of statutory duty, contributed in any way to the plaintiff's injury and damage? It is obvious, of course, that, if the standard had not been out of place, the plaintiff would never have attempted to set it right, and in that sense the leaning standard was concerned with the accident. But I cannot think that the leaning standard was in any sense or in any degree the cause of the accident; it was the act of the plaintiff, and that alone, which brought about the unfortunate injury. If it is to be said that there was here a breach of statutory duty (as there was) and because of its existence it must be regarded as a contributory cause, in the sense that without it the plaintiff would never have attempted to put it right and would never have been injured, although, had he acted prudently and properly, there would have been no accident at all, then the liability of the defendants would be purely nominal, in my opinion, but, in my view, the sole cause of this accident was the negligence of the plaintiff and the breach of statutory duty made no contribution.

E F G In these circumstances it is not necessary to discuss the question whether reg. 10 (1) (a) of the Building Regulations applies, although on the reasoning which governed *Sexton's* case (1), I should incline to say it did not.

H VAISEY, J.: I am of the same opinion. It is sometimes difficult to decide whether an antecedent act or event is the cause, or one of the causes, of a subsequent event, or whether, on the other hand, it is merely one of the surrounding circumstances in which, or part of the background in front of which, the subsequent event has taken place. Here it seems to me that the accident to the plaintiff was due entirely to his own negligence in doing a piece of work, well within his competence, in a manner which the learned judge described as "fantastically wrong". True it is that it was on the leaning standard that the work in question had to be carried out, but the fact that the standard was in that condition cannot, in my judgment, be treated as being in any reasonable sense a cause of the accident. It is not, I think, admissible to construct chains

of causation in a case such as this where a single cause—simple, obvious and amply sufficient to account for what happened—is to be found in the inexcusably careless behaviour of the workman himself. The argument in the old fable in which the loss of a kingdom is traced back to an originating and ultimate cause in the loss of a single nail from a horse's shoe does not commend itself to me as adaptable to this case. I concur in the reasoning of my Lords following that of STABLE, J., and I agree that this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiff); *Theodore Goddard & Co.*, agents for *Buckley, Pidgeon & Co.*, Liverpool (for the defendants).

[*Reported by* MISS PHILIPPA PRICE, *Barrister-at-Law.*]

NOLAN v. C. & C. MARSHALL, LTD.

[COURT OF APPEAL (Somervell and Birkett, L.JJ., and Upjohn, J.), January 19, 1954.]

Legal Aid—Costs—Payment into court—Recovery by legally assisted person of amount less than that paid in—Liability for defendants' costs after date of payment into court—Legal Aid and Advice Act, 1949 (c. 51), s. 2 (2) (e).

In an action against his employers for negligence and breach of statutory duty by a plaintiff who was an assisted person under the Legal Aid and Advice Act, 1949, the defendants paid into court £763. On trial of the action the judge awarded the plaintiff £500 general damages. In the civil aid certificate the plaintiff's disposable capital and his contribution towards the costs were assessed at nil. On the question of costs the judge made an order that the plaintiff should recover his costs up to the date of the payment into court and the defendants their costs after that date, and the defendants were authorised to deduct from the amount of damages awarded to the plaintiff the excess, if any, of their costs since the date of the payment in over the amount of the plaintiff's costs up to that date.

HELD: in considering the question of costs against an assisted person under s. 2 (2) (e) of the Act of 1949, the court should have regard to the amount of damages awarded to that person as one of the circumstances of the case, and, therefore, on the basis that the plaintiff had been awarded an amount less than that which had been paid into court, the judge's order was correct. On the facts of the case, however, the general damages awarded to the plaintiff should be increased from £500 to £1,200.

Decision of McNAIR, J. ([1953] 2 All E.R. 389), affirmed.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 2 (2) (e), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 535.

APPEAL by the plaintiff from an order of McNAIR, J., dated June 10, 1953, and reported [1953] 2 All E.R. 389.

On June 8, 1953, McNAIR, J., gave judgment for the plaintiff, an assisted person under the Legal Aid and Advice Act, 1949, whose disposable capital and contribution towards costs were nil, for £500 general damages against the defendants in an action for negligence and breach of statutory duty. His Lordship was then informed that in May, 1952, the defendants had paid £763 into court. It was contended on behalf of the plaintiff that by virtue of s. 2 (2) (e) of the Act of 1949 the ordinary rule in such a case, under which the defendants would set off their costs after payment in against those of the plaintiff up to the date of payment in and deduct any excess in their favour against the amount of the damages awarded to the plaintiff, should not apply. McNAIR, J., held that in all the circumstances of the case, including the means of the parties and their conduct in connection with the dispute, following the ordinary rule it would

be ordered that the plaintiff should recover his costs up to the date of payment into court and the defendants their costs since that date, and the defendants would be authorised to deduct from the amount of damages awarded to the plaintiff the excess, if any, of their costs since the date of payment in over the amount of the plaintiff's costs up to that date.

Beney, Q.C., and M. Waters for the plaintiff.

A *John Thompson* for the defendants.

SOMERVELL, L.J., stated the facts and continued: Counsel for the plaintiff took four points in this court. His first point concerned the quantum of damage. He said that £500 was a sum so disproportionate to the evidence and facts as found that this court should interfere. I have said before that I think there may be only one task more difficult than that of the judge of first instance in assessing damages and that is the decision of this court as to when it should interfere with the award. With respect to this matter, I have come to the conclusion that this is a case in which we should interfere. [His LORDSHIP then considered the medical evidence, the extent of the injury suffered by the plaintiff and the resulting disability, and said:] Taking those factors into account and allowing a reasonable amount for the other minor heads of pain, suffering and disfigurement, I think the plaintiff should be awarded £1,200.

The other points taken by counsel arose on the question of costs. They arose on the basis that there had been paid into court a sum larger than that which had been awarded. They do not now arise, of course, on the view we take with regard to the quantum of damages, but, as we have come to a clear conclusion, it is right that we should state it. It was first argued that the notice of payment in was bad in that it did not allocate or specify a sum in respect of the claim under the Factories Act, 1937, and a sum in respect of the claim at common law. R.S.C., Ord. 22, r. 1 (2), says:

E "Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the court or a judge otherwise order."

That point was not taken below and I think it is better that we should not deal with it. It can be dealt with in a case where it arises.

F The second point made on the question of costs by counsel for the plaintiff was that the rule applied by the judge and described by him as the normal rule was not in fact the normal rule. Counsel drew our attention to a summary of recorded cases in the ANNUAL PRACTICE to which the judge's attention was not drawn. Nothing I say is to be regarded as throwing any light on my view of that submission, which must be left to be dealt with in a case where it becomes necessary to decide it.

G The last point was that, the learned judge having decided that there were costs which the plaintiff who was an assisted person should pay, in considering what sum it was reasonable for him to pay under the Legal Aid (General) Regulations, 1950, reg. 17 (1) (b), took into account the fact that he was awarding him £500 in respect of his claim. We were referred to the Legal Aid and Advice Act, 1949, s. 4 (3), which deals with the extent of an assisted person's contribution, which is based on an assessment of his disposable capital and income. That subsection expressly provides that

"The regulations shall include provision for securing that the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute".

Of course, when the learned judge expressed his view on the matter, it had passed that stage; the dispute had been decided and he had awarded £500. I can find

nothing either in the Act or in the regulations which would go to show that the learned judge was wrong in taking that fact into account in the way in which he did. Indeed, counsel for the plaintiff was inclined to admit that it was hard to argue against it. For these reasons, I think the appeal should be allowed in the sense which I have indicated.

BIRKETT, L.J., expressed his agreement, gave his reasons for increasing the quantum of damages awarded, and continued: The only other point on which I desire to say a word is that which arises under the Legal Aid and Advice Act, 1949, s. 2 (2) (e). Under that provision it is clear that the court has to consider the circumstances at the moment when damages are being assessed, whereas in s. 4 (3) the relevant moment is the time of the assessment of the person's means, and any prospective gain from any claim which he may have is to be excluded from the assessment. When the court is dealing with costs under s. 2 (2) (e), where the words are

"shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties . . .",

I think that the fact that the assisted person has recovered some amount is one of the circumstances of the case. It is certainly a matter which the Act enjoins one to take into consideration, and I think it should be brought into account.

I would allow the appeal and alter the amount of damages from £500 to £1,200.

UPJOHN, J.: I agree.

Appeal allowed: judgment for the plaintiff for £1,200.

Solicitors: *Leonard Kasler* (for the plaintiff); *Watson, Sons & Room* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

HOPE v. BROWN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 21, 1954.]

Criminal Law—Attempt—Attempt to sell meat above maximum price—False price tickets kept separately from meat.

Price Control—Attempt to sell at excessive price—Meat parcels prepared with correct price tickets—False price tickets, to be affixed later, kept separately—Meat (Prices) (Great Britain) Order, 1952 (S.I., 1952, No. 1122), art. 3.

Enforcement officers of the Ministry of Food found in a refrigerator in a butcher's shop, of which the respondent was manager, packages of meat bearing tickets correctly specifying the contents and price. In a drawer, however, there was another set of tickets marked with higher prices which were above the maxima chargeable. The respondent admitted that he had instructed an employee to change the tickets before the delivery of the meat. The respondent was charged with attempting to sell meat at a price exceeding the maximum.

Held: until the false tickets were affixed to the meat there was merely an intention and preparation to commit the offence of selling at a price above the maximum and not an attempt; the acts of the respondent were not sufficiently connected with the offence to constitute an attempt to commit it; and, therefore, he was not guilty of the offence charged against him.

DICTUM OF PARKE, B., in *R. v. Eagleton* (1855) (24 L.J.M.C. 166), applied.

EDITORIAL NOTE. The Defence (General) Regulations, 1939, reg. 90 (1), was revoked by the Defence (General) Regulations, No. 12 Order, 1953 (S.I., 1953, No. 1664).

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 55AB, and reg. 90 (1), see BUTTERWORTH'S COMMERCIAL CONTROLS, Vol. 1, pp. 99 and 135.

Cases referred to:

- (1) *R. v. Eagleton*, (1855), 24 L.J.M.C. 158; 26 L.T.O.S. 7; 19 J.P. 546; Dears C.C. 376, 515; 169 E.R. 766, 826; 14 Digest 102, 750.
- (2) *Gardner v. Akeroyd*, [1952] 2 All E.R. 306; [1952] 2 Q.B. 743; 116 J.P. 460; 3rd Digest Supp.
- (3) *R. v. Linneker*, [1906] 2 K.B. 99; 75 L.J.K.B. 385; 94 L.T. 856; 70 J.P. 293; 14 Digest 104, 755.
- (4) *Wiles v. Maddison*, [1943] 1 All E.R. 315; 168 L.T. 280; 107 J.P. 83; 2nd Digest Supp.

CASE STATED by Lancashire justices.

At a court of summary jurisdiction, sitting at Wigan on Aug. 21, 1953, the appellant, Fred Hope, an enforcement inspector of the Ministry of Food, preferred twenty-one informations against the respondent, Thomas Brown, each alleging that on or about June 19, 1953, he attempted to sell meat at a price exceeding the maximum applicable in accordance with the Meat (Prices) (Great Britain) Order, 1952 (S.I., 1952, No. 1122), art. 3, contrary to the said order and to the Defence (General) Regulations, 1939, reg. 55AB, and reg. 90 (1).

It was proved or admitted that the respondent was employed as manager at a butcher's shop; that on June 19, 1953, two enforcement inspectors of the Ministry of Food visited and inspected the shop and interviewed the respondent; that in a refrigerator in the shop there were twenty-two packages containing meat and on twenty-one of them there was a ticket correctly specifying the contents of the package and a price which was in accordance with the order of 1952, each of which packages had been prepared by the respondent; that in a drawer in the shop there was another set of tickets each of which related to one of the packages and on each of these tickets a total price was marked, but no price per pound, and the total price in each case was in excess of that which could lawfully have been charged; and that, after being cautioned by one of the inspectors, the respondent made and signed a statement as follows:

"All this waste and excessive fat had to be trimmed and I try to oblige the customers, that's all. The extra price on the second ticket is to cover up the trimmings. I do this entirely on my own initiative to try to make the turnover and Mr. M. [the respondent's employer] does not know a thing about it. When the orders go out on the Saturday the girl is instructed to change the tickets over, and when she comes back she brings the genuine ticket back so I can sort the book out."

At the close of the appellant's case it was submitted for the respondent that there was no case to answer. On behalf of the appellant it was contended that on the facts proved and in the absence of any other evidence the respondent ought to be convicted. The justices accepted the submission of the respondent, and dismissed all the informations.

J. P. Ashworth for the appellant.

J. H. R. Newey for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The only question is whether or not the respondent can be convicted of an attempt to sell meat in respect of each of these twenty-one customers to whom he intended that the meat should be delivered on the next day. Does what he has done amount to an attempt? In my opinion, it does not. The mere intention to commit an offence means that an act has been done preparatory to the commission of the offence. The locus classicus on what amounts to an attempt is *R. v. Eagleton* (1) in which PARKE, B., said (24 L.J.M.C. 166):

"Some act is required, and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission

of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are . . . ”

In the present case, what remained to be done before there could be an attempt was the affixing to the meat of the false tickets. Until that was done, in my opinion, the matter remained simply what I may call in embryo and in intention. The girl, no doubt, and not the respondent himself, would have affixed the tickets, but that was because she was instructed to do so. Her act would have been the act of the respondent, but until she had affixed the tickets, it seems to me that one cannot say that an offence was committed. The preparation of the false tickets and putting them in the drawer is too remote from the actual transaction which would be necessary to constitute the attempt. It is obvious that there might be a sudden change of heart, or an intervention by the master, or something of that sort, which would have prevented any attempt being made to sell this meat to the customers. The court has always said, in cases where it has been found that there has been an attempt, that the crime would have been committed but for the intervention of someone, but no crime would have been committed in the present case until the meat had been sold to the customer with the false ticket.

Therefore, I think the mere fact that the respondent prepared a false ticket is not enough. No doubt, this charge was preferred because of the decision in *Gardner v. Akeroyd* (2), but that case turned on whether the proprietor of a butcher's business could be made vicariously liable for the act of an assistant in the shop which was preparatory to an illegal sale, but did not amount to an attempt, and we held that the doctrine of vicarious liability could not be so extended. Giving judgment in that case, I said ([1952] 2 All E.R. 311):

“ Now, applying the doctrine laid down in *R. v. Eagleton* (1), I should have no hesitation in holding that the servant in this case was guilty of, and could properly have been charged with, an attempt as the facts proved were clearly immediately connected with what would have been a substantive offence had not the enforcement officer intervened before the goods had been actually sold.”

But there the false tickets had already been affixed to the meat, while in the present case they had not. For these reasons I think the enforcement officers struck too soon. In my opinion, the justices came to a right decision in point of law and this appeal fails.

BYRNE, J.: Counsel for the appellant has drawn our attention to the definition in *STEPHEN'S DIGEST OF THE CRIMINAL LAW*, 9th ed., p. 24, art. 29, of an attempt:

“ An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted.”

When one examines the facts in the present case, it appears to me that the respondent's acts were not interrupted because the time had not arrived for their completion. His acts, in my opinion, were for that reason too remote. They certainly indicated an attempt, but were not sufficiently connected with the offence with attempting to commit which he was charged to constitute an attempt. I am of opinion that the justices were right, and this appeal should be dismissed.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Frank Platt & Fishwick*, Wigan (for the respondent).

[Reported by F. GUTTMAN, Esq., *Barrister-at-Law*.]

GRAINGER v. LIVERPOOL CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 22, 1954.]

*Local Government—Expenditure—Employment of valuer by rating authority—
Payment out of general rate fund—Local Government Act, 1933 (c. 51),
s. 187 (2).*

In 1952 the respondents, as rating authority, engaged D. to review the valuations of certain properties in their area, that they might make proposals for the re-valuation of those properties. Payments were made by the respondents to D. in accordance with the Local Government Act, 1933, s. 187 (2). The appellant appealed, as a person aggrieved, under s. 187 (3) of the Act of 1933 against the orders authorising those payments on the ground that the respondents had no power or authority to make them and so they were illegal and ultra vires.

HELD: under s. 33 (2) of the Local Government Act, 1948, the respondents, as rating authority, had a duty, and under s. 40 (1) (b), as persons aggrieved (being ratepayers in respect of property owned by them), had a right, to make a proposal for the alteration of the valuation list; the obtaining of advice in such a highly technical matter was merely incidental to the performance of the duty and the exercise of the right; and, therefore, the payments made by the respondents were intra vires and legal.

Observations of LORD HANWORTH, M.R., in *A.-G. v. Smethwick Corpn.* ([1932] 1 Ch. 576), applied.

FOR THE LOCAL GOVERNMENT ACT, 1933, s. 187, see HALSBURY'S
—STATUTES, Second Edn., Vol. 14, p. 453.

Cases referred to:

(1) *A.-G. v. Smethwick Corpn.*, [1932] 1 Ch. 562; 101 L.J.Ch. 137; 146 L.T. 480; 96 J.P. 105; Digest Supp.

(2) *A.-G. v. Great Eastern Ry. Co.*, (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; *affd.* H.L., (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 38 Digest 335, 475.

APPEAL under the Local Government Act, 1933, s. 187 (3).

During 1949 the respondents, the corporation of the city of Liverpool, who were the local authority for general statutory purposes and the rating authority for the city of Liverpool pursuant to the Rating and Valuation Act, 1925, began a re-valuation of office property in the central area of the city. This work was carried out by, or under the supervision of, Mr. Isaac Dixon, the rating valuer to the local assessment committee and the Liverpool rating committee, and by Feb. 1, 1950, approximately one quarter of the premises concerned had been dealt with. On Feb. 1, 1950, the provisions of the Local Government Act, 1948, whereby certain functions relating to valuation were to be transferred to the Inland Revenue, came into force, and the re-valuation of the remaining office properties in the central area was left in abeyance. In 1951 and 1952 the Inland Revenue was urged by the respondents to complete the re-valuation, but without success. In the meantime there was some dissatisfaction among the re-assessed occupiers and also the respondents were losing substantial revenue by reason of the failure to re-assess the remaining office properties in the central area, and in August, 1952, the respondents decided to engage outside professional assistance to review the valuations of these properties. Mr. Dixon was engaged for this work, he by that time being in private practice. From January, 1953, onwards, the respondents, on Mr. Dixon's advice, from time to time served on the valuation officer proposals to alter the valuation list in respect of the said office properties. These proposals were made in the respondents' name, and, where objections were

made, the notices of appeal were served in the respondents' name and in the manner prescribed by statute. On Apr. 28, 1953, the appellant, Richard Ernest Grainger, received a letter from Mr. Dixon stating that he had been instructed by the respondents to review the assessments of office property in the city and to advise them what changes, if any, should be made therein, and requesting certain information as to the lease under which the appellant held his office at 8, Victoria Street, Liverpool. On Apr. 29, 1953, the appellant replied, giving the information requested. On July 8, 1953, he received from the valuation officer of the Liverpool valuation area a notice of proposal, together with a copy of a form of proposal signed by the town clerk, for the alteration of the valuation list. The appellant, through his solicitors, then wrote various letters to the town clerk about the payment of fees to Mr. Dixon by the respondents, and on Sept. 3, 1953, the town clerk wrote to the appellant's solicitors stating that payments had been made to Mr. Dixon in accordance with the Local Government Act, 1933, s. 187 (2), in pursuance of a resolution of the Rating (Special) Committee dated Aug. 18, 1952, the powers and duties of the respondents, as rating authority, having been delegated to that committee.

The appellant appealed, under s. 187 (3) of the Act of 1933, as a person aggrieved by the orders made by the respondents for the payment of fees to Mr. Dixon, and asked for those orders to be quashed on the ground that the respondents had no power or authority to order or to pay the fees and that any or all such payments were illegal and ultra vires.

Percy Lamb, Q.C., Kennan and Irwin for the appellant.

Harold Brown for the respondents.

LORD GODDARD, C.J.: This matter which, on being opened, looked very formidable and one which involved the consideration of a large number of statutes and questions of law, seems to me to boil down to a comparatively simple point.

Under the Local Government Act, 1933, s. 187, which deals with orders for payments out of moneys from the general rate funds of boroughs, it is provided by sub-s. (3):

"Any person aggrieved by an order of the council made under this section may appeal to the High Court, and on any such appeal the High Court may give such directions in the matter as they think proper, and the order of the High Court shall be final."

The orders which are appealed against here are orders made by members of the Liverpool corporation, the appropriate persons, directing that sums of money should be paid to a Mr. Dixon for his services to the corporation in and about the valuation of certain properties within the city for the purpose of enabling the corporation to make proposals for the re-valuation of those properties in the valuation list. It is said that a revolution in rating procedure took place by virtue of the Local Government Act, 1948, and, to a certain extent, that is true. There had been an earlier revolution in 1925, by virtue of the Rating and Valuation Act, 1925, when the duties of overseers and so forth in relation to rates were abolished and rating authorities were set up. In 1948 the duties of rating authorities, so far as the valuation of properties was concerned for the purpose of preparing valuation lists, were done away with, and valuation was put into the hands of the local valuation officer, an official of the Inland Revenue.

When the matter was governed by the Act of 1925, the appropriate section which dealt with the employment of valuers was s. 38. That gave power to rating authorities and other persons, namely, assessment committees or county valuation committees, to employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in the area. Then it went on to give that person certain powers. That section was repealed when the Act of 1948 came into force—naturally enough, because it gave the assessment committee and the county valuation committee, both of which have now

disappeared, power to employ a valuer and gave to the rating authority power to employ a valuer to carry out a duty which is no longer placed on the rating authority. But, in the Local Government Act, 1948, s. 33 (2), Parliament has preserved the right of the rating authority to make proposals for the alteration of the valuation list, the difference being that those proposals have now to be made to the local valuation officer instead of to the assessment committee.

A More than that, rating authorities which, in this case, are the corporation of Liverpool, are themselves ratepayers, and they can be persons aggrieved because they may be able to say that their property, such as the town hall, is rated too high or that other properties in the area of rating are rated too low. Therefore, it seems to me, that the corporation can make a proposal to the local valuation officer either as the rating authority or as ratepayers, and it matters not whether they describe themselves as one or the other. I do not think it is even faintly
B suggested that they have not a locus standi to be heard to object.

What is suggested is that they have not the power to employ and pay a valuer. They, as a corporation, can act only through their officers, members, and so forth, and if a corporation have power to make this proposal, which they certainly have, either in their capacity as ratepayers or in their capacity as rating authority, it seems to me that to employ professional assistance must be
C incidental to the power which they have. It may be that in some places you might have on the appropriate committee of the corporation one or two members familiar with rating and it might not be found necessary to employ a rating surveyor, but it is quite clear here that the corporation of Liverpool as a matter of policy have decided that there are many office premises in Liverpool the valuation of which ought to be altered. Therefore, they have decided to make proposals,
D and to enable them to do this they have appointed somebody to assist them to prepare and advise them in making these proposals. It seems to me that that comes very well within the words, dealing with the powers of the corporation, which have been referred to more than once in the course of the hearing and are conveniently stated by LORD HANWORTH, M.R., in *A.-G. v. Smethwick Corpn.* (1) where he refers to the well-known judgment of JAMES, L.J., in *A.-G. v. Great Eastern Ry. Co.* (2), and says ([1932] 1 Ch. 576):
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"He deals with the question of a railway company going outside its statutory powers and, perhaps for its own purposes, taking part in the business of a colliery in order to secure commodities required for the purposes of its line. He says (11 Ch.D. 484): 'So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other'. . . . When that case went to the House of Lords, LORD SELBORNE said (5 App. Cas. 478) ' . . . But I agree with JAMES, L.J., that this doctrine ought to be reasonable, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires'. LORD BLACKBURN also says (ibid., 481): 'I quite agree with what JAMES, L.J., has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited'. . . ."
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It seems to me that the case for the corporation can be put as high as this. The corporation are under a duty—I do not say a positive duty but under a duty—as the corporation interested in the fair and proper rating of the city of Liverpool. They are under a duty as ratepayers and under a duty as the rating authority in Liverpool. If they think that an alteration is required, they are under a duty to see that a proposal for the alteration is made. It is not for them to

make the alteration because that is left now to the valuation officer. I think they are under a duty, if they know there are inequalities, or under-rating, or whatever it may be, to make proposals to have that corrected. If they are either under a duty or if it is a proper exercise of their powers to do it, and they are at liberty to do it, it seems to me that they must be at liberty to employ in such a highly technical matter as this technical advice because that is a mere incident in the performance of their various duties. For these reasons, I think this appeal fails and must be dismissed.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Lovell, White & King* (for the appellant); *Cree, Godfrey & Wood*, agents for *T. Alker*, town clerk, Liverpool (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

SHAXTED v. WARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 25, 1954.]

Education—School attendance—Duty of parent to secure regular attendance of pupil—"Available route"—Road unsafe for unescorted children—Dangerous crossing—Education Act, 1944 (c. 31), s. 39 (5).

By the Education Act, 1944, s. 39 (2) (c), a child shall not be deemed to have failed to attend regularly at school if the school at which the child is a registered pupil is not within "walking distance" of the child's home. By s. 39 (5) walking distance means, according to the age of the child, two or three miles measured by "the nearest available route."

The appellant, the father of a child, aged six years, who had failed to attend school regularly, being charged with an offence under s. 39 (1) of the Act (which provides that, if a child of compulsory school age fails regularly to attend school, the parent of the child shall be guilty of an offence), contended that, although the direct route from the child's home to the school was within the distance laid down in s. 39 (5), part of the road was unsafe for unescorted children as it included a dangerous crossing, and, therefore, was not an "available route"; that the nearest available safe route was more than the distance laid down in s. 39 (5); and, therefore, there was a reasonable excuse for non-attendance.

HELD: distance, not safety, was the test for determining "the nearest available route", and, therefore, the school was within walking distance of the child's home, and the appellant was guilty of an offence.

FOR THE EDUCATION ACT, 1944, s. 39, see HALSBURY'S STATUTES, Second Edn., Vol. 8, p. 183.

Case referred to:

- (1) *Hares v. Curtin*, [1913] 2 K.B. 328; 82 L.J.K.B. 707; 108 L.T. 974; 76 J.P. 313; 19 Digest 568, 89.

CASE STATED by Kent justices.

At a court of summary jurisdiction, sitting at Canterbury on Aug. 13, 1953, the respondent, Francis George Ward, an education welfare officer, preferred informations against each of the appellants, Bertie Herbert Harold Shaxted and Albert George Farrier, charging that each, being the parent of a child of compulsory school age, was guilty of an offence against s. 39 (1) of the Education Act, 1944, in that the child, who was a registered pupil at Preston County Primary School, failed to attend regularly thereat between Apr. 21 and June 26, 1953.

A It was proved or admitted that each of the appellants was the parent of a child of compulsory school age who was a registered pupil at the said school and failed to attend that school during the period mentioned in the information ; that each child lived in the hamlet of West Stourmouth and within the distance from the school laid down in s. 39 (5) of the Act as "walking distance" in relation to each such child respectively by the direct route; that this route was safe for the children to use if escorted, the bit of road near the school where, owing to the presence of a dangerous crossing, an escort would be desirable for small children being common to both the children in question ; that it was usual, and the duty of parents, to provide escort for their children to and from school, when necessary; that the education authority, nevertheless, arranged for an omnibus taking the children from Stourmouth to and from a secondary school at Sandwich to take the children of the appellants to and from school during B the period in question; that on the return journey the omnibus reached the school at 4.45 p.m. to pick up these children there, they having finished their lessons at 3.45 p.m.; that the appellants wanted a special omnibus from the school and would not provide an escort for their children; that another Stourmouth resident, a Mr. S., who was a co-defendant with the appellants and gave evidence, admitted that his son could have attended the school regularly, but C he had "had to stand by the other parents."

On behalf of the appellants it was contended: (i) that the direct routes were not safe for their children to use when returning from school in a party; (ii) that the afternoon bus from school was not suitable transport for the return journey; and, (iii) that, therefore, they were prevented by unavoidable cause within the meaning of s. 39 (2) (a) of the Education Act, 1944, from sending their children D to school; (iv) that the words "in relation to a child" of the ages specified in s. 39 (5) referred not merely to the words "walking distance", but that those words also governed the later words "nearest available route", limiting those words to such routes only as were safe for a child to use, that the direct routes were not safe for the children and the nearest available safe route was more than the distances specified in the section, and so the children were entitled to transport, but no suitable arrangements had been made for their transport from school. E On behalf of the respondent it was contended that "available route" meant a route which could be followed without committing trespass.

The justices were of opinion that no defence had been made out because (i) the direct routes were safe for children when escorted; (ii) there was no unavoidable cause, because the direct routes were safe if the parents had escorted their children or arranged for their escort, and also the omnibus provided was suitable in the circumstances; (iii) the suggested interpretation of the words "available route" was irrelevant because the justices held (a) that the direct routes were, in fact, safe for the children in question, and (b) that the omnibus provided from school was a "suitable arrangement" for the transport of the said children; (iv) and, further, the suggested interpretation of the words "available route" F was strained and unnatural. The justices held that the school was within walking distance of the home of each appellant so that the appellants were not entitled to transport for their children, and they convicted the appellants. The second G appellant withdrew his appeal.

Van Oss for the appellant, Shaxted.

Thesiger, Q.C., and *Jupp* for the respondent.

H LORD GODDARD, C.J., stated the facts and continued: The question is whether or not the school is within walking distance of the child's home. By the Education Act, 1944, s. 39 (1), a parent is guilty of an offence if his child fails to attend regularly at the school where he is a registered pupil, but by s. 39 (2):

"... the child shall not be deemed to have failed to attend regularly at the school . . . (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and

that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation . . . ”

We need not deal with suitable accommodation if the school is within walking distance, which by s. 39 (5)

“ . . . means in relation to a child who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route.”

What the justices had to decide was whether or not the school was within walking distance, and it is said that the route which the child took, and which is under two miles, is not the nearest available route because part of it is said to be dangerous for children to walk along unescorted. I cannot read the word “available” as meaning necessarily safe, because we can see how that word got into the Act. By the Elementary Education Act, 1870, s. 74 (3), it was a reasonable excuse:

“That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the bye-laws may prescribe.”

The Education Act, 1921, s. 49 (b) provided an identical “reasonable excuse”. Before the Act of 1921, in *Hares v. Curtin* (1), in which it was suggested that a cart track could not be a road and that the walking distance had not been measured according to, “the nearest road”, LORD ALVERSTONE, C.J., giving judgment, said ([1913] 2 K.B. 331):

“It does not mean a road of any particular class, but simply a route from the residence of a child to the nearest school.”

In the Act of 1944 the words used in s. 39 (5) are “two miles . . . measured by the nearest available route”. I do not think they were meant to make any change in the law, except that a number of somewhat unnecessary words were cut out and there was substituted the expression which had been used in this court in *Hares v. Curtin* (1).

To some extent I sympathise with the views of the appellant in the present case. It may be that parents would like to bring pressure on the Kent County Council to have someone to see that this “bit of road”, as the justices call it, is safe for the children to cross—someone, for example, as is seen in London, wearing a white smock and holding a board with the words “Children Crossing, Stop”. That, however, is a matter for the education authority to consider and put into operation if it thinks fit. I can only say, speaking for myself, that a route along which a child can walk and which measures not more than two miles is “the nearest available route”. It may sometimes be unsafe. Sometimes the route might be flooded, and, if so, and the child could not walk along it, that might be a reasonable excuse for not using it on that particular day. We are not dealing with that sort of question. We are dealing with the question where the parents think it is not safe. Parliament has not substituted safety for distance as the test. Any question with regard to safety must, and, I have no doubt, will, be taken into consideration by the education authority. I think in this case the justices came to a right decision and the appeal fails.

BYRNE, J.: I agree. Counsel for the appellant contended that the meaning of the word “available” in the Education Act, 1944, s. 39 (5), is that there is no sound reason why that route should not be used by children. I am bound to say that I cannot read that meaning into that word. The “nearest available route” means the method by which the two miles are to be measured from the child’s house to the school in order to ascertain whether or not it is a walking distance.

PARKER, J.: I agree.

Solicitors: *Jaques & Co.*, agents for *Girling, Wilson & Bailey*, Margate (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *Gerald Bishop*, Maidstone (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF
AUSTRALIA, LTD. v. AUSTRALIA (COMMONWEALTH)
COMMISSIONER OF TAXATION.

B [PRIVY COUNCIL (Lord Oaksey, Lord Morton of Henryton, Lord Reid, Lord Asquith of Bishopstone and Lord Cohen), December 7, 8, 1953, January 19, 1954.]

Privy Council—Australia—Estate duty—“Estate of a deceased person”—Partnership—Options of surviving partners to purchase deceased’s interest—Price to be ascertained excluding goodwill—Australian Estate Duty Assessment Act, 1914-42, s. 8 (3) (b), s. 8 (4) (e).

C

Estate Duty—Passing—Partnership—Options of surviving partners to purchase deceased’s interest—Price to be ascertained excluding goodwill—Whether deceased’s interest in goodwill passes or is deemed to pass—Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (b).

D

The Australian Estate Duty Assessment Act, 1914-42, s. 8, provides: “(1) Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act . . . (3) For the purposes of this Act the estate of a deceased person comprises . . . (b) His personal property, wherever situate (including personal property over which he had a general power of appointment, exercised by his will), if the deceased was, at the time of his death, domiciled in Australia; . . . (4) Property . . . (e) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased”.

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The deceased was a partner in a firm constituted by a deed of partnership dated Dec. 22, 1939, of which cl. 9 provided that the partnership should not be dissolved by the death or retirement of any of the partners and conferred on all save one of the surviving or continuing partners on the death or retirement of the deceased options to purchase the deceased’s share in the capital of the partnership in specified proportions. Clause 12 of the deed provided: “Upon the exercise of the respective options hereinbefore con-

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tained the purchase price payable on the exercise of such option shall be the total of the following amounts (namely):—(a) The proportionate part of the balance of assets over liabilities as disclosed in the balance sheet of the partnership in respect of the accounting year of the partnership prior to the date on which such option shall first be exercisable corresponding to the part of the interest in the partnership being purchased . . . (b) The like proportion of any real estate which shall have been acquired by the partnership between the end of the said period and the date on which the relevant option shall have been first exercisable . . . at the price at which the same shall have been acquired . . . (c) The like proportion of the profits of the partnership for the current year . . . Without affecting the generality of the foregoing provisions it is specifically agreed and declared that in computing the amount of purchase money payable on the exercise of any option no sum

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shall be added or taken into account for goodwill." On Jan. 28, 1944, the deceased died, and the surviving partners exercised the options conferred on them. The purchase price, ascertained in accordance with cl. 12, was fixed at £156,217 11s. 3d. No sum was taken into account for goodwill. The deceased's executor, for the purposes of the assessment of estate duty, accounted for £156,217 11s. 3d. as the value of the deceased's interest in the partnership. The Commissioner of Taxes claimed duty also on the deceased's share of goodwill under s. 8 (4) (e), for which purpose the share was agreed to be of the value of £20,000. A

HELD: the whole of the deceased's interest in the partnership assets including goodwill was assessable to duty under s. 8 (3) (b), and it followed that it could not be assessable under s. 8 (4) which dealt only with property not assessable as part of the estate falling within s. 8 (3). B

Trustees Executors & Agency Co., Ltd. v. Federal Commissioner of Taxation (1944) (69 C.L.R. 270), overruled. B

A.-G. v. Boden ([1912] 1 K.B. 539), overruled in part.

AS TO PROPERTY WHICH PASSES ON A DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 232, para. 222; and FOR CASES, see DIGEST, Vol. 21, p. 7, Nos. 21-23. C

Cases referred to:

- (1) *Trustees Executors & Agency Co., Ltd. v. Federal Commissioner of Taxation*, (1944), 69 C.L.R. 270; [1944] A.L.R. 315; 18 A.L.J. 180.
- (2) *Cain v. Malone*, (1942), 66 C.L.R. 10; 42 S.R.N.S.W. 245; 59 W.N. 209; 16 A.L.J. 155. D
- (3) *R. v. Commonwealth Court of Conciliation and Arbitration and Australian Tramway Employees Association. Ex p. Brisbane Tramways Co., Ltd. Ex p. Municipal Tramways Trust, Adelaide*, (1914), 18 C.L.R. 54; 20 A.L.R. 126.
- (4) *A.-G. v. Boden*, [1912] 1 K.B. 539; 81 L.J.K.B. 704; 105 L.T. 247; 21 Digest 9, 35.
- (5) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27. E

APPEAL by an executor of a will against a judgment of the Full Court of the High Court of Australia, dated May 16, 1949, affirming a judgment of WILLIAMS, J., in the High Court of Australia, dated Mar. 8, 1949. The facts appear in the judgment. F

Cross, Q.C., and *J. H. Stamp* for the appellant.

S. Pascoe Hayward, Q.C., and *V. M. C. Pennington* for the respondent.

Jan. 19. **LORD COHEN:** This appeal relates to an assessment made by the respondent under the Estate Duty Assessment Act, 1914-42, in respect of the estate of the late Frederick Charles Henry Thomas (hereinafter called Mr. Thomas) who died on Jan. 28, 1944. The appellant is the executor of his will. The principal asset of the testator was his interest in a firm carrying on business as furniture warehouseman under the name and style of "Maples" pursuant to a deed of partnership made Dec. 22, 1939, as modified by a supplementary agreement dated Dec. 4, 1940, the other partners being Robert Nathan, Mrs. Louisa Jones, Mrs. Lorna Hannon, Lionel Newton, Lauri Joseph Newton and Donald Lamond. G

Clause 5 of the deed provided that the capital of the partnership (thereinafter called the capital) should consist of the then existing assets of the partnership. Their Lordships pause here to observe that the parties agreed that, despite this definition, the expression "the capital", so far as the question now at issue is concerned, meant the capital as at the date of the death of Mr. Thomas. Clause 6 H

defined the interests of each partner in the capital and allotted to Mr. Thomas 19½ per cent. thereof. Clause 8 provided that the net profits of the business should be divided between the partners in proportion to their respective shares from time to time in the capital. Clause 9 provided that the partnership should not be dissolved by the death or retirement of any of the partners and contained provisions defining as regards each partner what was to happen in the event of his or her death or retirement. So far as Mr. Thomas was concerned the clause conferred options on the surviving or continuing partners, other than Donald Lamond, to purchase Mr. Thomas' share in the capital in specified proportions, the details of which are not material to the issues their Lordships have to decide. Clause 12 defines how the purchase price is to be ascertained in the event of any of the options being exercised, and is in the following terms:

- A “Upon the exercise of the respective options hereinbefore contained the purchase price payable on the exercise of such option shall be the total of the following amounts (namely):—(a) The proportionate part of the balance of assets over liabilities as disclosed in the balance sheet of the partnership in respect of the accounting year of the partnership prior to the date on which such option shall first be exercisable corresponding to the part of the interest in the partnership being purchased Provided always that if in compiling the relevant balance sheet the value of the book debts shall not have been treated as 15s. for each pound of the actual debts owing at the end of the period in respect of which such balance sheet shall have been compiled the said balance of assets over liabilities shown by the relevant balance sheet shall be adjusted by taking the said book debts into the said balance sheet at a value of 15s. for each pound; and (b) The like proportion of any real estate which shall have been acquired by the partnership between the end of the said period and the date on which the relevant option shall have been first exercisable (hereinafter called the current year) at the price at which the same shall have been acquired plus any amounts expended thereon by the partnership during the current year less any liability existing on such real estate to the vendor thereof or under any mortgage thereover. (c) The like proportion of the profits of the partnership for the current year ascertained in the manner provided in cl. 13 hereof. Provided always and it is hereby agreed and declared that the balance sheet signed by the parties hereto at the time of the execution of these presents shall be deemed to be the balance sheet of the partnership for the accounting year of the partnership ended on Feb. 28, 1939. Without affecting the generality of the foregoing provisions it is specifically agreed and declared that in computing the amount of purchase money payable on the exercise of any option no sum shall be added or taken into account for goodwill.”

- Clause 14 gave a person exercising an option the right to pay the purchase money by instalments, and provided for interest at the rate of £5 per cent. per annum on any balance for the time being unpaid. It also provided that, on the exercise of any option, the purchaser should be deemed to have acquired the interest in respect of which the option had been exercised as from the date that such option shall have been given or deemed to have been given—in the present case, in the events which happened as from the date of the death of Mr. Thomas. Clause 19 fixed the end of each accounting year of the partnership as Feb. 28.
- H The terms of the supplementary agreement are not material to any issue their Lordships have to decide.

Mr. Thomas having died on Jan. 28, 1944, the partners who survived him duly exercised the options conferred on them. The purchase price was ascertained in accordance with the provisions of cl. 12 of the partnership deed and was fixed at £156,217 11s. 3d. In accordance with the last sentence of that clause no sum was added or taken into account for goodwill. The purchase price was duly paid.

It will be convenient at this stage to refer to the relevant provisions of the Estate Duty Assessment Act, 1914-42. Section 8 so far as is material is in the following terms :

" (1) Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act . . . (3) For the purposes of this Act the estate of a deceased person comprises . . . (b) His personal property, wherever situate (including personal property over which he had a general power of appointment, exercised by his will), if the deceased was, at the time of his death, domiciled in Australia; . . . (4) Property . . . (e) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

Settlement is defined by s. 3 as follows :

" 'Settlement' means a conveyance, transfer, appointment under power, declaration of trust, or other non-testamentary disposition of property made by any person either before or after the commencement of this Act containing trusts or dispositions to take effect after the death of the settlor or any other person dying after the commencement of this Act."

Section 10 imposes on the administrator of a deceased person the duty of preparing and furnishing in the prescribed form a statement setting forth a full and complete return of all the estate in Australia of the deceased person. Section 15 imposes on the respondent the duty of making an assessment for the purpose of ascertaining the duty payable. Section 24 entitles an administrator who is dissatisfied with an assessment so made to lodge with the respondent notice of objection within thirty days after service of the notice of assessment. If the administrator is dissatisfied with the decision of the respondent on his objection, he has alternative remedies, the remedy relevant to the present case being a right to request the respondent to treat his objection as an appeal and to forward it to the High Court. Section 27 (1) provides that the appeal shall be heard by a single justice. By s. 27 (3) it is provided that the objector shall be limited, on the hearing of an appeal, to the grounds stated in his objection.

The appellant duly made a return pursuant to s. 10 on June 20, 1944. In the statement of assets annexed thereto there appears the following entry:

"Interest in a partnership, as per balance sheet and valuations, as per schedule No. 9 £156,217 11s. 3d."

Schedule No. 9 is in the following terms:

"Interest in a partnership

Value of deceased's $19\frac{1}{2}$ per cent. interest in the

partnership known as Maples

£156,217 11s. 3d.

(The amount set out is the amount at which the executor of the deceased is obliged to sell the deceased's interest in the said partnership pursuant to partnership deed dated Dec. 22, 1939, under which all but one of the surviving partners have the option of purchasing the interest of the deceased.)"

On Feb. 14, 1947, the respondent served notice of assessment on the appellant together with a federal estate duty alteration sheet which showed the alterations made in the assessable value shown in the return lodged. These included the following additions:

"Interest in partnership of Maples undervalued

£36

Proportion of goodwill in Maples—s. 8 (4) (e)

£20,000."

The last addition was, their Lordships think, made in this form as the result of the decision of the Full Court of the High Court in *Trustees Executors & Agency Co., Ltd. v. Federal Commissioner of Taxation* (1). The judgment in that case was given on Aug. 1, 1944, in a matter relating to the estate of James Brown Milne, deceased, and their Lordships will refer to the case hereafter as "*Milne's case*". Milne was a partner in the firm of John Sanderson & Co. and the partnership deed was similar in every material respect to the partnership deed in the

present case. On Milne's death his partners exercised their option to take over his share in the partnership capital at a price ascertained in accordance with the provisions of the deed, which included a provision that, on the death, retirement or expulsion of a partner, no allowance should be made to him or his representatives in respect of the value of the goodwill of the business. The court by a majority (RICH, STARKE and WILLIAMS, J.J.), LATHAM, C.J., and McTIERNAN, J., dissenting, held that, within the meaning of s. 8 (4) (e) of the Act, the deceased partner at the time of his death had a beneficial interest in the goodwill which, on or after his death, by virtue of the partnership agreement passed, or accrued to, or devolved on, the surviving partners. Their Lordships will have to return later to *Milne's case* (1), but they pause here to observe that it was not argued in that case that Milne's interest in the goodwill fell to be assessed under s. 8 (3). It seems to have been common ground between the parties, and to have been accepted by both majority and minority of the court, that, while Milne's interest in the other assets of the partnership was assessable under s. 8 (3) (b), his interest in goodwill was assessable, if at all, only under s. 8 (4) (e). The majority held that it was so assessable, but the minority were of opinion that, having regard to the terms of the partnership deed, it ceased on the death of a partner and, therefore, could not fall within s. 8 (4) (e).

On Mar. 14, 1947, the appellant lodged notice of objection pursuant to s. 24 of the Act. It is clear from the terms of that notice that it was primarily directed to supporting the view of the minority in *Milne's case* (1), but, having in mind a submission that was made by counsel for the respondent, their Lordships would call attention to para. 23, para. 24 and para. 25 of the notice of objection which were in the following terms:

"23.—That as at the date of his death the interest of the deceased was a right to receive the purchase price payable upon the exercise of the options contained in the articles of partnership in respect of the said firm, dated Dec. 22, 1939, as amended by indenture dated Dec. 4, 1940, made between the partners of the said firm, and on the exercise of the said options no amount was payable in respect of goodwill. 24.—That the interest of the deceased in the assets of the partnership ceased at the date of death of deceased conditionally upon the exercise of the said options and payment of the purchase price which options have been exercised and which purchase money has been paid. 25.—That the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to s. 8 (4) (e), or any other provision, of the Estate Duty Assessment Act."

On Jan. 29, 1948, the respondent disallowed the objection. On Mar. 4, 1948, the appellant required the respondent to treat the objection as an appeal and to forward it to the High Court.

The appeal came before WILLIAMS, J., on Mar. 8, 1949, Mr. J. B. Tait, K.C., appearing for the appellant and Mr. T. W. Smith, K.C., appearing for the respondent. In the transcript of the proceedings there appears the following passage from Mr. Tait's opening speech:

"That being cleared up, it left one matter in dispute between the parties, the matter now before the court. That is the question of goodwill, namely, that, in valuing that asset of the deceased which consisted of his interest in the partnership, account should be taken of the value of the goodwill. The parties have gone further. They have agreed upon what that value

would be if it should be included, and the figure is £20,000. This matter was the subject of a decision in this court in *Milne's case* (1) comparatively recently."

Mr. Smith for the respondent said that the respondent would not be relying on any other provisions of the Act apart from s. 8 (4), though he might wish at some later stage to rely on grounds not precisely in accordance with the views of the majority in *Milne's case* (1). At the conclusion of the argument the transcript records the following observations:

"Mr. Tait: I mentioned, I think, the parties had agreed, if the value of this goodwill was to be included, the figures should be £20,000. Perhaps that could be taken as a mutual admission.

"Mr. Smith: That has been agreed to, £20,000 as the value of the share of the goodwill if it be taxable.

"His Honour: Very well."

On the same day WILLIAMS, J., delivered judgment dismissing the appeal. The material portion of his judgment was in the following terms:

"The respondent, without giving up any other contentions open to him upon the true construction of the Act, contends that it forms part of his [the testator's] notional estate within the meaning of s. 8 (4) (e) of the Act. It seems to me necessarily to follow from *Milne's case* (1) that this contention must succeed. I must therefore order that the appeal be dismissed with costs."

The appellant appealed to the Full Court, who dismissed the appeal saying:

"It is conceded that this appeal must fail unless the court is prepared to reconsider and to overrule the decision in *Trustees Executors & Agency Co., Ltd. v. Federal Commissioner of Taxation* (1). The decisions of a superior court have a double aspect. They determine the controversy between the parties, and in deciding the case they may include a statement of principle which it is the duty of that court and of all subordinate courts to apply in cases to which that principle is relevant. Continuity and coherence in the law demand that, particularly in this court, which is the highest court of appeal in Australia, the principle of stare decisis should be applied, save in very exceptional cases. The court is not bound by its previous decisions so as absolutely to preclude re-consideration of a principle approved and applied in a prior case but, as was stated in *Cain v. Malone* (2), the exceptions to the rule are exceptions which should be allowed only with great caution and in clear cases. BARTON, J., in the *Tramways case* (3) which has been referred to by Mr. Tait, said (18 C.L.R. 69): 'I have never thought that it was not open to this court to review its previous decisions upon good cause. The question is not whether the court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decision.' His Honour proceeded to say: 'Changes in the number of appointed justices'—(and I would add, changes in the personnel of the Bench which happens to deal with the first case or a second case)—'can, I take it, never of themselves furnish a reason for review.' His Honour continued: 'But the court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest.' In the present case, there are no circumstances which would justify, in accordance with those principles, an overruling of the decision in the *Trustees Executors case* (1). The only circumstance which is really relied upon for the purpose of persuading the court to reconsider the decision is that it was a majority decision. This is plainly an insufficient ground for asking the court to overrule a previous considered decision of five justices. It may be that considerations are present in constitutional cases, where

Parliament is not in a position to change the law, which do not arise in other cases. In what I have said I make no reference to constitutional cases. The consequence is that, if the court adheres, as it should, to the decision in the *Trustees Executors* case (1) the appeal must fail."

Their Lordships have thought it desirable to set out in full the judgment of the Full Court in order to make it clear that neither in *Milne's* case (1), nor in the present case, was any argument addressed to the High Court in support of the proposition advanced before their Lordships that the deceased's interest in goodwill was part of his estate as being personal property within s. 8 (3) (b) and could not, therefore, be property not actually forming part of the estate but only deemed to be part of the estate under s. 8 (4).

From this decision the appellant appeals to this Board pursuant to special leave granted by His late Majesty on May 24, 1950. The reasons given by the appellant in this case for inviting your Lordships to reverse the decision of the High Court were directed, in the main, to supporting the views of the minority in *Milne's* case (1), but reason 3 was in the following terms:

"Because under the partnership agreement in the events which happened the deceased had no interest in the specific assets of the partnership after his death but only the right to receive the purchase price payable by the survivors."

The reasons advanced by the respondent in support of the judgment in the court below were intended primarily to support the judgment of the majority in *Milne's* case (1), but in para. 25 of his Case the respondent intimated his intention of advancing in the alternative the following contention:

"(i) That the deceased had at his death an undivided share in all the assets of the partnership. (ii) That the concluding words of the proviso to cl. 12 of the partnership deed did not have the effect of divesting the deceased on his death of his share in the goodwill as one of those partnership assets. (iii) That, consequently, the deceased's said undivided share of the goodwill was as much part of his personal property within the meaning of s. 8 (3) (b) of the Act as was his undivided share in any other asset of the partnership, and, on the subsequent purchase of his share in the partnership, his undivided share in the goodwill passed to the purchasers in the same way as did his undivided share in all the other assets of the partnership. (iv) That in assessing, pursuant to s. 8 (1) of the Act, the value of such part of the estate of the deceased as consisted of the deceased's share in the partnership, the respondent was not bound to accept as such value the price paid by the other partners when they subsequently purchased that share. (v) That such purchase was in effect, and to the extent of £20,000, made at an undervalue, such £20,000 being the agreed value of the deceased's share in the goodwill. (vi) That, in consequence, the assessment is right."

When the case came before their Lordships, counsel for the appellant attacked the reasoning of the majority in *Milne's* case (1) but he did not seek to defend the reasoning of the minority. He argued that Mr. Thomas's interest in the goodwill was only part of his interest in the partnership assets and that the whole of such interest was part of the personal property forming part of Mr. Thomas's estate and fell within s. 8 (3) (b). Counsel for the respondent did not seek to support that part of the judgments of the majority in *Milne's* case (1) which was based on a severance between the deceased's interest in goodwill and his interest in the other partnership assets: see, e.g., where *STARKE, J.*, said (69 C.L.R. 286):

"The question whether the commissioner was right in so including the value of the goodwill in his assessment depends upon several provisions of the Estate Duty Assessment Act. By s. 8 (3) (b) the estate of a deceased person comprises, inter alia, his personal property if the deceased was at

the time of his death domiciled in Australia. No doubt the partnership interest of the deceased was part of his estate, yet that interest did not include goodwill, for the partnership deed itself expressly provided that no allowance should be made to the deceased or his representatives in respect of the value of the goodwill of the business."

Counsel for the respondent argued that the whole of the deceased's interest in the partnership assets, including goodwill, fell to be assessed under s. 8 (4) (e). Their Lordships' reasons for rejecting this argument will appear sufficiently from the reasons which their Lordships will now proceed to give for thinking that *Milne's* case (1) was wrongly decided.

In *Milne's* case (1) three questions were submitted for the opinion of the Full Court, the first and third of which were as follows (*ibid.*, 276):

"(1) Whether the dutiable estate of the testator included any and if any what interest in the goodwill of the said partnership. (3) Whether the testator had at the time of his death any beneficial interest in the said goodwill which by virtue of the said indenture of partnership passed or accrued on or after his death or devolved on or after his death on any of the said surviving partners of the said firm of Sanderson & Co."

It is clear from the judgments that the Full Court treated the first question as asking whether the interest of the deceased in goodwill was dutiable under s. 8 (3). All the judges answered question (1) in the negative except RICH, J., who found it unnecessary to answer the question. The majority answered question (3) in the affirmative. It is clear from their judgments that all the judges, with the possible exception of RICH, J., proceeded on the basis that the deceased's estate never became entitled to a share in the value of the goodwill, and that the majority regarded the deceased's share in goodwill as something severable from his interest in the other assets of the partnership and passing or accruing to another person under s. 8 (4) (e). Their Lordships are unable to accept either of these propositions. In their Lordships' opinion the interest of Milne in all the partnership assets including goodwill vested in his administrator on his death although his executors would be bound, if the option were exercised, to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed. For this reason, their Lordships accept the alternative proposition advanced by counsel for the respondent, with which counsel for the appellant did not quarrel, that the whole of the deceased's interest in the partnership property, including goodwill, was assessable to duty under s. 8 (3) (b). Being so assessable, it necessarily follows that that interest cannot be assessable under s. 8 (4), which deals only with property not actually assessable as part of the estate falling within s. 8 (3), but which is to be deemed to form a part of the estate.

This conclusion is sufficient to dispose of the matter so far as the respondent's case rests on s. 8 (4) (e), but their Lordships feel bound to add that they feel grave doubt whether, considering only the language of s. 8 (4) (e), the respondent can bring the facts of this case within it. To do so he must rely on the exercise of the option, for it is plain that, if it is not exercised, s. 8 (4) (e) will have no application. That option under cl. 9 of the partnership deed is to be deemed to have been given by the legal personal representatives of Mr. Thomas, and, on its being exercised, there comes into being a contract of sale between them and the option holders. Such a transaction seems to their Lordships somewhat remote from a transaction of the kind which the language of s. 8 (4) (e) appears to contemplate.

In *Milne's* case (1) LATHAM, C.J. (69 C.L.R. 282), one of the minority, relied on the decision of HAMILTON, J., in *A.-G. v. Boden* (4), for the proposition that where a partnership deed provides that no allowance for goodwill should be made to a partner or his estate on his death his interest in the goodwill did not pass on

his death. In *A.-G. v. Boden* (4) the deceased had carried on business in partnership with his sons under a deed which contained a provision that on his death his share was to accrue to his sons in equal shares subject only to their paying out to his representatives the value of his share as at the date of his death ascertained by proper valuation without any valuation of, or allowance for, goodwill. The Crown claimed duty under the Finance Act, 1894, s. 2 (1) (b), on the footing that the deceased's interest in goodwill was property in which the deceased had an interest ceasing on the death of the deceased. The defendant claimed that the share in goodwill passed on the death of the deceased under s. 1 of the Finance Act, 1894, and, therefore, could not fall within the ambit of s. 2, in view of the decision of the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (5). They submitted, however, that it was really unnecessary to decide this point since the transaction between the father and his sons fell within the ambit of s. 3 (1) of the Act which exempts from duty property passing on the death of a deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit. HAMILTON, J., upheld this submission. His decision on this point would have been sufficient to dispose of the case, but he also dealt with the other point which he described ([1912] 1 K.B. 555) as a minor point. On this, he came to the conclusion (*ibid.*, 556) that the case fell within s. 2 (1) (b) and not within s. 1. Their Lordships are unable to agree with this view. In their opinion, the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant.

Counsel for the respondent, however, submitted that, even if their Lordships came to the conclusion they have indicated, their Lordships ought to dismiss the appeal either (a) on the ground that the record of the hearing before WILLIAMS, J., indicated an agreement that, if the share in goodwill formed part of the assessable estate (and their Lordships have indicated that it is assessable property under s. 8 (3)), its value was agreed at £20,000; and (b) on the ground that the contention advanced by counsel for the appellant which their Lordships consider well founded, viz.: that the share in goodwill was assessable only under s. 8 (3), was not open to the appellant as it was not to be found either in the reasons in their case or in their notice of objection.

So far as the first of these points is concerned, counsel for the respondent himself said that there are three possible views as to the ambit of the agreement: (i) that the parties were envisaging that Mr. Thomas's share in the goodwill was assessable under s. 8 (4), but his interest in the other assets was assessable under s. 8 (3), in which event the agreed value would not apply if his share in all the assets were assessable under s. 8 (3). (ii) that the agreed value was to apply if the deceased's share in all the assets, including goodwill, fell within s. 8 (4) (e). (iii) that the agreed value was binding no matter under which sub-section the deceased's share in the assets fell to be assessed. Seeing that the parties were obviously dealing with the matter on the footing that the issue would depend on whether the majority or the minority view in *Milne's* case (1) was to prevail, the first of these alternatives seems the most probable, but their Lordships were informed that there was some correspondence relating to the agreement which was not available to their Lordships. In these circumstances, their Lordships are not prepared to say more than that it would obviously be improper for them to hold that the appellant is precluded by the agreement from succeeding on this appeal.

On the second point, their Lordships need not spend any time in examining the appellant's case, for their Lordships are satisfied that, if the contention advanced by counsel for the appellant was within the ambit of the notice of

objection, it is sufficiently covered by his third reason to which their Lordships have already referred. If, however, it was not within this notice of objection a question of jurisdiction would arise, since s. 27 (3) of the Estate Duty Assessment Act, 1914-42, limits the objector to grounds stated in his objection. Had the appellant confined his notice of objection to stating as his ground that (see para. 25 of the notice of objection),

“ the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to s. 8 (4) (e) ” A

there could have been no doubt but that the appellant was entitled to argue that it could not be deemed to be part of the estate under s. 8 (4) (e), because it was actually part of the estate under s. 8 (3). Counsel for the respondent submits that the appellant is deprived of his right to present this argument because, as he says, the preceding paragraphs show that para. 25 was not directed to this point. Their Lordships, however, think that the necessary foundation for the argument is to be found in para. 23, para. 24 and para. 25 when read together, and must, therefore, refuse to dismiss the appeal on the ground that the argument falls outside the grounds stated in the objection. B

Counsel for the appellant invited their Lordships, if they reached this conclusion, to allow the appeal and amend the assessment by striking out the £20,000 added under s. 8 (4) (e) in respect of the deceased's proportion of the goodwill of Maples. Their Lordships are not prepared to adopt this course, which would mean that the respondent could only claim duty in respect of this item under s. 8 (3) if he could make a new assessment. Their Lordships do not know whether this would be possible or not, and do not find it necessary to investigate the possibility. The appellant has succeeded only on a ground which was not argued either before WILLIAMS, J., or before the Full Court. In these circumstances, their Lordships consider that the proper course to adopt is to declare that the deceased's interest in the goodwill, as in the other assets of the partnership, is part of the testator's estate within s. 8 (3), and is not to be deemed to be part thereof under s. 8 (4), and to remit the matter to the High Court to make such order as the High Court may think fit on the footing of this declaration. This order will enable the parties to advance before the High Court such arguments as they may think proper, having regard to that declaration. In particular, but without restricting in any way the generality of the arguments, (i) it will enable the respondent to allege that the agreement [referred to before WILLIAMS, J.] binds the appellant to accept the figure of £20,000 as the value of the deceased's interest in the goodwill under whatever sub-section it is held to form part of the assessable estate; (ii) it will enable the appellant to allege (a) that the respondent is bound by the valuation made pursuant to the partnership deed which represents the utmost the estate can ever receive; alternatively (b) that if it is open to the respondent to go behind the figure thus ascertained, the existence of the option must be taken into account in arriving at the value of Mr. Thomas's interest in the partnership assets. Both these points were raised before their Lordships, but in view of the advice which their Lordships propose to tender to Her Majesty, their Lordships express no opinion thereon. D E F

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, and set aside the orders of WILLIAMS, J., and of the Full Court, and to declare that the share and interest of the late Frederick Charles Henry Thomas in the assets of the firm or partnership carried on under the name or style of “ Maples ”, including the goodwill thereof, was part of his estate within s. 8 (3) of the Estate Duty Assessment Act, 1914-42, and that no part of such share or interest is to be deemed to be part of his said estate under sub-s. (4) of the said section, and to refer this matter back to the High Court of Australia to reconsider the objection of the appellant to the assessment made by the respondent in the light of the declaration aforesaid, and, in particular, but without prejudice G H

to the generality of the foregoing, to determine (a) whether any binding agreement has been made between the appellant and the respondent which fixed the value of the said share and interest of the said Frederick Charles Henry Thomas in the business and assets of the said firm, including the goodwill thereof, and if not (b) what value ought to be placed thereon under s. 8 (1) of the said Act having regard to all relevant circumstances. If, on such re-consideration by the High Court, the appellant secures a reduction in the assessed value of the said estate, the respondent shall pay the appellant's costs of the appeal to this Board. If the appellant fails to secure such reduction, each party shall pay his own costs of such appeal. The costs of all the proceedings in the High Court of Australia are to be in the discretion of that court.

Appeal allowed.

B Solicitors: *Crowther & Gray* (for the appellant); *Coward, Chance & Co.* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

C AUSTRALIA (COMMONWEALTH) COMMISSIONER OF
TAXATION v. SQUATTING INVESTMENT CO., LTD.

[PRIVY COUNCIL (Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Asquith of Bishopstone and Lord Cohen), November 25, 26, 30, December 1, 2, 3, 1953, January 21, 1954.]

D *Privy Council—Australia—Income tax—Income—Trade receipt—Compulsory acquisition of wool by government—Price paid on appraisalment—Subsequent voluntary additional payment—Income Tax Assessment Act, 1936-49, s. 25.*

The respondents carried on business as wool growers. Wool grown by them in the seasons 1939-40 to 1945-46 inclusive was acquired by the Commonwealth government pursuant to an arrangement ("the wool purchase arrangement") made in 1939 (at the outbreak of war) between the Commonwealth government and the United Kingdom government by which the latter government purchased all wool produced in Australia for the period of the war and one full wool year thereafter, except wool required in Australia. It was a term of the wool purchase arrangement that the United Kingdom government and the Commonwealth government would divide equally between them any profit arising from the re-sale outside the United Kingdom of wool purchased by the United Kingdom government under the arrangement. A central wool committee was set up, and also a State wool committee for each State in Australia, by the National Security (Wool) Regulations which provided for the appraisalment of wool by the committees and also provided that any moneys which might be received by the central wool committee from the government of Great Britain under the wool purchase arrangement over and above the purchase price payable by such government for the wool which might arise should be dealt with as the central wool committee should in its absolute discretion determine. Any person owning or controlling or having possession of any wool was bound to submit it for appraisalment. From the inception of the wool purchase arrangement, the central wool committee contemplated that the share of the Commonwealth government of any profit to arise should be paid to the wool growers (i.e., those supplying shorn wool), and wool supplied by them was listed in the brokers' appraisalment catalogues as "participating" wool. The respondents were suppliers of participating wool. In 1945 an agreement ("the disposals plan") was reached between the United Kingdom government and Dominion governments, including the Commonwealth government, whereunder a joint organisation was set up to dispose

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of stocks of wool accumulated in the United Kingdom. Each Dominion government was to purchase a half share in the stocks of wool from their respective Dominions (at cost less accumulated profits from sales of wool outside the United Kingdom), and was to receive half the net proceeds of sale of that wool on its being sold outside the United Kingdom. Payment for this half share was to be made by each Dominion government within four years and each Dominion government's half share in the proceeds of sale by the joint organisation was to be applied in payment of the amount so payable. The operations of the joint organisation in respect of Australian wool resulted in large profits, and the Wool Realisation (Distribution of Profits) Act, 1948, was passed to provide for distribution. The Act provided by s. 6 (1) for the declaration from time to time of amounts available for distribution, and by s. 7 (1) provided that an amount equal to each declared amount should be distributed. Section 7 (2) provided that out of each amount to be distributed there should be payable in relation to any participating wool an amount which bore to the amount to be distributed the same proportion as the appraised value of that wool bore to the total of the appraised values of all participating wool. Section 7 (3) provided for the payment to be made to the person who supplied the wool for appraisal. On Nov. 30, 1949, under s. 7, £22,851 was paid to the respondents, who still carried on their business as suppliers of wool. They were assessed to income tax on that sum.

HELD: the sum paid to the respondents was an additional payment voluntarily made to them for wool supplied for appraisal, or, if the compulsory acquisition could properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool, and in the respondents' hands it was a trade receipt of an income nature, assessable to income tax under the Income Tax Assessment Act, 1936-49, s. 25.

Perpetual Executors Trustees & Agency Co. (W.A.), Ltd. v. Maslen & Commonwealth of Australia ([1952] A.C. 215), explained.

Ritchie v. Trustees Executors & Agency Co., Ltd. (1951) (84 C.L.R. 553), approved.

Cases referred to:

- (1) *Perpetual Executors Trustees & Agency Co. (W.A.), Ltd. v. Maslen & Commonwealth of Australia*, [1952] A.C. 215; 3rd Digest Supp.
- (2) *Ritchie v. Trustees Executors & Agency Co., Ltd.*, (1951), 84 C.L.R. 553; [1951] A.L.R. 581; 25 A.L.J. 213.
- (3) *John Cooke & Co. Pty., Ltd. v. Commonwealth*, (1922), 31 C.L.R. 394; 29 A.L.R. 161; *affd.* P.C., (1924), 34 C.L.R. 269.
- (4) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 28 Digest 86, 495.

APPEAL by the Commissioner of Taxation of the Commonwealth of Australia against an order of the Full Court of the High Court of Australia, dated Apr. 13, 1953, on a Case stated by SIR OWEN DIXON, C.J., dated July 3, 1952. The facts appear in the judgment.

Sir Hartley Shawcross, Q.C., Heyworth Talbot, Q.C., A. D. G. Adam, Q.C. (of the Australian Bar), *Brungate* and *F. N. Bucher* for the appellant.

D. J. Menzies, Q.C., and *K. A. Aickin* (both of the Australian Bar) for the respondents.

Jan. 21. **LORD MORTON OF HENRYTON:** On Nov. 30, 1949, the respondents received the sum of £22,851 as their share of an interim distribution made by the Australian wool realisation commission pursuant to the Wool Realisation (Distribution of Profits) Act, 1948. The respondents were assessed to income tax on this sum as being part of their assessable income derived during the

year ending Dec. 31, 1949. The respondents objected to the inclusion of the said sum in the assessment, and the objection was treated as an appeal and forwarded to the High Court under s. 187 of the Income Tax Assessment Act, 1936-1949. SIR OWEN DIXON, C.J., stated a Case for the opinion of the Full Court of the High Court, under s. 198 of the same Act. The questions for the opinion of the Full Court were as follows:

- A “(i) Is the said sum of £22,851 . . . assessable income of the appellant within the meaning of the Income Tax Assessment Act, 1936-1949? (ii) If so, was the said amount part of its assessable income in the year ended Dec. 31, 1949, or in some other and what year or years?”

B The Full Court by a majority (McTIERNAN, WILLIAMS and WEBB, JJ.; FULLAGAR and KITTO, JJ., dissenting) answered question (i) in the negative. The case was then remitted to the High Court and KITTO, J., in accordance with the answer given by the Full Court, ordered that the sum in question be excluded from the assessable income of the respondents.

C The commissioner appeals by special leave from the decision of the Full Court and the consequent order of KITTO, J., and contends that the sum in question is taxable under s. 25 of the Income Tax Assessment Act, which is in the following terms, so far as material:

“(1) The assessable income of a taxpayer shall include—(a) where the taxpayer is a resident—the gross income derived directly or indirectly from all sources whether in or out of Australia . . . which is not exempt income.”

D The commissioner also relied in the alternative on the following clauses of s. 26:

E “The assessable income of a taxpayer shall include—(a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme . . . (g) any bounty or subsidy received in or in relation to the carrying on of a business, and such bounty or subsidy shall be deemed to be part of the proceeds of that business.”

F The relevant facts are fully stated in the Case Stated, and may be summarised for the purpose of the present appeal as follows: The respondents own pastoral properties in the States of New South Wales and Queensland and on such properties they carry on (inter alia) the business of wool growers. This business was carried on by the respondents during the years 1939 to 1946 inclusive, and the wool grown by the respondents in the seven wool seasons 1939-40 to 1945-46 inclusive was acquired by the Commonwealth pursuant to the National Security (Wool) Regulations (Statutory Rules, 1939, No. 108). These regulations were made for the purpose of carrying out an arrangement (hereafter referred to as G “the wool purchase arrangement”) made between the United Kingdom government and the Commonwealth government at the outbreak of war in 1939, by which the United Kingdom government purchased all wool produced in Australia for the period of the war and one full wool year thereafter, except wool required for the purpose of woollen manufacture in Australia. One of the terms of the wool purchase arrangement was that the United Kingdom government and the Commonwealth government would divide equally any profit H arising from the re-sale outside the United Kingdom of wool purchased by the United Kingdom government under the arrangement. A central wool committee, and also a State wool committee for each State, was set up by the wool regulations. The following regulations should be set out in full:

“Wool acquired by Commonwealth when submitted for appraisalment

15.—The sale of wool shall be by appraisalment under these regulations and the property in every parcel of wool submitted for appraisalment shall

pass to the Commonwealth when the final appraisement thereof is completed in the manner prescribed by the instructions of the central wool committee governing appraisement.

"Table of limits of appraisement types

16.—For the purpose of appraising wool according to description the central wool committee shall cause to be prepared a table of limits or lists of appraisement types of wool.

"Regard to be had to price in preparation of table of limits

17.—In the preparation of such a table of limits regard shall be had to the price payable by the government of Great Britain to the government of the Commonwealth under the arrangement between those governments and the limits shall be so fixed as to ensure that the price per pound payable by the government of Great Britain for the wool of any wool year will not be exceeded by the average price per pound of the total payments made pursuant to the appraisement of that wool.

"State wool committees to carry out appraisement

18.—Each state wool committee shall under the directions of the central wool committee carry out all arrangements for the appraisement of wool.

"All wool to be submitted for appraisement

19.—(1) All wool shall be submitted for appraisement. (2) If any person owning or controlling or having possession of any wool fails to submit it for appraisement he shall be guilty of an offence . . .

"Purchase of wool for woollen manufacture

23.—(1) Any person desirous of obtaining wool for the purpose of woollen manufacture in the Commonwealth may apply to the central wool committee for authority to purchase wool and the central wool committee may authorise the purchase of the wool subject to such conditions as it may think fit to impose . . .

"Finance

30.—(1) All moneys payable by the government of Great Britain under the arrangement made by that government with the Commonwealth for acquiring Australian wool shall be received by the central wool committee and out of such moneys the central wool committee shall defray all costs, charges and expenses of administering these regulations, and make the payments for wool to the suppliers. (2) Any moneys which may be received by the Central Wool Committee from the government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such government thereunder for the wool and any surplus which may arise shall be dealt with as the central wool committee shall in its absolute discretion determine."

In pursuance of the regulations, the Commonwealth acquired the whole of the Australian wool clip in each year during the war and the suppliers of the wool duly received the whole of the compensation moneys to which they were legally entitled under the regulations. It is unnecessary for the present purpose to refer to the "flat rate adjustment" and the "retention moneys" which are mentioned in the Stated Case. The United Kingdom government re-sold part of the wool purchased by it to other countries, and established in its books an account entitled "Divisible profits account" from which could be ascertained the profit divisible equally between the United Kingdom government and the Commonwealth government under the wool purchase arrangement.

Paragraph 26 of the Stated Case states as follows, so far as material for the present purpose:

"For the purpose of the administration of the regulations there was a basic distinction which separated all wool into two categories. This is the

A distinction between wool obtained from shearing of live sheep, i.e., 'shorn wool,' and wool obtained from the skins of slaughtered sheep, i.e. 'skin wool . . .' From the inception of the wool purchase arrangement the central wool committee contemplated that the Commonwealth government's share of any profit to arise should, if there were any profit, be paid to the wool growers, i.e., the suppliers of shorn wool and not to the suppliers of skin wool. Shorn wool was, therefore, classified as 'participating wool,' i.e., wool the suppliers of which were, according to the intention of the central wool committee, entitled to participate in the Commonwealth government's share of any profit to arise under the wool purchase arrangement, . . . The suppliers of skin wool . . . were not intended by the central wool committee to participate in any profit. Skin wool was, therefore, listed as 'non-participating.' Accordingly, all wool submitted for appraisal was, in addition to being appraised according to type and yield under the table of limits, listed in the broker's appraisal catalogues as 'participating' or 'non-participating.' "

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The wool submitted by the respondents was listed as "participating" wool and their Lordships think it can fairly be inferred that this fact, coupled with the terms of reg. 30 (2), must have led the respondents to hope, if not to expect, that the central wool committee might make further payments to them in exercise of the discretion vested in that committee by reg. 30 (2). For a summary of the subsequent events leading up to the passing of the Wool Realization (Distribution of Profits) Act, 1948, it is convenient to quote three paragraphs of the Case Stated :

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D " 30.—As a result of negotiations conducted in the year 1945, an agreement was reached between the United Kingdom government, the Commonwealth government and the governments of South Africa and New Zealand upon a plan for the winding-up of the wartime wool purchase arrangements and the disposal of the large stocks of wool held by the United Kingdom government without unduly disturbing the marketing or depressing the price of future wool clips. The agreement so reached was called the 'disposals plan' and is set out in the schedule to the Wool Realization Act, 1945 (Act No. 49 of 1945). Pursuant to that agreement, the United Kingdom government arranged for the formation of United Kingdom—Dominion Wool Disposals, Ltd., a company incorporated in the United Kingdom (commonly called the 'joint organization') and each of the other governments, set up by a subsidiary of the joint organization. The Australian subsidiary is the Australian wool realization commission set up by the Wool Realization Act, 1945. 31.—The joint organization was established in 1945 and commenced operations as from Aug. 1, 1945. The task of the joint organization was the disposal of the accumulated surplus of dominion wool purchased during the war by the United Kingdom government. The stocks held by the United Kingdom government on Aug. 1, 1945, and taken over by the joint organization on that date amounted to 10,407,000 bales of which 6,796,000 bales were Australian wool purchased from the Commonwealth by the United Kingdom government under the wool purchase arrangement. It was agreed that the three dominion governments concerned should each acquire a half interest in the stocks of wool from their respective dominions held by the United Kingdom government and that the value of such stocks for the purposes of the disposals plan, be taken as the original cost of the wool as appearing in the United Kingdom government books, less the accumulated profits from sales of wool outside the United Kingdom, i.e., the cost of the wool held in store less the balances standing in the divisible profits accounts. Each dominion government was to acquire on this basis, a half interest in the stocks of the wool purchased from it and held by the United Kingdom government on Aug. 1, 1945, and was to receive, after due

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allowance for operating expenses, half the net proceeds of sale of that wool upon its being sold by the joint organization. Payment for this half interest was to be made by each dominion government to the United Kingdom government within four years and each dominion government's half share in the proceeds of sale by the joint organization was to be applied in payment of the amount so payable. 32.—The disposals plan provided that the wool purchase arrangement should terminate on July 31, 1945, but further provided (in Part I, para. 9 thereof) that for the wool year 1945-46, the first year of the disposals plan (known as the interim period and terminating on July 31, 1946), the method of purchase of wool—viz., appraisalment and acquisition—which had operated during the preceding six years, should be continued, and (in Part III, para. 6) that the United Kingdom government would be responsible for financing the purchase of all the wool so acquired but that the management and sale of the 1945-46 wool clip should be entrusted to the joint organization and that such wool should be dealt with by the joint organization in the same manner as the stocks taken over by it as at Aug. 1, 1945. In Australia the acquisition of the 1945-46 wool clip was administered by the central wool committee until Nov. 15, 1945, upon which date the Australian wool realization commission took over. The system of acquisition upon appraisalment continued until June 30, 1946, and in the following wool season the sale of wool by auction was resumed—the first of such auctions being held in September, 1946. Thereafter all wool, both from new clips and stocks held by the joint organization, was disposed of by auction or private sale. Certain small quantities were brought in by the joint organization at reserve prices when other bids at auction did not reach the reserves established pursuant to the disposals plan.”

Section 9 (3) of the Act of 1945 provided that the commission

“shall have and perform all the duties, and shall have and may exercise all the powers, authorities and functions, of the central wool committee under—(a) the National Security (Wool) Regulations; . . . and for that purpose—(i) the commission shall, by force of this Act, be substituted for, and be deemed to be, the central wool committee; (ii) the assets of the central wool committee shall, by force of this Act, be vested in the commission; (iii) all rights, obligations and liabilities which, immediately prior to the commencement of this Act, were vested in or imposed on the central wool committee shall, by force of this Act, be vested in or imposed on the commission; . . .”

Thus, the Australian wool realisation commission was the true successor of the central wool committee set up under the regulations of 1939, and s. 10 provided that any reference in the regulations of 1939 to the wool purchase arrangement

“shall include and shall be deemed at all times, on or after Aug. 1, 1945, to have included a reference to the disposals plan.”

The operations of the joint organisation in respect of Australian wool resulted in large profits, and it became necessary for the Commonwealth to decide what ought to be done with these profits. The Wool Realisation (Distribution of Profits) Act, 1948, is entitled

“An Act to provide for the distribution of any ultimate profit accruing to the Commonwealth under the wool disposals plan, and for other purposes.”

Section 18 of the Act directed the preparation of a list showing (a) the persons who, in the opinion of the commission (i.e., the Australian Wool Realization Commission) were entitled to share in distributions under this Act; and (b) the appraised values of the wool in relation to which each such person was, in the opinion of the commission, so entitled. Section 4 contained a number of definitions, of which the following should be quoted:

“‘appraised value’, in relation to wool, means the value at which the wool

was appraised under the National Security (Wool) Regulations ; . . . 'declared amount of profit' means an amount which has been specified in a notice published in the "Gazette" in pursuance of s. 6 of this Act; 'participating wool' means wool appraised under the National Security (Wool) Regulations (whether under those regulations when in force under the National Security Act, 1939, or that Act as amended, or under those regulations when in force under the Wool Realization Act, 1945, or that Act as amended), being wool which was listed as participating wool in the appraisalment catalogue used by the appraisers for the purpose of that appraisalment; . . . 'the net profit' means the amount remaining after deducting from the wool disposals profit the expenses and charges of the commission in administering this Act, other than commission payable to brokers ; "

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B Section 6 (1) provides:

"At any time before the wool disposals profit has been ascertained, the Minister may, with the approval of the Treasurer and after consultation with the commission, and if he is satisfied that the financial position under the disposals plan justifies his so doing, by notice published in the 'Gazette', declare an amount to be available for distribution under this Act out of the expected net profit."

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Part III of the Act is headed "Persons Entitled", and s. 7 is as follows:

"(1) Subject to this Act, an amount equal to each declared amount of profit shall be distributed by the commission in accordance with this Act. (2) There shall be payable by the commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool. (3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisalment. (4) Where two or more persons jointly supplied participating wool for appraisalment, those persons shall, for the purpose of determining their claims in relation to that wool in any distribution under this Act, be treated as one person."

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Section 8 contains a provision with regard to wool which was submitted by a dealer for appraisalment, and is not material for the present purpose. Sections 9 to 14 inclusive deal with the situation which may have arisen by reason of various events, such as the death or bankruptcy of the person who supplied the wool for appraisalment, and s. 10 should be quoted in full, as it was the section which came under consideration in *Perpetual Executors Trustees & Agency Co. (W.A.), Ltd. v. Maslen & Commonwealth of Australia* (1), hereafter mentioned.

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"(1) Where participating wool was supplied for appraisalment by a company which is defunct, an amount which would otherwise be payable under this Act to the company may be paid by the commission to such person as appears to the commission to be justly entitled to receive it. (2) Where participating wool was supplied for appraisalment by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the commission to any former partner or partners (including the personal representatives of a deceased former partner). (3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisalment."

The sum of £22,851 now in question was paid to the respondents under s. 7 of the Act of 1948. They are still carrying on business as suppliers of wool. Counsel

for the appellant submitted that the sum in question was, in the hands of the respondents, a trade receipt of an income nature, and relied strongly on *Ritchie v. Trustees Executors & Agency Co., Ltd.* (2). In that case, the High Court had to consider a case in which the trustees of a will had carried on business on a pastoral station, under a power in the will, and had from time to time submitted "participating" wool for appraisalment under the regulations of 1939. They received £4,770 under the provisions of the Act of 1948 and the question before the High Court was whether this sum should be treated as capital or income in the hands of the trustees.

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The Full Court of the Supreme Court of Victoria had held that the trustees

"should hold and deal with the moneys as a receipt of an income nature in relation to the Murray Downs station-property business, to be brought into account accordingly and dealt with in accordance with the trusts of the will of Charles Campbell deceased relating to the station properties"

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and the High Court unanimously affirmed this decision. It is true that the minds of the learned judges of the High Court were not specifically directed to the question of income tax, but there are passages in the judgment of the court which are so important for the present purpose that they must be quoted in full. The court said (84 C.L.R. 576):

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"For the purpose of determining whether the payment received by the trustees of the will from the wool realization commission should be regarded as capital or income and if income to what period of enjoyment it is attributable it has been thought important to trace from the beginning the relevant steps in the extensive and complex governmental transaction which the distribution of profit in question brings almost to an end. If this were not done it would be easy to misconceive the relation of the supply of wool for appraisalment to the wool disposals profit and to the right conferred by the Act to share in its distribution in accordance with the appraisalment value of the wool submitted. It is clear that from the beginning the distribution, in whole or in part, of the Australian share of any surplus arising on divisible profits account was contemplated. The decision was taken administratively that skin wool should be excluded and wool was accordingly submitted for appraisalment and appraised as participating and non-participating. That of course implied that the basis of distribution would be appraised value of the wool submitted. But it was equally clear that no legal right to participate in a distribution of profits was conferred upon suppliers of participating wool, that is, until the enactment of the Wool Realization (Distribution of Profits) Act, 1948. In the beginning it was made to depend wholly on the discretion of the central wool committee. It is conceivable that a court interpreting the regulations might have implied limitations upon the manner in which the discretion was exercisable, but even so no right to participate could possibly have been imputed, particularly having regard to the reasons upon which were based the decisions in *John Cooke & Co. Pty., Ltd. v. Commonwealth* (3). No payment to the supplier of wool, beyond, at all events, appraised value (whether appraised value simpliciter or adjusted to flat rate is not material) was required by the regulations; all else remained a matter of administration. But courts should not be unmindful of the fact that administrative measures and understandings may, according to circumstances, raise an expectation almost as assured of realization as if it rested upon a foundation of legal right. Section 9 (3) of the Wool Realization Act, 1945-50, transferred the powers of the central wool committee to the wool realization commission and the Wool Realization (Distribution of Profits) Act, 1948, removed the whole matter of the disposal of profits from the province of administrative discretion and placed the distribution upon a defined statutory basis. Not only did it convert the expectations which existed into claims which though not actionable (see s. 28)

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became claims with a legal foundation; it also provided an appropriate and definitive rule for a number of situations of difficulty arising from death, bankruptcy, change of persons acting in a representative capacity and dissolution of partnerships and of companies, it invalidated assignments and it prescribed the machinery of distribution. The rule which the legislature adopted for cases in which one of the events mentioned occurred between the supply of participating wool for appraisalment and the distribution varied in expression, but in effect it was to require the moneys to be dealt with as if the supply of wool for appraisalment had been a sale made at the time of such supply and the amount payable out of the distributable profits were part of the proceeds of sale. This of course does not mean that there should be any notional change in the date of receipt, only that, treating the payment as received on the actual date of receipt it should for the specified purposes be regarded as though it were a payment, that is, a delayed or deferred payment of part of the proceeds of a sale of the wool made at the time of appraisalment. None of these provisions applies to the facts of the present case. The trustees themselves submitted the wool for appraisalment acting under trusts established long before the wool purchase arrangement, the settlement preceded it and there is no question of an assignment within s. 29."

After setting out certain contentions advanced on behalf of the parties interested in capital, the court proceeded (*ibid.*, 579):

"The course pursued to give effect to the wool purchase arrangement by the acquisition of wool from the grower must be considered as an entirety. The receipt of the payments is an actual consequence of the submission of wool for appraisalment. It is a consequence which from the beginning was contemplated as a contingent result of submitting the wool for appraisalment. Legally it was left for the time being to the discretion of the central wool committee. But administrative arrangements were made from the beginning by that body in readiness for the contingency becoming actual, by determining what wool should share and what should be excluded and by expressly appraising on that footing the wool submitted. The two statutes, the Wool Industry Fund Act, 1946, and the Wool Realization (Distribution of Profits) Act, 1948, are not disconnected. Together they take up the discretion which reg. 30 (2) vested in the central wool committee, a body superseded under the Wool Realization Act, 1945-50, and proceed to deal with the subject legislatively instead of administratively. The one statute says what part of the funds governed by that sub-regulation should be applied in the language of the Act for purposes associated with the wool industry. The other statute gives legislative effect to the expectation that the amounts arising upon divisible profits account under the wool purchase arrangement with the United Kingdom should be distributed among growers as a percentage of the appraised value of the participating wool submitted and it provides the machinery for the purpose. It is, of course, true that the Parliament, in the exercise of its legislative power, could have dealt in any manner it chose with the fund. But that legal fact does not determine the character or the consequences of the course which the Parliament actually took or the nature, as between capital and income, in trusts for successive interests, of the amounts distributed. They constitute receipts resulting from the operations of wool-growing. As possible or contingent receipts they were in contemplation when the appraisements were made. The title to receive them when in the end it is placed on a legal basis consists in the submission of shorn wool for appraisalment for the purposes of the wool purchase arrangement. The amount is a percentage of the appraised value of the wool so submitted. The source of the distribution is in effect the fund arising under the divisible profits clause in the arrangement. When the Wool Realization (Distribution

of Profits) Act, 1948, speaks of the rights, duties and liabilities of a person made a payee in respect of wool submitted by a defunct company, a dissolved partnership or a deceased person being the same as if the amount were part of the proceeds of a sale of the wool by the company, partnership or deceased person at the time of the supply of the wool for appraisement, the purpose is not to require an assumption entirely departing from the truth but simply to bring the situation within an express definition which would remove all doubt of its character. It may possibly be true that the compulsory submission of wool for appraisement did not amount to a 'sale' and that whatever the transaction be called the word 'proceeds' could properly be used only of the appraised value or the appraised value adjusted to flat-rate parity, because all else depended entirely on administrative or legislative discretion. But, apart from questions of legal right and legal definition, there is no closer practical analogy than that which s. 10 (3) and s. 11 (b) adopt, viz., the proceeds of a sale of the wool. They are receipts resulting from the operations of growing wool."

It is obvious that these views, expressed with so much force and clarity, have a strong bearing on the present appeal. There are no circumstances which differentiate the payment made to the trustees in *Ritchie's* case (2) from the payment made to the respondents in the present case. When the trustees and the respondents respectively received these payments they were still carrying on the business in the course of which they had submitted wool for appraisement in the years 1939 to 1946. Thus, *Ritchie's* case (2), like the present case, was one to which the special provisions in ss. 8 to 14 inclusive of the Act of 1948 did not apply. Moreover, their Lordships do not think that the decision in *Ritchie's* case (2) rested on any equitable principles applicable as between life tenant and remainderman; it rested simply on the character of the payment—was it capital or income?

Before commenting further on the judgment in *Ritchie's* case (2), their Lordships will turn to *Perpetual Executors Trustees & Agency Co. (W.A.), Ltd. v. Maslen* (1), as the three judges forming the majority in the High Court in the present case, undoubtedly, attached great importance to *Maslen's* case (1) and to certain observations made by their Lordships' Board in the course of its judgment. The facts in *Maslen's* case (1) were as follows. One Connolly, who died on Dec. 28, 1946, had until June 30 of that year been in equal partnership with one Laffer in a pastoral business in Western Australia known as the Mardathuna Pastoral Co. By a deed dated June 17, 1946, and operating from July 1 of that year, Connolly assigned the beneficial interest of his half share in the company to the Maslens in equal shares as tenants in common. Since the question as to what the property assigned included was in dispute between the parties, the exact terms in which the assignment was made should be quoted in so far as they are material. By cl. 1 of the assignment it was provided that Connolly assigned to the Maslens

"all his right title and interest in . . . (d) . . . the benefit of all contracts and engagements and book debts to which Patrick Andrew Connolly and Claude Ashley Laffer may be entitled in connexion with the said business together with all other assets of the said business."

The said business referred to was that of the company. By another deed dated Oct. 2, 1946, Laffer assigned his half share to one of the Maslens. Laffer's assignment was in no wider terms than that of Connolly's and need not be further referred to. As a result of the Act of 1948, two sums became payable in respect of "participating" wool supplied for appraisement, prior to June 30, 1946, by Messrs. Connolly and Laffer. The Maslens, on the one hand, and Connolly's and Laffer's representatives, on the other, claimed to be entitled to the two sums, and, in those circumstances, the latter took out originating summonses in the Supreme Court of Western Australia for the purpose of ascertaining to whom the sums

were properly payable. In the Supreme Court of Western Australia WALKER, J., decided in favour of the plaintiffs' claim, but the High Court (LATHAM, C.J., and KITTO, J.; FULLAGAR, J., dissenting) reversed that decision, and held that the assignees were entitled. On appeal, their Lordships' Board, in agreement with WALKER, J., and FULLAGAR, J., took the view that the sums in question did not pass under the assignment.

A The issue before the Board (omitting one question not material for the present purpose) was thus stated in the judgment ([1952] A.C. 225):

" . . . what is the true destination of these two sums and any other sums which may be paid by the commission in respect of participating wool furnished by the partnership of Messrs. Connolly and Laffer ? "

B It is important to see exactly what were the contentions put before the Board and how the Board chose between these contentions. The contentions and the choice are set out as follows (*ibid.*, 228):

C " The determination of the matters in issue in Australia, therefore, which are submitted to their Lordship's Board, falls to be decided on the true construction of the provisions of Part III of the Act. The appellants rest their argument on the terms of s. 7 (3) and say that the share of the sums in dispute which they claim are payable in relation to participating wool, and accordingly payable to the persons who supplied it for appraisalment. Messrs. Connolly and Laffer are the persons who supplied the wool jointly and are to be treated as one person (s. 7 (3) and (4)). And accordingly the wool was supplied by a partnership which has been dissolved and the amount D is properly payable to any former partner or partners, including the personal representatives of a deceased partner. The sums in dispute were, they say, properly payable to either of the claimants as representatives of Mr. Connolly or as representatives of Mr. Laffer, but not to the respondents. The respondents, on the other hand, draw attention to the fact that the provisions of s. 7 (3) [in [1952] A.C. 228, s. 10 (3) is referred to, but this is an obvious misprint] are stipulated to be subject to the Act, and rely on the terms of s. 10 and s. 11 as distinguishing this from a case where E a living partner claims the benefit of the payment. Section 10 (3), they say, no doubt authorises payment, where a partnership is dissolved, to a former partner or his representatives. But when the money has been paid to him, his duties in dealing with it are prescribed by s. 10 and s. 11. Those duties, they contend, are to treat the payment as part of the proceeds of the sale F of the wool made at the time of its supply for appraisalment, i.e., as if the supplier was entitled to the payment at that time. An identical obligation is, they maintain, imposed on a personal representative under s. 11, since he is enjoined not to treat the sum paid as part of the personal estate but as having the quality of the proceeds of a sale made by the deceased supplier at the time when he furnished the wool for appraisalment. Their Lordships G have to choose between these two constructions. Obviously the recipient, whether he be a former partner or a personal representative, cannot keep the money for himself. If he be a member of a dissolved partnership, he must account to his former partner, and if he be a personal representative, he must treat the money as part of the estate which he is administering. But do the provisions go further and stipulate that it is to be dealt with as if it were H the result of a contract or debt which came into existence when the wool was supplied for appraisalment ? So to construe the wording would be to do violence to the admitted fact that it is a gift. No doubt the wording might be clearer, but *prima facie* the sums received are payable to the supplier and it is for the claimants to establish the contrary. The correct view, in their Lordships' opinion, is that it is a true gift to the supplier of the wool. It is not, and never was, part of the assets of the partnership."

In that passage the Board rejects the suggestion that s. 10 (3) of the Act of 1948 has the result that a debt, equal to the amount of the subsequent payment, must be regarded as having been owed to the suppliers of the wool as from the date on which they supplied it. The suggestion thus rejected was the basis of the claim put forward by the assignees. They had contended that a debt of this amount must be deemed to exist at the date of supply, and as that date was prior to the assignment of 1946 the debt must be deemed to have been included in the assets assigned to them. The rejection of that suggestion, and the consequent refusal of that claim, was the only decision given by the Board in *Maslen's* case (1).

It will at once be seen that, on this footing, the decision in *Maslen's* case (1) has no bearing on the problem arising in the present case. There are, however, certain passages in the judgment on which counsel for the respondents strongly relied as indicating that sums paid to suppliers under the provisions of the Act of 1948 are not assessable income in the hands of the recipients. In the passage already quoted, the Board described the payment then in question as a "true gift" to the suppliers and later it was described as "a personal gift to the parties concerned". In their Lordships' view the word "gift" does not assist the respondents. It was used in order to negative the idea that a debt was deemed to arise at the time when the wool was submitted for appraisalment. Undoubtedly the Commonwealth was not bound to pay this sum to the suppliers. The payment was a voluntary one, though it fulfilled a well-founded hope or expectation on the part of the suppliers; but it is well settled that a voluntary payment may be subject to income tax in the hands of the recipient: see, for instance, *Blakiston v. Cooper* (4). Nor does the use of the adjective "personal" assist the respondents, having regard to the circumstances in which it was used. The mind of the Board in *Maslen's* case (1) was in no way directed to income tax questions, and it is inconceivable that, by using this adjective, their Lordships meant to suggest that the payment in question was awarded to the suppliers because of their exceptional personal merits or sterling characters. It was awarded to them simply because they had supplied wool for appraisalment, and s. 7 of the Act of 1948 makes this abundantly clear. Their Lordships were, of course, quite aware of the distinction, for income tax purposes, between a gift "peculiarly due to the personal qualities" of the recipient: see *Blakiston v. Cooper* (4) ([1909] A.C. 107), and a payment for goods or services, and they cannot have meant to suggest that the payment in question was of the former kind, as such a suggestion would be inconsistent with the plain words of s. 7 (3).

Counsel for the respondents relied also on the sentence ([1952] A.C. 229):

"It [the payment] is not, and never was, part of the assets of the partnership"

as indicating that the payment to the present respondents could not be said to be a trade receipt. Their Lordships cannot accept this suggestion. In their view, the sentence means no more than this, that the partnership between Connolly and Laffer had been dissolved before the payment was made, and the Board was again rejecting the argument that a book debt must be deemed to have come into existence during the continuance of that partnership.

Finally, their Lordships can find nothing in the judgment in *Maslen's* case (1) to indicate that the Board disapproved of the reasoning or of the decision in *Ritchie's* case (2). The problem in *Maslen's* case (1) was to identify the recipient of the sum then in question, not to decide whether that sum bore the character of capital or income in the hands of the recipient. It appears from the transcript of the proceedings in *Maslen's* case (1), though not from the report in [1952] A.C., that *Ritchie's* case (2) was cited in the course of the argument: and their Lordships entertain no doubt that, if the Board in *Maslen's* case (1) had thought that *Ritchie's* case (2) bore on the question in issue and was wrongly decided, the latter case would have been mentioned in the judgment.

A It was pointed out by counsel for the appellant that there are phrases in the judgment in *Maslen's* case (1) which support the argument for the appellant. The payment is described as "the extra proceeds" ([1952] A.C. 229) "the extra profit" and "the extra sum paid" (*ibid.*, 230). Their Lordships recognise that these phrases might be read as indicating that, in the view of the Board, the payment then in question should be regarded as an additional sum added to the compensation already paid for the wool compulsorily acquired, but it would not be right to attach too much weight to the wording of phrases used *alio intuitu*. In their opinion, neither the decision in *Maslen's* case (1), nor the reasoning on which that decision was based, afford any assistance in the problem now arising for decision. They have dealt with the case very fully because of the importance attached to it by the majority of the High Court in the present case, and because they realise that some passages in the judgment, divorced from their context, are open to misconception.

B What, then, is the nature of the payment now in question, and in what capacity did the respondents receive it? Having regard to the whole history of the matter, beginning with the wool purchase arrangement and the regulations of 1939, continuing with the submission of wool for appraisalment by the respondents and the classification of that wool as participating wool, and ending with the payment of the sum in question, pursuant to s. 7 of the Act of 1948, their Lordships come to the conclusion that the payment must be regarded as an additional payment voluntarily made to the respondents for wool supplied for appraisalment, or, if the compulsory acquisition can properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. Their Lordships are in agreement with the reasoning and the decision in *Ritchie's* case (2), and the following passages are particularly germane to the present problem (84 C.L.R. 580):

E "They [the payments] constitute receipts resulting from the operations of wool-growing. As possible or contingent receipts they were in contemplation when the appraisements were made. The title to receive them when in the end it is placed on a legal basis consists in the submission of shorn wool for appraisalment for the purposes of the wool purchase arrangement . . . They are receipts resulting from the operations of growing wool."

F The respondents were in business as wool suppliers at all material times, and the payment was made to them, not because of any personal qualities, but because they, among others, supplied participating wool. They supplied the wool in the course of their trade and this further payment was made to them because they supplied it. In the present case, the respondents were still trading when the payment was made. It was in their hands a trade receipt of an income nature. Their Lordships express no opinion as to the proper description of the payment in the hands of a payee who was not trading at the date of the payment, as this case is not before the Board.

G Counsel for the respondents contended that, even if this would have been the result, had the distribution been made by the central wool committee in the exercise of its discretion under reg. 30 (2) of the regulations of 1939, a different situation had arisen, by reason of intervening events, before the distribution was in fact made. This contention, and the answer to it, are fully set out in the judgments of the minority of the High Court, and their Lordships agree with that answer. There is, in their view, a chain of events which sufficiently connects the payment of the £22,851 in November, 1949, with the supply of wool for appraisalment in 1939-1946. It is true that one of these events was a discretionary act on the part of Parliament, but that act was in effect the final link in the chain, since it directly associated the payment with the participating wool supplied for appraisalment, first by directing payment to the suppliers, and, secondly, by making the amount of the payment depend on the proportion which the appraised

value of the participating wool supplied by each supplier bore to the total of the appraised value of all participating wool.

For these reasons, which are in substance the same as the reasons given by FULLAGAR and KITTO, JJ., in the High Court, their Lordships are of opinion that the sum in question forms part of the assessable income of the respondents under s. 25 of the Income Tax Assessment Act. It is thus unnecessary to consider the alternative argument of the Crown which was based on s. 26 of the same Act. Counsel for the respondents did not seek to contend that, if the payment was assessable, it could be attributed to any year other than the year ending Dec. 31, 1949. A

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and each of the questions raised by the Stated Case should be answered in the affirmative. The respondents must pay the costs of the appellant here and in the High Court. B

Appeal allowed.
Solicitors: *Coward, Chance & Co.* (for the appellant); *Woodroffes* (for the respondents). B
[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NIGHTINGALE v. COURTNEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), January 18, 19, 1954.] C

Rent Restriction—Surrender of tenancy—Surrender by operation of law—Contract by statutory tenant to purchase house—Failure to complete—Rescission of contract by landlord—Tenant remaining in possession—Nature of occupation.

By a contract, dated Feb. 23, 1952, the landlord of a dwelling-house which was subject to the Rent Restrictions Acts agreed to sell her leasehold interest in the premises to the tenant of the lower flat for the sum of £650, of which £65 was paid as a deposit on that date. The special conditions of sale provided, inter alia, that the date for completion was to be on or before Mar. 17, 1952, that, as to the lower flat, the property was to be sold subject to the existing tenancy, that vacant possession of the top flat (which was then unoccupied) was to be given on completion, and that the landlord, while waiving all arrears of rent of the lower flat up to June 10, 1951, reserved a right to recover all arrears after that date. There was no provision in the contract for the payment of interest on the purchase money until completion. After the date of the contract the tenant continued to occupy the lower flat, but paid no rent. As he failed to complete although extensions of time were given, the landlord treated the contract as repudiated and rescinded it, the deposit being forfeited. She then claimed possession of the lower flat on the ground, inter alia, that the effect of the contract was to put an end to the tenancy, and that, from the date of the contract, the tenant was in occupation merely as a licensee. D

HELD: there was no presumption that a tenant, whether contractual or statutory, who entered into an agreement with the landlord to purchase the house where he resided, acquired an immediate equitable interest in the demised premises which was inconsistent with the continuance of the tenancy so that, by operation of law, the tenancy was determined by surrender, and, therefore, the tenant did not automatically lose the protection of the Rent Restrictions Acts by reason of the contract of Feb. 23, 1952; the nature of his occupation of the lower flat from the date of the contract depended on the terms of the contract which showed that, pending completion, he remained a statutory tenant; and, therefore, the landlord was not entitled to possession on the ground that there was a surrender of the tenancy. E

Turner v. Watts (1928) (97 L.J.K.B. 403), distinguished. F

G

H

AS TO SURRENDER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 267-274, paras. 300-307; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 569, 570, Nos. 6900-6912.

Cases referred to:

- (1) *Turner v. Watts*, (1927), 97 L.J.K.B. 92; *affd.* C.A., (1928), 97 L.J.K.B. 403; 138 L.T. 680; 92 J.P. 113; 31 Digest, Replacement, 575, 6954.
 A (2) *Doe d. Gray v. Stanion*, (1836), 1 M. & W. 695; 5 L.J.Ex. 253; 150 E.R. 614; 31 Digest, Replacement, 520, 6428.
 (3) *Leek & Moorlands Building Society v. Clark*, [1952] 2 All E.R. 492; [1952] 2 Q.B. 788; 3rd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE HODGSON, made at Wandsworth County Court on Oct. 12, 1953.

- B On Feb. 23, 1952, the defendant, who was the statutory tenant of the lower flat of a house of which the plaintiff was the landlord, entered into a written agreement with the plaintiff to purchase her leasehold interest in the house and paid a deposit on the purchase money. From the date of the agreement he continued in occupation of the lower flat, but he paid no rent, nor had he paid arrears of rent due before Feb. 23, 1952. The agreement contained no provision for the
 C payment of interest on the purchase money pending completion. The defendant having failed to complete, the plaintiff brought an action for, inter alia, (a) a declaration that the agreement had been avoided and the deposit forfeited, (b) possession of the lower flat on the ground that, by virtue of the agreement, the defendant had surrendered his tenancy and thereafter had remained in occupation as a licensee, and (c) arrears of rent up to Feb. 23, 1952. Alternatively, she claimed
 D that, if the defendant was entitled to the protection of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, she was entitled to possession on the ground of non-payment of rent. The county court judge found that the contract had been rescinded and the deposit forfeited, and he made an order for possession on the ground that after the date of the contract the defendant had remained in occupation as a licensee and was not protected by the Rent Restrictions Acts.

- E *Grayson* for the defendant.
Coningsby for the plaintiff.

SIR RAYMOND EVERSHERD, M.R.: On this appeal, with all respect to the learned county court judge, I have come to a different conclusion as regards the effect of the contract for sale by the plaintiff to the defendant, on Feb. 23, 1952, of her leasehold interest in the premises in suit. It is plain that before that contract was entered into there had been a number of disputes between the plaintiff and the defendant, and the intention of the contract for sale was to resolve all outstanding matters between the parties. The premises in question are known as 33, Criffel Avenue, Wandsworth, and are held by the plaintiff under a lease dated Dec. 5, 1885, for a term of ninety-nine years from June 24, 1880.

- G At the material date the upper part, or top flat, was vacant. The defendant occupied the bottom part, or the lower flat, and at the date of the contract his right to such occupation was by virtue of the Rent Restrictions Acts—that is to say, he was a statutory tenant, paying, of course, a rent. The contract provided (putting it for the moment briefly) that the defendant should purchase the whole premises. When he had done so, the plaintiff's interest in them would, of
 H course, cease altogether, and, in particular, the defendant would cease to be a tenant of the plaintiff, either contractual or statutory. The purchase price was fixed at the sum of £650, of which £65 was paid as a deposit at the date of the signing of the contract.

Clause 4 of the special conditions of sale provided that the date for completion was to be on or before Mar. 17, 1952, i.e., a date little more than three weeks ahead. Clause 5 provided;

"The tenure of the property and the estate, term, or interest sold are as stated in the particulars and the property is sold subject to . . ."

first, matters registered or capable of registration under the Land Charges Act, 1925, tithe and land tax, covenants and conditions contained in the lease in question, and a payment of the yearly rent of £12, and then, last:

"(d) As to the lower flat to the existing tenancy of the purchaser who shall assume the rent now or formerly paid to be the right and proper rent and shall raise no requisition or objection in regard thereto."

Clause 6 of the special conditions provided:

"Vacant possession of the top flat will be given to the purchaser on completion."

Clause 10 was:

"In consideration of the foregoing agreements by the purchaser the vendor hereby agrees with the purchaser that the vendor will on completion waive and release to the purchaser all and any claims that she may have against the purchaser in respect of costs [under certain other actions between her and the purchaser] and further that on completion the vendor will waive and release to the purchaser any arrears of rent due from the purchaser to her up to and including June 10, 1951, but reserves her right to any arrears of rent due to her from and including June 11, [1951]."

It was provided that the Law Society's General Conditions of Sale should also be applicable save as varied by or inconsistent with the special conditions. Only one of the Law Society's General Conditions need be mentioned, and that is cl. 6, which provides that:

"Where the purchaser is authorised (otherwise than under a lease or tenancy entered into or created before the date of the contract) to take physical possession of the property before the actual completion . . .",

then certain provisions apply, including (i) an obligation on the purchaser to pay outgoings, rates, insurance, and so forth, and (ii) an obligation to pay interest on the purchase money.

The hope and expectation that the matter would be completed on Mar. 17, 1952, and that thereafter all outstanding causes of the troubles and disputes would cease, was sadly disappointed. As is usual, extensions of time were given, and the date of actual completion was postponed for some time, but eventually it became apparent to the plaintiff that the defendant was not able or willing to complete the purchase, and, accordingly, she exercised the right, which she claimed to have under the contract, of treating it as repudiated, accepting the repudiation, and rescinding the contract, the deposit of £65 being forfeited. Thereafter she brought her present action claiming possession. The issues in the action related, first, to the validity of the plaintiff's rescission of the contract. The judge held in her favour that she was entitled to rescind and to forfeit, and there is no appeal against that part of the decision. Secondly, the plaintiff claimed possession on one or both of two grounds, the first being arrears of rent. As to that it appears from the judgment that the figures were somewhat complicated. The period dates back for some time, and the judge, having regard to the view he took on the alternative branch of the case, stood over the matter of rent arrears, and it remains so adjourned now. In the view that I take it will be necessary for that matter to be resumed, for I gather that no rent has, on any view, been paid for a considerable time, and it will obviously be a question for the county court judge whether in all the circumstances of this case the jurisdiction, which he, undoubtedly, has, because of non-payment of rent, to make an order for possession, should not now be exercised by him. That, however, is a matter for his discretion, and I say no more about it.

The alternative ground for possession, the one which was successful before the county court judge, was this. It was contended by the plaintiff that the effect

of the contract was to put an end altogether to the defendant's rights as a tenant, whether contractual or statutory, and to make his possession or occupation of the lower part of the house from the date of the contract onwards referable to a mere licence, a licence (which emerged, it was said, from the terms of the contract) to go on occupying as purchaser until completion. In support of that contention *Turner v. Watts* (1) was cited. The learned county court judge accepted that submission, held that the defendant's occupation was merely that of a licensee, that the licence had been validly determined, and that he saw, therefore, no answer to the claim for possession.

A One other matter of fact I should state before I proceed to look at *Turner v. Watts* (1) and come back to a consideration of the terms of the contract here in question. It seems that the defendant said that he had paid rates, and the argument of the plaintiff in favour of the contract operating to determine the tenancy took advantage of that circumstance. I will assume for the purposes of the rest of my judgment that at some stage the defendant did pay some rates in respect of some part of the property. I repeat, however, that that was all he paid. He certainly paid no rent from February, 1952, onwards, nor has he paid any interest on the purchase money. He said that he thought that the rent which was payable would be taken into account on completion. However, as I have said, he did not pay it.

B Counsel for the plaintiff contended that, in light of the decision of *Turner v. Watts* (1) (where there was an agreement by a sitting tenant to purchase the reversion), that circumstance is, at any rate, *prima facie* evidence of a surrender by operation of law, at least in the absence of something in the contract negating such a result. I hope that I have correctly apprehended the submission. I am bound to say that I reject it. In *Turner v. Watts* (1) the contract for sale contained a provision for the payment of interest on the purchase price from the date of the contract until completion, and there was an express agreement on the defendant tenant's part to maintain and keep the premises in repair, pending completion, and to pay outgoings. Thus, *SALTER, J.*, in the Divisional Court, said (97 L.J.K.B. 95):

E "In the present case it is plain that the defendant is not to pay any rent and the plaintiff said that he so understood the agreement. On the other hand, the purchase-money is to be paid by Sept. 1, or interest becomes payable from that date. The defendant, in my opinion, has a right under the agreement, as purchaser, to use and occupy the house pending completion. She can call for a conveyance at any time on paying the purchase-money and any arrears of interest. If she is more than a licensee and acquires any estate in the land, it is no more than a tenancy at will. The weekly tenancy is surrendered, either expressly or by operation of law."

F The case was taken to the Court of Appeal, where *SCRUTTON, L.J.*, examining the particular terms of the contract there in question, said (*ibid.*, 406) that it was an odd agreement. After stating the terms of the agreement, he said (*ibid.*):

G "I must hold that the agreement . . . amounts to a surrender of the weekly tenancy held by the defendant from the plaintiff."

H In my judgment, that case turned on the particular terms of that particular contract. More especially, it turned on the circumstance that (as *SALTER, J.*, observed) the form of the contract negated the continued payment of rent and provided in lieu for an obligation on the purchaser's part to pay interest and to undertake such matters as repairs, insurance, and maintenance. Thus it was, as I think, an exception to what would be the ordinary rule, where a sitting tenant buys the reversion. That ordinary rule was established many years ago in *Doe d. Gray v. Stanion* (2), decided in 1836. In *FOA'S LANDLORD AND TENANT*, 7th ed., p. 619, it is stated:

"Where a tenant entered into an agreement to purchase the reversion, it was held that such agreement, being impliedly conditional on a good title being made, did not operate as a surrender."

When the matter was considered in this court in *Leek & Moorlands Building Society v. Clark* (3), SOMERVELL, L.J., said ([1952] 2 All E.R. 493):

"That case [*Turner v. Watts* (1)] we think turned on the terms of the agreement, and, in particular, a provision that interest should accrue on the purchase price from the date of the agreement. In the absence of any provision express or to be implied an agreement to purchase would not so operate [i.e., operate to terminate a tenancy]: *Doe d. Gray v. Stanion* (2)."

I respectfully agree with that view, which is, indeed, binding in any case on this court. A question remains, which may be dealt with briefly, whether it matters that the right of occupation in question is not one arising under a lease or contract but by virtue of the Rent Restrictions Acts. To put it in another way, is the case different where the purchaser is not a contractual tenant, but (as we say) a statutory tenant? In my judgment, the answer to that is in the negative. If there is nothing in the agreement which indicates that the right of occupation which is to continue is referable to something other than the statute which previously supported it, then, as it seems to me, the statutory tenant continues until the completion to be a statutory tenant, just as a contractual tenant would continue until completion to be a contractual tenant, and there would be no surrender of the statutory tenancy by operation of law any more than there would be a surrender of a contractual tenancy.

But that leaves the question: Was the effect of the contract of Feb. 23, 1952, to alter the situation, to put an end to the statutory tenancy so that the right of the defendant to continue in occupation was to be referable thenceforward, not to his previously existing tenancy, contractual or statutory, but to his right as purchaser under the contract? The first thing to note in answering that question is that no right of occupation, in terms, is given by the contract. To put it at its highest in the plaintiff's favour, the contract is silent on that matter. It is quite true that cl. 6 of the Law Society's General Conditions of Sale is incorporated, but that, of course, is subject to the special conditions, and, in any case, speaks only of an authorisation to the purchaser to take physical possession of the property otherwise than under a tenancy. One is then thrown back to see where is the authorisation. I think, however, that the matter goes further. The indications which I find in the contract are in the opposite direction, and show, as it seems to me, that the supposed occupation, i.e., the contemplated occupation, is that which the purchaser was already enjoying, and his right is referable to his pre-existing rights. The first indication to that effect is in cl. 5 (d) of the special conditions, which says in terms that the property is to be sold subject "as to the lower flat to the existing tenancy of the purchaser" I quite agree that the main object of that clause is directed to something else, namely, to quietening the possible problems about the validity of the rent that the defendant had previously paid. But still, in terms, the contract says that on completion the property sold is sold subject to the existing tenancy of the lower flat, which necessarily supposes that that tenancy, whatever its nature or quality, will be still subsisting. Then, again, cl. 6 of the special conditions speaks of "vacant possession of the top flat" being given "on completion". We are told that it was empty, and it follows that the fact that vacant possession is to be given on completion negatives, as I think, the notion that possession of any part of the premises is to be taken under the contract at any earlier date. Finally, I think that cl. 10 of the special conditions tends in the same direction, for, by its express language, though the vendor waives all arrears of rent up to June 10, 1951, she reserves a right to recover all arrears after that date, and there is no hint that the accrual of rent ceased at any particular date. I, therefore,

find myself unable to resist the conclusion that by the express terms of the contract the continued statutory tenancy is contemplated. Certainly, I find nothing in the contract which negatives or displaces what I hold to be the general rule which would otherwise be applicable under the common law.

- That leaves only one point. It is submitted on behalf of the plaintiff that, in judging the mutual intention, one can pay regard to what happened and observe that (according to the assumption which I have said that I am prepared to make)
- A the defendant paid some rates, and, therefore (it is said), if there is a matter of real doubt on the terms of the contract, then one should resolve the doubt in accordance with the actual behaviour of the parties. In the first place, I do not think that there is doubt. It may be that the parties did not entirely comprehend their proper relationship under the contract. But, if they did misapprehend it, then it does not seem to me that this court is entitled to misconstrue
- B the contract in order that it may share in the misapprehension. But, in any case, it is not clear to me that payment of a particular item of rates by the defendant is inconsistent with the true view of the contract as I think it to be. It would certainly be a very surprising thing if the effect of the contract either was, or was ever thought to be, such that the defendant could go on from the date of the contract to completion (which might be, as in fact it was, postponed
- C so as to be some time after the date of the contract) without any obligation to pay anything whatever. For all those reasons, therefore, though I confess with some regret because I think that the plaintiff seems to have been very ill-used about this matter, I think that this part of the decision of the county court judge cannot be sustained. I repeat that it is not the end of the matter, because in the view which I take, the case must go back to the county court so that the
- D matter of arrears of rent may be further investigated, and, having regard to the whole circumstances and the length of time during which the rent has been in arrear, it seems to me by no means clear that the learned judge would think it right not to make an order for possession. But that, as I have also earlier said, is, of course, a matter for his discretion and not for this court. On this appeal I think the result is that we should set aside the decision of the county court
- E judge and make an order accordingly.

- DENNING, L.J.: When a statutory tenant has entered into a contract to purchase a house but has not yet completed the purchase, then in the interval pending completion he does not automatically cease to be a statutory tenant. It all depends on the agreement between the parties. If it is agreed between
- F them that the tenant shall no longer pay rent, but only pay interest on the purchase money, that goes a good way to show that he becomes in law a licensee and is not protected by the Rent Restrictions Acts : see *Turner v. Watts* (1). But if nothing is agreed about his position in the interval, then in law he remains a statutory tenant until completion. In that case, if he cannot ultimately find the purchase money, he will, no doubt, forfeit his deposit, but he does not lose
- G his statutory tenancy as well.

- The difficulty in this case, to my mind, is to know really what was the agreement, if any, between the parties on the point. The judge inferred an agreement from the conduct of the parties. He relied on the fact that after the contract of purchase the tenant did not pay rent, and that the landlord's agent in his rent book closed the rent account and the tenant himself paid the rates. Those
- H are points well worthy of consideration, but, to my mind, they are over-powered by the fact that there was nothing in this agreement compelling the tenant to pay any interest on the purchase money in the interval before the date fixed for completion, and it is not likely that the parties intended that the tenant should have, even for a short period, complete freedom to stay in the house without paying either rent or interest. The more likely interpretation of the facts is that the tenant was to be liable for rent in the interval, and that it was not to

be paid in cash but included in the completion account. Balancing the various considerations, I agree with SIR RAYMOND EVERSHED, M.R., that there is not sufficient in this case to outweigh the ordinary rule that pending completion the tenant remained a statutory tenant. That decides the appeal, but it does not necessarily decide the question of possession, because it may well be that owing to non-payment of rent for all this time an order for possession can be made on other grounds. I agree that the appeal should be allowed accordingly.

ROMER, L.J.: I agree, and I only add a few words as we are differing from the learned county court judge. It was the foundation, as I understood it, of the argument of counsel for the plaintiff that, when a tenant enters into a contract with his landlord to purchase the reversion, he acquires an immediate equitable interest in the demised premises which is inconsistent with the view that the tenancy continues as a tenancy, and that by operation of law, accordingly, the lease is determined by surrender. From that starting point counsel then went on to say that there is nothing in the terms of the contract between the parties in the present case which would displace that general presumption. For my part I am quite satisfied that there is no such presumption at all. Certainly there is not where the tenant's lease is a contractual one, as was pointed out by SOMERVELL, L.J., in the passage in *Leek & Moorlands Building Society v. Clark* (3) to which SIR RAYMOND EVERSHED, M.R., has referred, and I can see no reason why the position should be in any way different where the tenancy is a statutory tenancy. It seems to me that the question of surrender or no surrender is one of intention of the parties, to be discovered from the terms of the contract into which they have entered.

Turner v. Watts (1) was a case where, on the true construction of the contract and having regard to the various provisions which it contained, the court came to the conclusion that the intention of the parties was that a surrender was intended to operate. In the present case it seems to me that the indications to which my Lords have referred support the general rule that no surrender was in contemplation and that no surrender was brought into operation. First, there is the very significant fact that under cl. 5 (d) of the special conditions of sale the tenancy is expressly preserved, because the property is bought subject to the existing tenancy, and, even if the full operation of that provision is ineffectual, nevertheless it shows what the intention of the parties was. How, on the one hand, it can be said that the tenancy determined and came to an end at once on the signing of the contract, and, on the other hand, that the parties contemplated it as still existing on completion, it is difficult to see. Then, secondly, there is this to be observed, that, if there was a surrender which was to operate at once, then the plaintiff, during the period prior to completion, would get nothing in return for the defendant's occupation of the property. She would get no rent because, *ex hypothesi*, the lease had determined, and she would get no interest on the purchase money because there was no contractual provision which provided for it, because I agree with the Master of the Rolls that cl. 6 of the Law Society's General Conditions of Sale would not operate in that contingency. Therefore, it seems to me that there is ample corroboration in the terms of the contract of sale for the view that *prima facie* no surrender was intended. I agree that the appeal should be allowed.

Appeal allowed. Case remitted to the county court for further investigation as to arrears of rent.

Solicitors: *Robbins, Olivey & Lake*, agents for *Foster & Finley*, Malvern (for the plaintiff); *Leopold Spero* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

STEPHENSON v. JOHNSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 28, 1954.]

Justices—Information—Failure to pay workman minimum remuneration—
Lack of “such particulars as may be necessary for giving reasonable
information of the nature of the charge”—*Dairy worker—Magistrates’*
A *Courts Rules, 1952 (S.I., 1952, No. 2190), r. 77 (1) (2)—Milk Distributive*
Wages Council (England and Wales) Wages Regulation Order, 1952 (S.I.,
1952, No. 986), *schedule, para. 6 (2) (b) (i).*

The appellant was convicted before justices on an information charging
that “she being an employer of workers to whom the Milk Distributive
B *Wages Council (England and Wales) Wages Regulation Order, 1952, made*
under the *Wages Councils Act, 1945, applies, did on Dec. 21, 1952, at*
Anderton’s Dairy, Foundry Street, Northampton, unlawfully fail to pay
remuneration not less than the statutory minimum to George Harry Tarry,
one of the said workers, contrary to s. 11 of the Wages Councils Act, 1945,
and the said order made thereunder.”

HELD: the information was defective in that it did not give such
C particulars as were necessary to give the appellant reasonable information
of the nature of the charge against her, as required by the *Magistrates’*
Courts Rules, 1952, r. 77 (1) and (2); the information should have specified
the provision of the order which, it was alleged, the appellant had
infringed, the nature of the worker’s employment, the amount which he
D *had been paid and the amount which, it was alleged, he should have been*
paid, and (quaere) his age; and, therefore, the appellant should not have been
convicted.

Robertson v. Rosenberg (1951) (115 J.P. 128), applied.

FOR THE MAGISTRATES’ COURTS RULES, 1952, r. 77, see *STONE’S JUSTICES’*
MANUAL, 85th Edn., Vol. 2, p. 2632.

E Case referred to:

(1) *Robertson v. Rosenberg, (1951), 115 J.P. 128; 2nd Digest Supp.*

CASE STATED by Northampton justices.

At a court of summary jurisdiction sitting at Northampton on May 18, 1953,
the respondent, Herbert Cecil Johnson, a wages inspector, preferred an informa-
F tion against the appellant, Elsie Doris Edith Stephenson, charging that on Dec.
21, 1952, she unlawfully failed to pay remuneration not less than the statutory
minimum to George Harry Tarry, contrary to the *Wages Councils Act, 1945,*
s. 11, and the Milk Distributive Wages Council (England and Wales) Wages
Regulation Order, 1952.

The respondent was a wages inspector under the *Wages Councils Act, 1945.*
On Dec. 21, 1952, the appellant was carrying on a business known as
G *Anderton’s Dairy* at premises in Foundry Street, Northampton, and was
concerned in the course of the business in the retail sale of milk. On Sunday,
Dec. 21, 1952, one George Harry Tarry worked for the appellant at the dairy
from 9.0 a.m. to 1.30 p.m. as a washer of milk bottles, such work being incidental
to the appellant’s business of selling milk by retail. He was paid 16s. 6d. for his
H work on that day by the appellant’s husband on her behalf. Tarry was in the
full-time employment of Northampton Corporation for whom he normally
worked in each week on all days except Sunday, but when there was work for
him to do for his employers on a Sunday he attended and performed it. He never
had a formal agreement with the appellant as to his employment at the dairy. He
did not go every Sunday, nor was he under any obligation to the appellant to
attend for work on Dec. 21, 1952, or any other Sunday. The appellant was
not bound to employ him on Dec. 21, 1952, or on any other Sunday. In fact,

he had worked intermittently for the appellant on Sundays for some years prior to Dec. 21, 1952. He worked four and a half hours on each Sunday when he went, for which he was paid 16s. 6d.

It was contended on behalf of the appellant that the information was insufficient. Before any evidence was heard, an application for particulars as to (i) what sums, if any, ought to have been paid in respect of work except overtime, and the basis on which, and under what provision of the order, each such sum was calculated; (ii) what sums ought to have been paid for (a) overtime, and (b) waiting time, and the basis on which, and under what provisions of the order, each such sum was calculated; (iii) what further sums, if any, ought to have been paid under Part IV of sched. I to the order; (iv) what sum was alleged to have been the statutory minimum remuneration of the worker mentioned in the information; and (v) what sum was alleged to have been paid to the worker below the statutory minimum remuneration. These particulars had been requested by a letter dated July 22, 1953, on behalf of the appellant, to which the respondent's solicitors had replied on July 23, 1953, that the particulars set out in the information were sufficient and gave reasonable information of the nature of the charge, that the questions referred to matters which, if relevant, would be the subject of evidence at the hearing, or to questions of law arising on the application of the relevant statutory instrument to facts relating to a worker employed by the appellant, which facts were peculiarly within the appellant's knowledge, but that the appellant was referred to para. 6 (2) of the schedule to the order, dealing with the minimum remuneration payable at the relevant date to workers (other than six-day workers) for work on a Sunday.

It was contended on behalf of the respondent that the information was sufficient as it stood and gave reasonable information as to the nature of the charge. If a worker was to be excluded from the Act and the order, he must be both casually employed and employed otherwise than for the purpose of his employer's business; if he was either not employed casually or was employed for the purposes of his employer's business, he was within the Act and the order, if the order, by its terms, applied to him. The evidence of Sunday work and payment therefor and of the fact that Tarry worked for the appellant on Sundays only was sufficient to support the information under the order. On Dec. 21, 1952, George Harry Tarry was working overtime and was a worker to whom Part III of the schedule to the order applied, and under para. 6 (2) (b) (i) of the schedule to the order he was entitled to be paid 18s. 11d. in respect of his work on Dec. 21, 1952.

The justices were of opinion that the information as laid was sufficient and refused to order the respondent to give any further particulars, and convicted the appellant, who now appealed.

J. G. S. Hobson for the appellant.

S. B. R. Cooke for the respondent.

LORD GODDARD, C.J.: The appellant was summoned before justices for the county borough of Northampton on an information preferred by an inspector of the Ministry of Labour, the information being that she

"being an employer of workers to whom the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952, made under the Wages Councils Act, 1945, applies, did on Dec. 21, 1952, at Anderton's Dairy, Foundry Street, Northampton, unlawfully fail to pay remuneration not less than the statutory minimum remuneration to George Harry Tarry one of the said workers, contrary to s. 11 of the Wages Councils Act, 1945, and the said order made thereunder."

The first point that was taken by counsel for the appellant before us and before the justices was that the information was defective in that it did not give reasonable information or sufficient particulars to enable the appellant

to know what case she had to meet. In the opinion of the court, that is a good point, and this information does not give reasonable information of the nature of the charge.

Rule 77 of the Magistrates' Courts Rules, 1952, which replaced a corresponding enactment in the Criminal Justice Act, 1925, s. 32 (to which I need not refer, though that was the Act in force at the time the information was laid) provides by para. (1):

- A "Every information, summons, warrant or other document laid, issued or made for the purposes of, or in connection with, any proceedings before a magistrates' court for an offence shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the elements of the offence, and gives such particulars as may be necessary for giving reasonable information of the nature of the charge."
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- As is well known, the Criminal Justice Act, 1925, was designed so that informations before magistrates' courts should be substantially in the same concise form as indictments had been since the Indictments Act, 1915. Since the Act of 1915
- C an indictment has been a very different thing from what it was before that date, when indictments were very long and very prolix and often had to make a great number of averments which were not necessary for the purpose of knowing what the case was about. Now an indictment simply states, first, the statement of offence, which may be obtaining money by false pretences, burglary, or whatever it may be, quite shortly, contrary to the relevant enactment. Then the
- D particulars tell the defendant what he is actually charged with, the nature of the offence.

- In the present case we have had to deal, first, with a section of an Act of Parliament which appeared to the court at first somewhat difficult to understand, but the argument of counsel for the respondent has made it clear to us. We have then had to deal with the order made by the Minister, called the Milk Distributive
- E Wages Council (England and Wales) Wages Regulation Order, 1952. The order itself is very short; it is the schedule that matters. There is one schedule with several parts, several paragraphs and several definitions, and to find out what a man has to be paid, you first have to find out his age, then the actual nature of his employment, then whether he is a seven-day worker or a six-day worker, and other things. In this case it was, apparently, proved to the satisfaction of
- F the justices that Tarry ought to have been paid 18s. 11d., whereas, in fact, he was only paid 16s. 6d. with which, one may say in passing, though, I suppose, it is not material, he was perfectly satisfied, and probably now he will not get any more of this work which he used to do on Sunday mornings to supplement his income. Be that as it may, it is most important when a person is being summoned before a criminal court that he should know exactly what he
- G is being charged with, and, when one has to deal with a schedule of this complication, it does seem to me that merely to tell a person that he is going to be charged with not paying the statutory minimum remuneration to some particular worker, he is not being given reasonable information as to the nature of the charge. As I have pointed out, many things have to be taken into account in order to find out what is the minimum remuneration. The appellant would,
- H no doubt, know what she did pay to this man. It may be that with the assistance of her solicitor or accountant she can work out what she ought to have paid, but one can very well understand the case in which an employer may say: "You are saying I did not pay this man enough. I say I did. Why do you say I did not. What am I going to be charged with when I get to the court? Why is it said I did not pay enough?" If the inspector lays the information in respect of, we will say, a pasteuriser, and it turns out that, instead of being a pasteuriser,

the man is a roundsman at the material time, a different schedule may apply and a different sum would have to be paid.

In my opinion, especially having regard to *Robertson v. Rosenberg* (1), where we emphasised the necessity in cases of summary jurisdiction of letting people know exactly with what they were charged, the information should contain, first, a reference to the particular paragraph of the schedule to the order which it is alleged has been violated. That seems to me to be quite elementary, especially considering that r. 77 (2) provides:

“ If the offence charged is one created by or under any Act, the description of the offence shall contain a reference to the section of the Act, or, as the case may be, the rule, order, regulation, bye-law or other instrument creating the offence.”

This information does not refer to any section or any rule, order or regulation, and yet when the case comes into court this order is produced and different parts of it have to be gone into to find out exactly what remuneration it is said the man ought to have been paid. I think that these informations ought to specify the relevant part of the order and the nature of the man's employment. I am not sure that they ought not to contain a statement of his age because the amount that he is entitled to receive depends on his age. At any rate, I am satisfied that in this case the appellant was not given enough information. Therefore, the information was bad and the justices should not have entertained it. In my opinion, they were wrong in a matter of law, and this appeal succeeds.

BYRNE, J.: I agree. This information was defective. It should at the least have contained a reference to para. 6 (2) of the schedule to the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952, and it should also have contained a statement to the effect that the man in question was paid 16s. 6d. instead of 18s. 11d. for the work he did. I agree that this appeal should be allowed.

PARKER, J.: I agree with both judgments.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Becke, Green & Stops*, Northampton (for the appellant); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

THABO MELI AND OTHERS v. REGINAM.

[PRIVY COUNCIL (Lord Goddard, C.J., Lord Reid and Mr. L. M. D. de Silva),
January 13, 1954.]

Criminal Law—Murder—Series of acts—Erroneous belief that death caused by first act—Death actually caused by second act—No mens rea in respect of second act.

A The appellants, in accordance with a preconceived plan, took a man to a hut, gave him beer so that he was partially intoxicated, and then struck him over the head. They then, believing him to be dead, took his body and rolled it over a low cliff, dressing up the scene to make it look like an accident. In fact, the man was not then dead, it being established from medical evidence that the final cause of his death was exposure when he was left unconscious at the foot of the cliff. On their trial for murder the appellants contended that the two acts done were separate acts, and that, while the first act was accompanied by mens rea, it was not the cause of death, but that the second act, while it was the cause of death, was not accompanied by mens rea, and that, therefore, they were not guilty of murder.

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C HELD: it was impossible to divide up what was really one series of acts; the crime was not reduced from murder to a lesser crime, merely because the appellants were under some misapprehension for a time during the completion of their criminal plot; and, therefore, the appellants were guilty of murder.

AS TO CRIMINAL INTENTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 10-16, paras. 3-8.

D APPEAL by special leave in forma pauperis by the four accused from a judgment and sentence passed by the High Court of Basutoland on Mar. 26, 1953, whereby they were convicted of murder and sentenced to death. The facts appear in the judgment.

E *S. N. Bernstein and Hughes-Chamberlain* for the appellants.
Gahan, Q.C., and *J. G. Le Quesne* for the Crown.

Jan. 13. LORD REID: The four appellants in this case were convicted of murder after a trial before SIR WALTER HARRAGIN, judge of the High Court of Basutoland, in March, 1953. The appeal which has been heard by this Board dealt with two matters: first, whether the conclusions of the learned judge on questions of fact were warranted: and, secondly, whether, on a point of law, the accused are entitled to have the verdict quashed.

F On the first matter, there really is no ground for criticising the learned judge's treatment of the facts. It is established by evidence, which was believed and which is apparently credible, that there was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him, and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was there treated to beer and was at least partially intoxicated; and he was then struck over the head in accordance with the plan of the accused. Witnesses say that while the deceased was seated and bending forward he was struck a heavy blow on the back of the head with a piece of iron like the instrument produced at the trial. But G a post-mortem examination showed that his skull had not been fractured and H medical evidence was to the effect that a blow such as the witnesses described would have produced more severe injuries than those found at the post-mortem examination. There is at least doubt whether the weapon which was produced as being like the weapon which was used could have produced the injuries that were found, but it may be that this weapon is not exactly similar to the one which was used, or it may be that the blow was a glancing blow and produced less severe injuries than those which one might expect. In any event, the man was

unconscious after receiving the blow, but he was not then dead. There is no evidence that the accused then believed that he was dead, but their Lordships are prepared to assume from their subsequent conduct that they did so believe; and it is only on that assumption that any statable case can be made for this appeal. The accused took out the body, rolled it over a low krantz or cliff, and dressed up the scene to make it look like an accident. Obviously, they believed at that time that the man was dead, but it appears from the medical evidence that the injuries which he received in the hut were not sufficient to cause the death and that the final cause of his death was exposure when he was left unconscious at the foot of the krantz.

The point of law which was raised in this case can be simply stated. It is said that two acts were done:—first, the attack in the hut; and, secondly, the placing of the body outside afterwards—and that they were separate acts. It is said that, while the first act was accompanied by *mens rea*, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by *mens rea*; and on that ground, it is said that the accused are not guilty of murder, though they may have been guilty of culpable homicide. It is said that the *mens rea* necessary to establish murder is an intention to kill, and that there could be no intention to kill when the accused thought that the man was already dead, so their original intention to kill had ceased before they did the act which caused the man's death. It appears to their Lordships impossible to divide up what was really one series of acts in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case, either in South Africa or England, or for that matter elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case between the law of South Africa and the law of England; and they are of opinion that by both laws there can be no separation such as that for which the accused contend. Their crime is not reduced from murder to a lesser crime merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

Their Lordships must, therefore, humbly advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Henry S. L. Polak & Co.* (for the appellants); *Burchells* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

HARTLEY v. MAYOH & CO. AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), January 14, 15, 1954.]

A *Factory—Fire—Fireman electrocuted while fighting fire—“Persons employed” —Regulations for Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Act, 1901 to 1907 (S.R. & O., 1908, No. 1312), reg. 9—Factories Act, 1937, s. 60 (1), as amended by Factories Act, 1948 (c. 55), s. 12 (1).*

Fire—Negligence—Fireman electrocuted—Liability of occupiers—Invitee—Mains supply of electricity to lighting circuit not cut off—Obsolete type of mechanism—Unusual danger.

B In breach of the duty of the defendant firm, the occupiers of a factory, under reg. 9 of the Regulations for the Generation, Transmission, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, 1908, ordinary tumbler switches similar to those in use in a house, adjoining the main switchboard, were used to control the electricity supply in the lighting circuit of the factory. Through the negligence of the defendant electricity board and their predecessors, the connections from these tumbler switches to the master switchboard had been transposed, with the result that current still flowed from the live wire of the tumbler switches, when switched on, and, through the neutral wire of the master switch, to the earth wire throughout the circuit after the master switch had been switched off. The defendant board did not discover this defect after they had done work in the factory in the 1930's, 1946 and 1950, and did not point out to the defendant firm that the tumbler switches were obsolete. Firemen summoned to a fire at the factory were directed by the manager to the main switchboard and the master switch, where they switched off. But, excusably as it was found, they did not realise that the tumbler switches were main switches, and they were not so informed, even after complaint that the electricity was not all switched off, by the manager, who had been with the defendant firm twenty years and knew that they did not serve lighting points in the building, but not that they were the main switch. One of the firemen was electrocuted, and, in an action by his widow, the trial judge found both defendants guilty of negligence and the defendant firm in breach of statutory duty, and apportioned the responsibility for the damage as to ninety per cent. against the defendant board and as to ten per cent. against the defendant firm. In an appeal by the defendant firm,

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HELD: (i) the fireman was not a person for whose benefit the electricity regulations were made, not being of the class of “persons employed” to protect whom power to make the regulations was conferred by s. 60 (1) of the Factories Act, 1937, as amended by the Factories Act, 1948, s. 12 (1), and the defendant firm were, therefore, not liable for their breach of their statutory duty in respect of his death.

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Decision of BARRY, J. ([1953] 2 All E.R. 525) on this point, reversed.

(ii) although the primary cause of the accident was the defendant board's negligence in not discovering the defect in the connections, and in not informing the defendant firm that the tumbler switches were obsolete, in view of the requirements of reg. 9 of the electricity regulations the defendant firm were under a duty to know where their main switches were, and the manager was negligent in not knowing this and in failing to warn the firemen, who were invitees, of the unusual danger presented by the fact that they were not the usual type of main switch and might so be overlooked and, therefore, the apportionment of the responsibility for the damage must be upheld.

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Judgment of BARRY, J. ([1953] 2 All E.R. 525), affirmed.

AS TO BREACH OF STATUTORY DUTY IN A FACTORY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 651-655, paras. 917-924; and FOR CASES, see DIGEST, Vol. 24, pp. 908-914, 915-925, Nos. 62-98 and 103-180. FOR THE FACTORIES ACT, 1937, s. 60 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1046.

AS TO THE DUTY OF AN OCCUPIER TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604-609, paras. 853-858; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 54-61, Nos. 291-329.

Cases referred to:

- (1) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 24 Digest 911, 80.
- (2) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; 2nd Digest Supp.

APPEAL by the defendant firm against an order of BARRY, J., dated Mar. 28, 1953, and reported [1953] 2 All E.R. 525, in an action for damages for negligence against the two defendants (the defendant firm and the North Western Electricity Board) and for breach of statutory duty against the defendant firm. BARRY, J., held both defendants liable and awarded the plaintiff £10,000 damages, and he apportioned the responsibility for the damage as to ninety per cent. against the defendant board and as to ten per cent. against the defendant firm. The defendant firm appealed.

Laski, Q.C., and *Da Cunha* for the defendant firm.

Brabin, Q.C., and *P. Curtis* for the plaintiff.

SINGLETON, L.J.: In March of last year BARRY, J., had before him the claim of Mrs. Doris Hartley, a widow, for damages for negligence against Mayoh & Co., the defendant firm, and the North Western Electricity Board. The claim was that her husband, Reginald Dingle Hartley, a divisional officer in the fire brigade of the city of Salford, had met his death through the negligence of both defendants, or through breach of statutory duty. The judge found negligence proved against both defendants, and, with some hesitation, held that the defendant firm were responsible in damages for breach of statutory duty, and he gave judgment for the plaintiff for £10,000 damages. He apportioned the responsibility for the damage ninety per cent. against the defendant board, and ten per cent. against the defendant firm. The firm appeal against that order in so far as it held them responsible, and contend that the whole responsibility lies on the board. Counsel for the defendant firm said that he could conduct the appeal almost entirely by reference to the considered judgment of BARRY, J., which sets out the facts clearly.

On the morning of Sunday, Sept. 24, 1950, there was a fire at the works of the defendant firm, who are pickle manufacturers, carrying on business in a comparatively small factory in Ford Lane, Salford, to which the Factories Acts apply.

When a fire brigade attends a fire, one of the first things done is to see that all electricity is cut off, so that there is no danger of anyone receiving a shock while working in the damaged premises, since the risk of a shock is the greater when a person's clothes are wet. Inquiries are made as to where the electricity main is and where the electric supply can be cut off. The deceased, as a member of the fire brigade, arrived at the factory at about 11.35 a.m., on the Sunday, and went with Sub-officer Bigland to find the main electric switches. Mr. Bigland asked the manager of the defendant firm, Mr. Holland, where the switches were. Mr. Holland, who started with the defendant firm in 1932, more than twenty years ago, directed them to the main switchboard, which was on the ground floor within a few yards of where they were, and quite near the door of Mr. Holland's office. As the photograph shows, there was one switch on the left

and one, the switch controlling the motor circuit, just before the main board. Those were both switched off by Mr. Bigland or by one of the fire brigade officers. They do not directly affect the portion of the factory with which we are concerned. To the right of the board there were two other switches, called tumbler switches, similar to the ordinary switch seen in a house. They were not thought to have anything to do with the main supply, and on the evidence given it was said to be reasonable that no one should so regard them. A little distance away, at the

- A bottom of some steps, there was what was considered to be the master switch, and if that switch, which was referred to as switch S, was turned off, in the ordinary course there would be no electric current in the part of the factory where the fire was. There were also two individual switches, S.1., and S.2., which were switched off, and the switching off of those likewise should have been a guard against there being any electric current in that part of the factory.
- B Those switches being off, the firemen felt that there was no danger of any electric current in the neighbourhood of the fire, but within a short time one or two of the men received minor shocks, and Mr. Bigland returned to Mr. Holland to make further inquiries. Mr. Holland looked at the switchboard downstairs, ascertained that the main switches were both off there, and gave an assurance that the switches were off and that there was no other main switch. Within a
- C short time the deceased was dead. He was seen by another officer going towards the fire, when he collapsed almost into the fire. He had an electric wire in his hand, and he had been electrocuted. It was in respect of his death that his widow brought the action.

BARRY, J., having found the facts, said:

- D "Before considering any question of legal liability I must now inquire how this fatality occurred. There can, I think, be no doubt that it was due to two causes, in the absence of either one of which the deceased would not have met his death. The first of these two causes was that the electricity supply in the lighting circuit had not been cut off. This circuit was, in fact, controlled by the two tumbler switches to which I have already referred. No one had turned these two switches into the 'off' position, because no one had realised their true function. Despite this failure to turn off the main
- E lighting supply, the lighting wires in the upper part of the building should have been 'dead', as they should have been disconnected by the master switch at the foot of the stairs. In addition to the fact that this switch was 'off', no current should in any event have been flowing through the lighting wires in the long room as the switch controlling the lighting in this room
- F was also in the 'off' position, but thus arises the second and more complicated cause of the disaster. Put shortly, the connections between the two tumbler switches and the meter on the one hand and the neutral phase on the switchboard on the other were crossed."

I think I am right in saying that "were crossed" should read "were transposed". The judge continued:

- G "Those connections consisted of two leads, both blackened with age, but one of them was, in fact, red and the other black. This difference in colour between the two leads could be detected without any undue difficulty by wiping the dirt from the insulating material surrounding the leads. The lighting system in the building consisted, as is normal if not invariable, of two wires running immediately adjacent to each other, one being the
- H phase wire through which the current should be passed, and the other the continuous neutral or earth wire which, nowadays at least, is invariably coloured black. For the system to work as designed, the red lead should have travelled from the meter to the right hand tumbler switch, thereby conveying the current to the phase wire, which ran throughout the lighting circuit and carried the current to the various lighting points. The black lead should have run from the left tumbler switch to the neutral bar on the

switchboard, which is shown in the agreed photograph and marked with a letter 'H'. As I have said, at the time when the accident occurred these two leads were, in fact, crossed. The result of this was that the black, neutral or earth wire was 'live' throughout the whole circuit. The master switch to which I have referred, and the switch controlling the lighting in the long room operated on the phase wire, which should, of course, have been the only 'live' wire in the circuit. These switches did not, and could not, cut off the electric current from the continuous neutral wire. As a result, although these two switches were in the 'off' position the neutral wire was still charged, and wrongly charged, with electricity. If a man in wet clothing came into contact with it, the whole of the power of the mains was liable to pass through his body with the fatal results which, unfortunately, eventuated in the present case. It follows, therefore, I think, that this accident could never have happened if the tumbler switches had been in the 'off' position, nor could it have occurred if the current had been flowing, as it should have done, through the phase wire which was controlled by the master switch and the switch controlling the lighting in the long room and not through the neutral wire."

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Thus, at the time when it was thought that there was no current in the neighbourhood of the fire, through this unfortunate transposition of the wires on the tumbler switches there was a live wire, and that was not affected by the cutting off of the main S switch or of the other switch or switches in that room. The defendant board have not appealed against the order made against them, and that is not surprising, for it is found by the judge that they were responsible for this transposing of the wires. The judge said:

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"I am, however, forced to the conclusion that, on a strong balance of probability, the original crossing of the two leads from the tumbler switches to the board's apparatus was the fault of someone, some unknown employee of the board. This fault was committed on some previous occasion which it is wholly impossible to identify",

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and he gave other reasons for the conclusion which he reached.

When any work of importance was done to the electricity system in this factory a representative of the board, or of their predecessors, tested it, and if there had been a proper test this defect, which must have been of long standing, must have been found. The tumbler switches, indeed, constituted what ought to have been regarded as the main switch. A main switch ought to have an iron bar across it, so that it would be recognised as a main switch. But when merely two tumbler switches appear, as these two did, they are unlikely to be recognised by anyone, and certainly by any fire brigade officer coming to the factory, as a main switch. From what I have said it is clear that an appeal on the part of the defendant board could have had no hope of success. They have not appealed, and it cannot be gainsaid that the main responsibility, if not the whole responsibility, for this unfortunate happening, lies on them or on their predecessors. Work which should have been followed by a test had been done in the late 1930's, again in 1946, and again in 1950. Witnesses from the defendant board said that the system of having a main switch of this kind was obsolete, and that their practice was to point that out to occupiers. They had not pointed out anything of that nature to the occupiers of this factory, the defendant firm, which is a matter for great regret.

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Counsel for the defendant firm submitted that the whole of the responsibility arising from the death of the deceased rested on the defendant board, that no negligence was proved against the defendant firm, and that there was no breach of statutory duty by them. He said that, in any event, if there was a breach of statutory duty, the deceased was not a person for whose benefit the regulations were made, and an action for breach of statutory duty would not lie at the

instance of his widow. The Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907 (S.R. & O., 1908, No. 1312), are preserved for present purposes by s. 159 (1) of the Factories Act, 1937. The power to make regulations now is given by s. 60 of the Act of 1937, as amended by the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O., 1946, No. 376), para. 2, and the Factories Act, 1948, s. 12 (1), and sched. I, as follows:

A “(1) Where the Minister [of Labour and National Service] is satisfied that any manufacture, machinery, plant, equipment, appliance, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.”

B The power to make the regulations is given when the Minister is satisfied that the work is of such a nature as to cause risk of bodily injury to persons employed. Before the amendment made by s. 12 (1) of the Factories Act, 1948, the power to make the regulations was given if the Minister was satisfied that the manufacture, etc., was of such a nature as to cause risk of bodily injury to persons
C employed “in connection therewith”. I do not think that the deceased was a person for whose benefit the regulations could be made, or were made, and I do not think that an action lies for breach of statutory duty in this case.

A somewhat similar position arose in *Groves v. Lord Wimborne* (1) each of the judgments in which discussed whether the Factory and Workshop Act, 1891, or a particular section of it, was passed in the interests of the public at large or of a particular class of persons, see per A. L. SMITH, L.J. ([1898] 2 Q.B. 407), RIGBY, L.J. (*ibid.*, 413, 414), and VAUGHAN WILLIAMS, L.J. (*ibid.*, 415, 416). In my view, the deceased was not one of the class of persons for whose benefit the regulations were made in that he was not a person employed. For that reason I do not think that any action for breach of statutory duty lies against the
D occupiers.

E Regulation 9 on which reliance was placed provides:

“Where one of the conductors of a system is connected to earth, no single-pole switch, other than a link for testing purposes or a switch for use in controlling a generator, shall be placed in such conductor or any branch thereof.”

F It is agreed for the purpose of this appeal that the tumbler switches, as they are placed and as they were at that time, constitute a breach on the part of the occupiers of reg. 9. Though that breach does not, in my view, give the right to an action for damages for breach of statutory duty, I feel that regard must be had to it from another point of view. The occupier of a factory is in a different position from the occupier of a private house or flat. He is charged with certain
G duties under the Factory Acts, and under the regulations which are made under those Acts in so far as they affect factories. Regulation 9 puts a duty in regard to a single-pole switch on the occupier of a factory. Thus it is clear that the occupier of a factory must know something about his switches, and it seems to me that he ought to know where the main switch is. That is a matter for consideration when one has to deal with the claim for damages for negligence
H at common law. It was said on behalf of the plaintiff against the defendant firm: “You are occupiers of a factory on which the deceased went, and thus the ordinary law with regard to invitor and invitee applies, and the deceased, being an invitee and using reasonable care for his own safety, was entitled to expect that you would use reasonable care to prevent damage from unusual danger of which you knew, or ought to have known”. It was added no warning was given of any unusual danger.

The unusual danger of which the occupiers knew, or ought to have known, was that their main switch, which consisted of two tumbler switches, was not indicated in the normal way. Mr. Holland, their manager, did not know that that was the main switch. The judge pointed out that, if he knew that those switches did not serve any lighting points in the building, he was at least put on inquiry to see what they were. Although he had been there almost twenty years, he did not know where the main switch in the building was, and though he showed the fire brigade officers the switches of which he knew, he did not show them this main switch. I do not think he can be heard to say that he was not negligent in that respect, for his duty as manager of the factory was to know where the main switch was.

Counsel for the defendant company submitted that that did not matter, because the real cause of this accident was the transposing of the two wires in connection with the tumbler switches, which brought current into the neighbourhood of the fire and caused the death of the deceased, to which it was replied: Yes, but if the main switch had been indicated as a main switch, or if the firemen had been told it was the main switch, this accident would never have happened. BARRY, J., said that he accepted the evidence of the many witnesses who told him that any fireman would assume that two unconnected tumbler switches controlled some lighting points, but not the main supply. There was no negligence, in other words, on the part of any officer of the fire brigade. In dealing with the duty owed by an invitor to an invitee the judge said this:

"Stated at its very lowest, the duty of an occupier of premises to his invitee is to use proper care to ensure that his premises are free from any unusual danger, or, alternatively, to give due warning of any unusual danger of which he knows or ought to know. With this standard in mind I am quite satisfied that the defendant firm failed to fulfil their common law duties towards the deceased. It is, however, right to say that I acquit them of any conscious default. I am also far from satisfied that they ought to have known that the polarity of the lighting system had been reversed by the crossing of the leads between the tumbler switches and the meter and neutral phase. On the other hand, I consider that the occupiers of premises of this kind ought to have been aware of the way in which the mains supply to the lighting and power circuits could be switched off. I am fortified in this view by the evidence of Mr. Holland, the defendant firm's manager. He told me that he knew that the two tumbler switches did not control any local lighting points. This should, I think, have put him on inquiry as to their true function. Neither Mr. Holland nor anyone else in the employment of the defendant firm warned the deceased of the unusual danger which existed in those premises for firemen or other persons who might come into contact with the electric wires, this unusual danger being, of course, the fact that the lighting supply was controlled by a switch which did not appear to be a mains switch and that electric current could circulate through the electric circuit when the only two switches which appeared to be mains switches were turned to the off position. Put in another way, the defendant firm ought, I think, to have realised that the absence of any link-bar between the two tumbler switches constituted an unusual danger to persons in the situation of the deceased, against which such persons clearly ought to have been warned. If no warning was to be given, the defendant firm should have fulfilled their alternative duty, i.e., they should have rendered their premises safe and eliminated this unusual danger by the simple means of fitting a link-bar between the two tumbler switches or fixing some label or notice in the neighbourhood of the switches indicating that they controlled the main lighting supply to the building."

That is how the judge put the case on the plaintiff's claim against the defendant firm for negligence. I was much impressed by the argument of counsel for the

defendant firm on this part of the case. I think it is extraordinarily hard on them, when they may well have thought they were entitled to rely on the visits from time to time of officers of the defendant board, to be found guilty of negligence in bringing about the death of a fire brigade officer because they had not pointed out the unusual danger, which would have been avoided if the regulations had been carried out. The real danger was introduced by the transposing of the wires. That was at least the main cause of the death. BARRY, J., heard all the evidence, and he came to the conclusion that the defendant firm were guilty of negligence, too, in that they had not pointed out the main switch, but had indicated another as the main switch. Clearly, their manager ought to have known that the tumbler switches were the main switch, and if he had done so this accident would not have happened. BARRY, J., felt, accordingly, that he could not acquit the defendant firm altogether from responsibility.

- A I feel myself that he might have reached the conclusion that, as the main responsibility was on the defendant board, who either had not tested or had not ascertained what they should have ascertained, the whole fault was on them, as counsel for the defendant firm submits. When a fire brigade is called to a place the most important thing is to turn off the main switch. There would have been no danger if the main switch had been turned off, and, although the factory was not a large one, with only some sixteen electricity points altogether, no one knew which was the main switch.

In considering the position of the defendant firm it is necessary to look at the evidence of Mr. Bigland, the sub-officer of the fire brigade, who went to the premises with the deceased just after 11.30 on the morning of Sept. 24, 1950. He was asked:

- D "And at about 11.35 did you, as a result of what was said to you, seek out the main electrical switches on the premises? (A) I did. (Q) Is the turning off of the main switches followed as a general rule when you are summoned to a fire? (A) Always, sir. The men are ordered to attend to the switches and to knock them off—and the gas. (Q) Did you go down to the switchboard on this day? (A) I did. (Q) Was the deceased with you? (A) Yes, sir. (Q) How did you find the switches—as the result of what the first defendants' works manager told you? (A) Yes, sir, Mr. Holland pointed out where the correct switches were. (Q) Look at the photographs. No. 1, that is the photograph of the switchboard. Is that right? (A) Yes, sir. (Q) When you went there did you what you call 'knock off' the handles of the switches shown on the photograph—one below the board and one to the left hand top corner of the board? (A) I did. (Q) Did you speak to Mr. Holland at that time? (A) Yes, sir. (BARRY, J.): Did Mr. Holland go with you? (A) He pointed out the position of the switches. (Counsel for the plaintiff): Are they in the basement? (A) On the ground floor. (Q) He came into the room in which the switches were? (A) Yes. (Q) And did you say anything to him about the switches, or he to you? (A) No, sir. Immediately after I had knocked off the switches I returned to the upper floor. (Q) When you went to the upper floor did you receive a minor shock yourself? (A) I did, sir. (Q) Mr. Bigland, was there in addition to the ordinary light switches a master switch on the premises? (A) Yes, sir, adjacent to the office door on the first floor there was a master switch just above my height. (Q) Was that off? (A) Yes, sir. (Q) When you found you had this minor shock did you then go back to the switchboard? (A) I immediately contacted Mr. Holland and ascertained from him that there were no other switches in that electric circuit other than those he took me to in the first onset. (Q) Did you go back to the switchboard? (A) I went back to the switchboard with Mr. Holland. (Q) And what did Mr. Holland do or say? (A) I asked him were there any more switches and he said 'No', and I told him this: We were still receiving shocks and that there must be other

switches which were not in the off position. He immediately put on his glasses and stood on a packing case in front of the switchboard and ascertained that the switches on the board were in the off position, and I brought him then to the master switch which he said isolated all the lights on the upper storey. He got as near to it as six or nine inches. (BARRY, J.): To see that all the switches were off. (A) Yes, sir, it was rather dark. There was a little smoke knocking about in the ground floor premises. It was awkward to see, but Mr. Holland put on his glasses and got into a position where he could see the switchboard quite satisfactorily. (Q) He told you they were all off? (A) He said in his opinion they were all off, my Lord. (Counsel for the plaintiff): I think that shortly after that you realised that the deceased man had been electrocuted? (A) That is correct, sir. (Q) Now, Mr. Bigland, looking at that switchboard as you did, there are on the right hand side two tumbler switches, are there not? (A) Yes, sir. (Q) You now know this also formed the main switch? (A) I do now. (Q) At that time did you know that? (A) No, sir. (Q) Did they look like a main switch to you? (A) No, sir, they didn't. (Q) What did you think they were? (A) From their appearance they looked like ordinary lighting switches. (Q) Have you ever seen—well, first of all, was there a link bar connecting the two switches? (A) There was no link bar connecting the two switches. Had there been I would have had another look and made sure they were in the off position. (Q) Have you ever seen yourself tumbler switches without a link bar acting as main switches such as these? (A) Never in my experience and I was in the building trade. Nor have I since seen switches like that. (Q) How old are you? (A) Forty-two. (Q) Mr. Holland had not pointed them out to you? (A) No, sir, he had not pointed them out to me as main switches."

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It appears fairly clear that, before the deceased was electrocuted, there had been not only the initial pointing out of the switches, but a return to them and an assurance that they were switched off, and thus that they were the only main switches. That was after Mr. Bigland had pointed out that they were still getting shocks and there must be another switch. From the cross-examination of that witness, it might be said that it is not wholly clear, even if such an assurance was given, that it was given before the electrocution of the deceased. There may be a doubt about that, though I should have thought that immediately the fire brigade officer was electrocuted there would be a cry-out at once, and in these comparatively small premises someone would have heard. It looks to me as though the assurance was given before the electrocution of the deceased, but I do not think one ought to place great reliance on that if there be any doubt about it.

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I believe it to be the duty of the occupier of a factory to know where the main switch is. The manager of this factory did not know. The main switch was not as a main switch ordinarily is. There was no iron bar across, which would have indicated that it was the main switch, and which, as the fire brigade officer said, would have caused him to look again to see that it was off. In that respect I feel it difficult to say that the judge's finding against the defendant firm was wrong. I approach the matter in this way. Suppose there had not been any defendants other than the defendant firm. Suppose time had run in favour of the defendant board as a public authority before an action was brought, that the only defendants had been the defendant firm, and that it had been proved that their manager did not know where the main switch was, but had indicated to the fire brigade other switches as being the main switches. Is it clear that an action against the defendant firm in those circumstances would have failed? I do not think it is. It would have been for the judge to make up his mind on the evidence given whether negligence was proved or not. The judge examining this case carefully, and setting down his finding, arrived at the conclusion that he could not exonerate the defendant firm entirely.

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Counsel for the defendant firm reminded the court that this is a re-hearing, and that, if we reached the conclusion that the judge was wrong, we ought to say so. I am not satisfied that he was wrong. In those circumstances no good purpose would be served by my saying what I should have found myself. I am not prepared to say that it would be right for this court to overrule the judgment of BARRY, J. I am sorry that I have reached that conclusion, for I think the far, far greater responsibility lies upon the defendant board who created the danger.

A I think there is much to be said in favour of the submission of counsel for the defendant firm that, if they have visits now and then from the defendant board, they are entitled to expect the board to point out if something is wrong. In this case the real mistake was the mistake of the defendant board's representatives. In the years that went by no one from the board pointed out to the defendant firm that anything was wrong. That is a terrible state of affairs, but it does not
B enable me to say that the learned judge was wrong in deciding that the occupiers of the premises, the defendant firm, were responsible to some extent. I have already said that I do not agree with the judge's finding that an action for damages for breach of statutory duty would lie in this case, but on the other part of the claim I feel that the appeal of the defendant firm must be dismissed.

C **JENKINS, L.J.:** I have found considerable difficulty in this case, but on the whole I have come to the conclusion that the learned judge's decision to the effect that the defendant firm are liable at common law to the plaintiff in respect of the accident to her husband ought not to be disturbed. I think that the defendant firm, in the person of their manager on the spot, Mr. Holland, ought to have known that the two tumbler switches in fact constituted the main switch for the lighting circuit on this building. I think Mr. Holland ought to have
D known that in his capacity as the manager of this factory, particularly in view of the statutory obligations to the defendant firm's own workpeople owed under the electricity regulations. Further, I think Mr. Holland, as representing the defendant firm, ought to have known that this was not a normal or modern type of main switch, and that the men of the fire brigade would be likely to overlook the fact that it was a main switch, and to consider that, by turning off the two-
E power circuit main switches adjacent to the switchboard, they had turned off the whole of the electric supply to this factory. Further, I think Mr. Holland must be taken to have known that it would be highly dangerous for the firemen to proceed to deal with the fire unless all current was cut off from the building, so as to prevent the risk to them of injury by electric shocks. In these circumstances, it seems to me that Mr. Holland ought to have known that the firemen
F here were exposed to an unusual danger consisting of the risk that, owing to the unusual and obsolete character of the main switch relating to the lighting circuit, they might seek to deal with the fire on the mistaken assumption that, by turning off the two-power circuit main switches, they had effectively made the whole of the electrical system in the factory dead. That being so, under the ordinary law of invitor and invitee, it was the duty of the defendant firm through
G Mr. Holland to protect the firemen from damage arising from this unusual danger, or to warn them of it. In actual fact he did neither of these things, and the result was that the current in the lighting circuit was not cut off at the main switch. So far, it seems to me, it would be reasonably plain that the learned judge was justified in holding the defendant firm liable. It is, however, still necessary to consider the effect on that conclusion of the circumstance that the master switch
H controlling all the lights in the upper part of the building (which was the seat of the fire) was turned off, so that, if all the wiring in connection with this system had been in proper order, no current would have reached the upper storey by reason of the omission to turn off the two tumbler switches, which constituted the main switch for the lighting circuit.

Counsel for the defendant firm has forcefully argued that, inasmuch as this master switch would have effectively rendered dead the electric wires in the

immediate vicinity of the fire if the wiring had been in order, it cannot be said that Mr. Holland's omission to see that the firemen understood which were the main switches caused, or contributed to, the death of the deceased to any extent. The true cause, he said, was the reversing of the phase wire and the neutral wire at the switchboard, which prevented the master switch from effectively cutting off the current. It will be remembered that the learned judge in effect found it impossible to hold that the defendant firm or Mr. Holland knew, or ought to have known, of this reversing of the wires, and, accordingly, on counsel's argument, the true cause of the fatal accident to the deceased was an unusual danger of which it could not be said that Mr. Holland or the defendant firm knew, or ought to have known. I certainly would not differ from that finding of the learned judge. Nevertheless, in my view, the defendant firm cannot escape liability on account of the fact that the master switch was shut off. I think that feature of the case should be looked at in this way. For the reasons I have endeavoured to state, there was negligence on the part of the defendant firm in the person of Mr. Holland, and that negligence had resulted in an omission to shut off the main switch of the lighting circuit. If the wires had not been crossed at the switchboard, the circumstance that the master switch was shut off would have averted the consequences of that negligence, but inasmuch as the wires were crossed, or reversed, although that was not a circumstance of which Mr. Holland either knew, or ought to have known, nevertheless the result was that the consequences of the original negligence did operate; and, accordingly, although, as I have said, I regard this as a difficult case and I think that it is very near the line, I am on the whole of opinion that the learned judge's conclusion on this aspect of it ought not to be disturbed.

I agree that the existence of the statutory obligation under reg. 9 of the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory Acts of 1908 which provides:

“Where one of the conductors of a system is connected to earth, no single-pole switch, other than a link for testing purposes or a switch for use in controlling a generator, shall be placed in such conductor or any branch thereof”

affords strong support for the view that one must conclude that Mr. Holland, and through him the defendant firm, ought to have known of the probability that the two tumbler switches would not be recognised as a main switch, inasmuch as it was the duty of the defendant firm to link those two switches by means of a bar or other device in order to satisfy the provisions of reg. 9. On the other hand, I agree with my Lord that the deceased was not a person belonging to the class of “persons employed” for whose benefit these regulations were enacted, and, accordingly, I agree that the plaintiff could not successfully maintain a civil claim based on breach of that statutory duty.

I have only to add that, in my view, the case would be clearer against the defendant firm if it was plain on the evidence that the report of Mr. Bigland or other members of the fire brigade that they were still receiving electric shocks after the main switches had supposedly been turned off had been made, and that Mr. Holland's assurance that all the main switches were turned off had been given, before the moment when the deceased met his death. But the evidence as to the order of events is not sufficiently definite to make it possible for me to form any conclusion on that. Even so, for the other reasons I have endeavoured to state, I think that the learned judge's judgment on the matter of common law liability should stand. Accordingly, I agree that this appeal fails and should be dismissed.

HODSON, L.J.: I agree with both the judgments which have been delivered. It is abundantly clear that the substantial cause of this grievous

accident was the negligence of the defendant board, who have been found ninety per cent. to blame. Counsel for the defendant firm has based his argument on the language of LORD WRIGHT in *Yorkshire Dale Steamship Company v. Minister of War Transport* (2), which is as follows ([1942] 2 All E.R. 15):

“ This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it.”

Counsel for the defendant firm said, looking at this matter from the common-sense point of view without endeavouring to be unduly scientific or metaphysical, that the cause of this accident was the fact that the wires from the main switch to the meter were transposed, so that, the main switch not being in the off position, the electricity was running wild in the building along the neutral wires which should have been dead. That is a very strong argument, but the learned judge has found that there was a subsidiary and less important cause of this accident, which was that the defendant firm, the occupiers of the factory where the fire occurred and where the deceased met his death, were in breach of their common law duty, because if the main switch, which they ought to have known was a main switch, had been in the off position, the accident would not have happened. That is sufficient to establish a causal connection between the negligence and the accident. It is true that the manager had switched off another switch between the main switch and the premises where the man met his death, and two subsidiary switches, three in all, which would, if the wiring system had been in order, have prevented the accident. As JENKINS, L.J., has pointed out, the wiring system not being in order, in my view it is open to the court to come to the conclusion that the consequences of the original negligence persisted, and it is not right to exclude from consideration the deficient knowledge of the defendant firm of the inefficiency of their switch, and its situation.

I think that the way in which LORD WRIGHT put it, that this is a matter for the man in the street and is not a matter of scientific investigation, leads one to the conclusion that on the question of causation this court should be slow to interfere with the conclusion of the trial judge. Counsel for the defendant firm said, quite rightly, that, although the court should be slow to act, nevertheless it is open to the court to do so. I accept that, but, difficult as this case is, I feel myself unable to say with any certainty—indeed, I feel the reverse—that one can exclude from consideration, in dealing with the position at common law, the fact that the defendant firm were in breach of the electricity regulations.

I agree that it is not open to the plaintiff to found her cause of action on the regulation on which she relies. That regulation, reg. 9, is in general terms. It does not exclude the plaintiff from the class of persons who may bring an action, but it is made under what is now s. 60 (1) of the Factories Act, 1937, which gives power to the Minister, on being satisfied that any manufacture, or machinery, or other matter, in a factory is of such a nature as to cause the risk of bodily injury to the persons employed, to make such regulations as appear to him to be reasonable and practicable and to meet the necessity of the case. That involves that regulations can only be made within the limits of the powers conferred by s. 60 (1), and s. 60 (1) contains the words “ persons employed ”, which were substituted for the words “ persons employed in connection therewith ” in the earlier legislation. These words do not, in my opinion, extend the ambit of the Act far enough to include a fireman who comes on the premises to fight a fire, whether called by the occupier or anyone else. I respectfully disagree with the learned judge’s construction of the words “ persons employed ” as being wide enough to cover such a person, and, as I have already, I think, made clear, I do

not regard the regulations as being open to separate construction apart from the section of the Act under which they are made. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Shaw, Smith & Co.*, Manchester (for the defendant firm); *Bower, Colton & Bower*, agents for *George Davies*, Manchester (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

EAD v. HOME SECRETARY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 25, 1954.]

B

Police—Pension—Appeal to quarter sessions—Appeal against decision of medical referee—Jurisdiction of quarter sessions—Police Pensions Act, 1948 (c. 24), s. 5 (1)—Police Pensions Regulations, 1949 (S.I., 1949, No. 1241), reg. 45 (1).

While a member of the metropolitan police force the appellant developed an infection which disabled him from performing his duties, and he was retired from the force and awarded an ill-health gratuity under the Police Pensions Regulations, 1949, reg. 5. The appellant applied for a supplementary pension under reg. 43 (2) in lieu of the gratuity, and when his disablement was certified by a duly qualified medical practitioner under reg. 43 (1) as not being the result of any injury received by him in the course of duty, he gave notice of appeal under reg. 44 (2). The Home Secretary appointed a medical referee who confirmed that the disablement was not the result of an injury received in the course of duty, and the appellant appealed to quarter sessions under the Police Pensions Act, 1948, s. 5 (1). The appeal committee dismissed the appeal on the preliminary objection that under reg. 45 (1) quarter sessions had jurisdiction only to decide whether or not the evidence before the medical referee was inaccurate or inadequate and did not have jurisdiction to review the decision of the medical referee or to hear further evidence. On appeal,

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HELD: section 5 (1), proviso (b), of the Act expressly stated that the regulations under the Act might provide for the reference of a case "to a medical practitioner, whose decision thereon shall, subject to such rights of appeal as may be provided by the regulations . . . be final"; by reg. 44 (3) the decision of the medical referee was final subject to reg. 45; reg. 45 (1) provided for an appeal only for the purpose of considering whether or not the evidence before the medical referee was "inaccurate or inadequate"; and, therefore, no appeal lay to quarter sessions against the decision of the medical referee.

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EDITORIAL NOTE. The Police Pensions Regulations, 1949 (S.I., 1949, No. 1241), were amended by the Police Pensions Regulations, 1950 (S.I., 1950, No. 778), the Police Pensions Regulations, 1951 (S.I., 1951, No. 2192), and the Police Pensions Regulations, 1952 (S.I., 1952, No. 2162).

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FOR THE POLICE PENSIONS ACT, 1948, s. 5 (1), proviso (b), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 191.

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APPEAL by John Raymond Ead from a decision of the Appeal Committee of the County of London Quarter Sessions.

The appellant joined the metropolitan police force on July 22, 1946, after a medical examination. By September, 1950, a tuberculous infection of his spine had developed. On Apr. 17, 1952, the appellant was examined by a consultant surgeon who issued a certificate dated Apr. 24, 1952, stating that the appellant was suffering from tuberculosis, that he was disabled from performing his duties

as a member of the police force, and that such disablement was likely to be permanent. By letter dated May 13, 1952, the commissioner informed the appellant that, in view of that certificate, the date of the appellant's retirement from the police force would be May 15, 1952, and that he had been granted an ill-health gratuity under the Police Pensions Regulations, 1949, reg. 5. The appellant then applied for a supplemental pension under reg. 43 (2) in lieu of the gratuity, but, by a certificate dated July 24, 1952, the consultant surgeon certified that the disability was not the result of any injury received by the appellant in the course of his duty as a member of the police force and a supplemental pension was refused. By letter dated Aug. 19, 1952, the appellant gave notice of appeal under reg. 44 (2), and stated, *inter alia*, that he had received injury while arresting two prisoners on Jan. 20, 1948. In accordance with the provisions of reg. 44 (2), the Home Secretary was informed, and he appointed a medical referee to decide the appeal. On Nov. 13, 1952, the medical referee examined the appellant and the documentary evidence and decided that the disablement was not the result of any injury received by the appellant in the execution of his duties. The appellant appealed, under the Police Pensions Act, 1948, s. 5, to the County of London Quarter Sessions. The appeal was heard on Apr. 29, 1953, when counsel for the respondent, the Secretary of State, submitted that it was not open to that court to review the decision of the medical referee, but that their powers were limited to considering whether or not the evidence which had been placed before the medical referee was inaccurate or inadequate. The court upheld the submission, and on May 8, 1953, the appeal was dismissed.

R. D. L. Du Cann for the appellant.

Mervyn Griffiths-Jones for the Home Secretary.

PARKER, J., delivered the following judgment of the court. This case comes before this court under the Police Pensions Act, 1948, s. 5 (3), which provides:

"An appeal shall lie on a point of law from any decision of a court of quarter sessions under this section to the High Court in accordance with rules of court and the decision of the High Court shall be final."

By the Police Pensions Regulations, 1949, reg. 43:

"(1) . . . the question whether a person is entitled to any and, if so, what awards . . . shall be determined in the first instance by the police authority.

(2) Where the police authority are considering whether a person is disabled they shall refer for decision to a duly qualified medical practitioner selected by them . . . (a) whether the person concerned is disabled, and . . . (c) whether the disablement is the result of an injury received in the execution of duty. (4) The certificate of the selected medical practitioner on the questions referred to him under the preceding provisions of this regulation shall, subject to the provisions of reg. 44 and reg. 45, be final."

Regulation 44 provides machinery for the aggrieved person to get a copy of that certificate and also enables him to appeal from the decision contained in it. That appeal is notified to the Secretary of State who is to appoint an independent person, called the medical referee, to decide the appeal, and that decision is final subject to the appeal provided for in reg. 45. Regulation 45 (1) reads as follows:

"A court hearing an appeal under s. 5 of the Act . . . may, if they consider that the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority to him for re-consideration in the light of such facts as the court . . . may direct, and the medical authority shall accordingly re-consider his decision and, if necessary, issue a fresh certificate which, subject to any further re-consideration under this paragraph, shall be final."

In the present case the appellant was dissatisfied with the decision of the consultant surgeon, being the qualified medical practitioner. He appealed and the Secretary of State appointed a medical referee who came to the conclusion that the injury of which the appellant complained did not result from the appellant's service. From that decision of the medical referee the appellant appealed to the County of London Quarter Sessions, the appeal being, not on the ground that the medical referee had before him "inaccurate or inadequate evidence" on which to base his conclusion, but, as is admitted, against the medical referee's decision. Argument took place and the appeal committee ruled that they could not go into that question and that their jurisdiction was limited to deciding whether or not the evidence before the medical referee was inaccurate or inadequate so that they could determine whether or not they should refer the matter to him for re-consideration.

Before this court counsel for the appellant argued that by s. 5 of the Police Pensions Act, 1948, a person in the position of an appellant has a general right of appeal from the refusal of the police authority to grant a pension, and it must be remembered that the police authority has to be guided by or to act on the medical certificates. Accordingly, he says that the right of appeal is quite general except in so far as it has been expressly cut down by regulations. He agrees that there is power to cut down that right of appeal by regulations because by s. 5 (1), proviso (b), it is provided:

"regulations made under this Act may provide, in relation to questions arising out of those regulations, for the reference of any such matter as is specified in the regulations, either by the police authority or by the court, to a medical practitioner, whose decision thereon shall, subject to such rights of appeal as may be provided by the regulations to such tribunal as may be constituted thereunder, be final on the matter so referred."

Counsel says that, if one looks at reg. 45 (1) it is clear that the general right of appeal has not been cut down, but that that regulation is merely setting out what the court may do with such an appeal, the court being the quarter sessions.

In our view, the answer to that argument is that s. 5 of the Act gives no general right of appeal as such in the sense that it exists except in so far as it is taken away by the regulations. Section 5 provides, in sub-s. (1), proviso (b), that the regulations may contain provisions that certain medical matters shall be decided by the medical practitioner and that the certificate of the medical practitioner shall be final subject to any rights of appeal that the regulations may give. When one looks at the regulations, one finds that the certificate or the decision of the medical referee is final and there is no right of appeal except in so far as provided by reg. 45. I am satisfied that the only appeal provided by reg. 45 (1) is an appeal by an appellant who says that the medical referee had inaccurate or inadequate evidence on which to come to his conclusion, and that there is no appeal against the conclusion itself. In these circumstances, we dismiss the appeal.

Appeal dismissed.

Solicitors: *Ludlow, Head & Walter* (for the appellant); *Treasury Solicitor.*

[*Reported by F. GUTTMAN Esq., Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. TANN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, J.J.), January 27, 28, 1954.]

Metropolis—Building—“Structure”—*Car shelter of tubular steel framework covered with canvas—London Building Act, 1930 (c. clviii), s. 22 (1).*

A The respondent erected in the front garden of her dwelling-house, which was situated in the administrative county of London, a car shelter, consisting of tubular steel framework, the main members of which were fixed together by pipe screw angles and joints, the framework being covered with a canvas covering fastened to it by canvas tapes and small tie-ropes. The shelter was affixed to two wooden gateposts in the forecourt wall of her house, and had sliding canvas curtains at its entrance from the road. The
B respondent was charged with unlawfully erecting a structure beyond the general line of buildings in the street in question without the consent in writing of the appellants, in contravention of the London Building Act, 1930, s. 22 (1).

C HELD: “structure” in s. 22 (1) was not to be construed ejusdem generis with the term “building”, since there was no genus and, on construction, s. 22 (1) was meant to include something wider than a building; “structure” in the sub-section meant a structure in the nature of a building, and, in deciding whether an erection was a structure its intention must be looked at; here, the shelter was intended to serve the purpose of a garage; and, therefore, it was a structure in the nature of a building, and the respondent was in breach of s. 22 (1).

D Dicta of LINDLEY, L.J., in *Lavy v. London County Council* ([1895] 2 Q.B. 582), and of VAUGHAN WILLIAMS, J., in *London County Council v. Pearce* ([1892] 2 Q.B. 112), applied.

AS TO “BUILDING” OR “STRUCTURE” IN THE METROPOLIS, see HALSBURY, Hailsham Edn., Vol. 16, p. 430, para. 622.

E Cases referred to:

- (1) *Lavy v. London County Council*, [1895] 2 Q.B. 577; 64 L.J.M.C. 262; 73 L.T. 106; 59 J.P. 630; 26 Digest 503, 2102.
- (2) *London County Council v. Pearce*, [1892] 2 Q.B. 109; 66 L.T. 685; 56 J.P. 790; 34 Digest 590, 103.
- (3) *London County Council v. Illuminated Advertisements Co.*, [1904] 2 K.B. 886; 73 L.J.K.B. 1034; 91 L.T. 352; 68 J.P. 445; 26 Digest 503, 2106.
- (4) *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee*, [1943] 2 All E.R. 587; 108 J.P. 45; 2nd Digest Supp.

F CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the North London Magistrate's Court on Oct. 21, 1953, the appellants, the London County Council, preferred an
G information against the respondent, charging that within the six months immediately preceding the laying of the information she unlawfully erected a structure (a car shelter) at 25, Paget Road, Stoke Newington, in contravention of s. 22 of the London Building Act, 1930, in that the structure was erected beyond the general line of buildings on the north side of Paget Road without the consent in writing of the appellants, whereby she became liable to the
H penalty prescribed by s. 148 (2) (iii) of the London Building Acts (Amendment) Act, 1939, and to have an order made against her to demolish the structure or a part of it.

The following facts were found. The car shelter was put in the forecourt or garden of the respondents' dwelling-house which was situate on, or fronting, the north side of, and was No. 25 in, Paget Road, Stoke Newington, by the respondent within the six months immediately preceding the date of the laying of the information. Paget Road was a street within the meaning of the London Building

Act, 1930, s. 22, and the general line of buildings on the north side on which No. 25 was situated was as defined by the certificate of the superintending architect of metropolitan buildings given in pursuance of s. 22. The general line of buildings was within fifty feet of Paget Road, and the car shelter was erected or brought forward in front of the general line of buildings without the consent in writing of the appellants. The car shelter consisted of a tubular steel framework, the main members of which were fixed together by pipe screw angles and joints, the framework being covered with a canvas covering, with sliding canvas curtains at its entrance from Paget Road. At the date of the laying of the information, the car shelter had rested on the ground without wheels, but small wheels had subsequently been affixed to and under the tubular framework. The canvas covering was fastened to the tubular framework by a series of canvas tapes and small tie-ropes. The shelter was affixed to two wooden gateposts in the forecourt of No. 25, Paget Road, by means of four metal fittings round the upright tubular framework with screws which were screwed to the wooden gateposts. The width between the gateposts was seven feet, and the overall width of the car shelter framework was seven feet, nine inches. The metropolitan borough of Stoke Newington had formed and made a vehicular crossing of the footway from the carriage way to the gateway in the forecourt wall of No. 25, the cost of which the respondent had paid to the council. The shelter had remained in situ since its erection and its purpose was to provide shelter for a car. A

It was contended on behalf of the appellants that the shelter was a "building or structure" within the meaning of the London Building Act, 1930, s. 22, and that the respondent was liable to the penalties prescribed by the London Building Acts (Amendment) Act, 1939, and to an order to demolish pursuant to the London Building Act, 1930, s. 30. The question was one of law, alternatively of mixed fact and law. Counsel for the respondent agreed that the question was one of law or of mixed fact and law, but contended that, nevertheless, the car shelter was not a structure within the meaning of s. 22 of the London Building Act, 1930. B

The magistrate dismissed the information and the appellants appealed. C

Percy Lamb, Q.C., and *Scrivens* for the appellants. D

C. Lawson for the respondent. E

LORD GODDARD, C.J.: The learned magistrate found that this shelter was not a "structure", and, if it was a mere question of fact, we should be bound by his decision, but it seems to me that he has not asked himself the proper questions. What he says is this : F

"I was of opinion that the car shelter was not a building within the meaning of s. 22 of the London Building Act, 1930; that the term 'structure', as there used, must be construed ejusdem generis with the term 'building'; that a structure to be within the section must be something in the nature of a building; and that, applying those principles, the 'car shelter' was not a structure within the meaning of s. 22 of the said Act, but was something in the nature of a tent which in no way defeated or adversely affected the general objects of the London Building Act, 1930, as specified in the preamble to such Act." G

I think the learned magistrate was wrong in saying that he must construe the term "structure" as ejusdem generis with the term "building." There is no genus, and it is obvious that the Act is meant to include something wider than a building. If you had simply to construe the word "structure" ejusdem generis with the word "building" and say that "structure" meant a building, there would have been no necessity for the legislature to use both words. The real question is: Is this a structure? "Building" should be omitted from consideration altogether. H

A convenient test was laid down by LINDLEY, L.J., in *Lavy v. London County Council* (1) ([1895] 2 Q.B. 582), where he said:

"We must look at this case, and not at the effect of other cases. In this case we must ask ourselves, as men of the world, whether such a new wall [he was dealing with a wall] as this is not a building, structure, or erection within the mischief of s. 75 [of the Metropolis Management Act, 1862]."

- A I do not pretend that I know what the mischief is in these matters, but, if I ask myself whether this shelter is a structure, I confess I think the question is only capable of one answer. I think it is a structure. If it was a mere temporary thing, such as a tent in the summer time would be, I am not saying that it would be a structure, but the object of this thing is to provide this house with something which it has not got at present, namely, a garage. Clearly one would never be
- B able to get permission to build a garage at the place where this shelter is—when I say "build", I mean a garage consisting of ordinary building material—and this shelter is put there to remain their permanently. It is not a thing put up one week and moved the next.

VAUGHAN WILLIAMS, J., in *London County Council v. Pearce* (2) ([1892] 2 Q.B. 112), said:

- C "I do not mean to say that a man is to be allowed to evade the Act of Parliament by building on wheels what he intends to be a wooden structure, and then saying that it is not within the Act because it is on wheels. In all cases we must be guided by what I may call the intentions of the structure, and must inquire with what intention it was made."
- D In this case we are ignoring wheels. If you apply that test, it seems to me obvious that this structure, whatever you like to call it, was put there for the purpose of permanently housing a car at a place where there was no other garage. I think one must look at it as, I was almost going to say, a home-made garage, placed where it is in place of an ordinary garage. I think, therefore, that we must hold that the magistrate did not direct himself properly, and that,
- E if he had asked himself as an ordinary citizen what this shelter was, he must have come to the conclusion that it was a structure, and, therefore, this appeal must be allowed.

BYRNE, J.: I agree.

- F PARKER, J.: I agree. I would only add that, speaking for myself, I am prepared to accept the view that "structure" in this context means a structure in the nature of a building. That was the phrase used by LORD ALVERSTONE, C.J., in *London County Council v. Illuminated Advertisements Co.* (3) ([1904] 2 K.B. 892). The same meaning was put on that word, though in connection with a different Act, by ATKINSON, J., in *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee* (4) ([1943] 2 All E.R. 592).
- G It seems to me that, in deciding whether a structure is something constructed in the nature of a building, it is perfectly proper to look at the intention of the structure, as, in the passage my Lord has referred to in *London County Council v. Pearce* (2), VAUGHAN WILLIAMS, J., expressly so states. Looking at the matter in that light and adopting the test laid down by LINDLEY, L.J., in *Lavy v. London County Council* (1), the question posed is this: As men of the
- H world can we say that this thing, to use a neutral expression, is a structure constructed in the nature of a building? It is quite clear that this erection was intended to be a garage, and, looked at in that way, and asking oneself the question: Is this a structure in the nature of a garage?, the answer is clearly, Yes. It seems to me that the learned magistrate misdirected himself in first of all seeking to apply the ejusdem generis rule, and then treating "structure" as in the nature of a building in the sense that, if it was made of canvas, it could not be a building, because it was in the nature of a tent. It seems to me that

the statement of facts admits of only one conclusion, that is, that this was a structure within the meaning of the Act.

Appeal allowed.

Solicitors: *J. G. Barr, Solicitor, London County Council* (for the appellants); *Thornton, Lynne & Lawson* (for the respondent).

[Reported by G. A. KIDNER, Esq. Barrister-at-Law.]

A

PERCIVAL v. STANTON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 27, 1954.]

Fishery—Salmon fishery—“Fixed engine”—Drifting net with light anchors attached to act as brake—Salmon and Freshwater Fisheries Act, 1923 (c. 16), s. 11 (1), s. 92 (1) (c).

B

Where light anchors are attached to a salmon net merely for the purpose of acting as a brake or drag and the net is intended to, and does in fact, drift with the tide, it is not a “fixed engine” within the meaning of s. 11 (1) of the Salmon and Freshwater Fisheries Act, 1923, as it is neither “fixed”, nor “secured by anchors”, nor “made stationary in any other way”, within the definition of “fixed engine” in s. 92 (1) of the Act.

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FOR THE SALMON AND FRESHWATER FISHERIES ACT, 1923, s. 11, s. 92 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 67, 120.

Case referred to:

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(1) *Thomas v. Jones*, (1864), 5 B. & S. 916 ; 34 L.J.M.C. 45 ; 11 L.T. 450 ; 29 J.P. 55 ; 122 E.R. 1071 ; 25 Digest 48, 432.

CASE STATED by Northumberland justices.

On Sept. 5, 1953, at a court of summary jurisdiction sitting at Alnwick, an information was preferred by the appellant, John Percival, on behalf of the Northumberland and Tyneside River Board, charging the respondents, William Stanton and George Robert Stanton, with an offence against the Salmon and Freshwater Fisheries Act, 1923, s. 11, in that on July 30, 1953, they unlawfully used a fixed engine, namely, a net secured by anchors, for taking salmon in tidal waters, namely, the sea, south of Alnmouth.

E

At the hearing of the information on Oct. 15, 1953, the following facts were proved or admitted. On July 30, 1953, the respondents were fishing for salmon in the open sea, in a bay off the coast of Northumberland, by means of a salmon net which was shot from a fishing coble in the form of a letter “T”. The net was suspended in the water by means of cork floats. The approximate length of its headpiece was one hundred yards and of its tailpiece two hundred yards, and its approximate weight, when wet, was above eight hundredweights. The end of the tailpiece was close to the water's edge and the headpiece was some two hundred yards outward into the sea, lying approximately parallel to the water's edge. There were strong tidal currents in that part of the sea, and at the time of the fishing operation there was a reasonably strong wind blowing. Without some means of keeping the net in formation, the action of the wind and currents would have reduced the net into a shapeless tangle, and fishing by this method would not have been possible. To keep the net in formation, the respondents attached a bundle of metal quoits to the end of the tailpiece and, by means of detachable ropes tied to the net, they also attached three anchors to the headpiece. The anchors were made of iron, were of light type and of conventional two-fluked pattern, and each weighed about three pounds. Their effect was to act as a drag or brake on the drift and movement of the net, and they did not act, and were not intended to act, so as to secure the net, as a stationary object, to the sea-bed. At that place the sea-bed consisted of smooth,

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soft, shingly sand, and the net was able to, and in fact did, drift substantially with the currents, although braked in its freedom of unrestricted movement by the dragging of the anchors through the sand. The respondent, William Stanton, had followed this method of fishing for over thirty years.

- The issues were: (i) Was the net a "fixed engine" within the meaning of s. 11 of the Act of 1923? (ii) Was the sea wherein the net was shot "tidal waters" within the meaning of the section? On the issue of "fixed engine", it was A contended by the appellant that the three anchors attached to the net made it a "fixed engine" within the meaning of s. 11, as it thereby became a "net secured by anchors" within the definition of "fixed engine" in s. 92 (1) of the Act, and that it was not necessary for the prosecution to prove, or for the court to find, that the net, by reason of the anchors, became affixed to and stationary on the B sea-bed. The respondents contended (i) that the phrase "secured by anchors" meant moored to the sea-bed as a fixed and stationary object, and that, as the anchors in this case were not intended to, and did not, have that effect, but merely acted as a brake or drag to keep the net in formation, and allowed substantial drift, the anchors did not "secure" the net and make it a "fixed engine"; (ii) that the words "secured by anchors" should be construed C ejusdem generis with the words "or made stationary in any other way" in s. 92 (1); and (iii) that, the Act being a penal Act, the words "secured by anchors" should be read in their ordinary meaning as making fast, and that a wider and more generalised meaning should not be attached to the phrase. The respondents relied on the meaning of the words "anchor" and "secure" in the OXFORD DICTIONARY. The justices were of the opinion that the net used by the D respondents was not a "fixed" engine within the meaning of s. 11 of the Act, and dismissed the charge. At the invitation of both parties they formally determined that the open sea in which the respondents were fishing was not "tidal waters" within the meaning of the section.

Widgery for the appellant.

Aarvold and *R. A. Percy* for the respondents.

- E **LORD GODDARD, C.J.:** This is a Case stated by justices of the county of Northumberland, who, I expect, know a good deal about salmon fishing along that coast and about the habits and methods of salmon fishers. The justices dismissed an information against the respondents which charged them that they

- F "did unlawfully use a fixed engine, namely, a net secured by anchors, for taking salmon in tidal waters, namely, the sea south of Alnmouth, contrary to the Salmon and Freshwater Fisheries Act, 1923, s. 11."

- Two questions were stated by the justices for our decision. The first was whether the net used by the respondents was a "fixed engine" within the meaning of s. 11. If it was not, obviously no offence has been committed. The G second question was whether or not, as the net was in the sea, it could properly be described as being "in tidal waters". That rather depends on some definitions which appear and which have from time to time appeared in the Salmon Fishery Acts, but, as the court is of the opinion, on the facts found by the justices, that no offence has been committed because this was not a "fixed engine" it would not be desirable for us to give any opinion on the construction of "tidal waters", H because our opinion would be merely obiter and could be challenged in any future case.

The facts found by the justices, to put them shortly, are that the net which the respondents were operating was a T-shaped net. Exactly how the tailpiece is attached to the headpiece does not appear, and I do not think it matters, but the tailpiece, when it is shot from the boat, comes very nearly, though not quite, to the shore. It is weighted at one end with some quoits. At the top it has cork floats to keep it floating in the water and on the bottom it has some steel

quoits at the end, to keep it straight. The headpiece, which also has cork floats to keep the net at the proper depth, has at the bottom, or sea-bed, end three light anchors. The approximate weight of the net when it is wet is upwards of eight hundredweights, and each anchor weighs about three pounds. The object of the anchors is to weigh down the net to some extent so as to keep it from getting into a "shapeless tangle", as the justices said. The justices found that the effect of the anchors was to act as a drag or brake on the drift and movement of the net, and that they did not act, and were not intended to act, so as to secure the net to the sea-bed as a stationary object. The sea-bed at the place consisted of smooth, soft, shingly sand, and the net was able to, and in point of fact did, drift substantially with the currents, albeit braked in its freedom of unrestricted movement by the dragging of the anchors through the sand. The question is whether those anchors turn this net into a "fixed engine" within the meaning of s. 11 of the Salmon and Freshwater Fisheries Act, 1923.

The definition in s. 92 (1) of the Act of 1923—and I shall have to deal with the earlier Acts historically in a moment—is:

"The expression 'fixed engine' includes . . . (c) any net secured by anchors and any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill dam . . ."

That definition is not an absolute definition, as it states what a "fixed engine" includes, but the first thing I should say with regard to a "fixed engine" is that it must be fixed. I do not see how, whatever the definition clause says that the expression is to include, it could remove the necessity for a "fixed engine" to be fixed, and, if a thing is fixed, it seems to me, it must be stationary. The words of the definition are:

" . . . any net secured by anchors and any net or other implement for taking fish fixed to the soil, or made stationary in any other way . . ."

Applying the ordinary canons of construction, I think that the words "secured by anchors" show, in view of the words which follow, that the net is meant to be secured so that it is fixed, so that it is stationary. I think that that is supported by the history of the Salmon Fishery Acts, because the Act of 1923 is a consolidating Act as well as an amending Act, and it is quite obvious that, being a consolidating Act, it has borrowed the words of the definition from the previous Acts which it consolidates, and one has to see what those Acts provided. The Salmon Fishery Act, 1861, s. 4, provided:

" 'Fixed engine' shall include stake nets, bag nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish."

There, again, I emphasise the word "fixed", because, as I have said, it seems to me that nothing can be a "fixed engine" unless it is fixed. Then, in s. 11 of the Act of 1861, that definition was somewhat expanded. By s. 11, which prohibited the placing of "fixed engines" in any inland or tidal waters, it was provided that, for the purposes of the section,

" . . . a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine . . ."

While that was the state of the law, *Thomas v. Jones* (1) came before a court of the Queen's Bench Division. In that case a net was used on the River Tivy, near Cardigan, by a fisherman who had got his net secured at one end, but the court held that it was not a "fixed engine" because, being unsecured at the other end, directly the salmon hit the net the net rolled round the salmon and, therefore, because it could roll round the salmon, it was not a fixed net. Whether I should have decided the case in the same way as the Court of Queen's Bench decided it in 1864, if I had been alive and sitting in 1864, I do not know. I have

a strong suspicion that I should not. That was a decision which was not open to appeal, and, therefore, in 1865 the legislature stepped in and put an amending definition of "fixed engine" in s. 39 of the Salmon Fishery Act, 1865, which runs in this way:

"'Fixed engine' shall in this Act and the Salmon Fishery Act, 1861, include any net or other implement for taking fish fixed to the soil, or made stationary in any other way . . ."

A So, first, there is s. 11 of the Act of 1861, which deals with "a net . . . secured by anchors, or otherwise temporarily fixed to the soil", and then in s. 39 of the Act of 1865 there is a "net or other implement . . . fixed to the soil, or made stationary in any other way". In the Act of 1923, which, as I have already said, is a consolidating Act, the legislature naturally refer back to the two earlier Acts and incorporate both of those definitions or descriptions in s. 92 (1): "Any net secured by anchors"—that is borrowed from the Act of 1861—

" . . . and any net or other implement for taking fish fixed to the soil, or made stationary in any other way . . ."

C That is borrowed from the Act of 1865 and is intended to enlarge the words of the first definition. I do not think that that means that one ought to contrast "secured by anchors" with "made stationary in any other way". The history of the definition of "fixed engine" makes it clear that Parliament used the words which they used in s. 92 (1) of the Act of 1923 because the words "secured by anchors" were in the Act of 1861, and they incorporated them into the Act of 1923 together with the extended definition which was put into the Act of 1865 because of *Thomas v. Jones* (1).

D It seems to me, however, that in all cases of this kind to some extent it must be a question of degree. If it is a question of degree, it is a question of fact for the justices, and in the present case the justices have found that the net was not a "fixed engine" because it was not fixed. I do not want it to be said that, if it is shown that a net has been let down with anchors attached to it, the net ceases to be a "fixed engine" merely because the anchors have dragged, as they might do in a storm. If they are put down with the intention of anchoring the net to the sea-bed, then I think that the net becomes "secured by anchors". But if, as the justices found in this case, these little light anchors were used, not for that purpose, but merely to act as a brake or a drag on a net which was intended to drift with the tide, it seems to me that one cannot say that the net is a "fixed engine". First, it is not "fixed", and, secondly, it is not "secured by anchors".

F It has got some anchors on it, but they do not secure it. Nor is it "made stationary in any other way", because it is not stationary. It moves. It is partly a question of fact and partly a question of construction, but I have come to the conclusion that we cannot interfere with the decision of the justices in this case. Indeed, I think they were right.

G BYRNE, J.: I agree.

PARKER, J.: I also agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *N. H. Thomas*, clerk of the Northumberland & Tyneside River Board (for the appellant); *Crossman, Block & Co.*, agents for *Adam Douglas & Son*, Alnwick (for the respondents).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

PLUNKETT v. ALKER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 25, 1954.]

Education—Cleanliness of pupil—Verminous hair—Proceedings against parent—Pupil living with father and mother—Liability of mother—Education Act, 1944 (c. 31), s. 54 (6).

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A pupil at a school whose hair was cleansed under a compulsory cleansing order of a medical officer of health made under s. 54 (3) of the Education Act, 1944, was again found to have his hair infested with vermin. The child lived with his father and mother, and the mother was charged, as his parent, with an offence against s. 54 (6) of the Education Act, 1944. She contended that, where a child lived with his father and mother, the mother was not "his parent" within the meaning of that sub-section. It was found as a fact that the child's condition was due to the neglect of the mother.

HELD: "parent" in s. 54 (6) included the mother; and as, on the facts, the condition of the child was due to her neglect, she was guilty of an offence under the sub-section.

London County Council v. Stansell (1935) (154 L.T. 241), doubted and not applied. C

FOR THE EDUCATION ACT, 1944, s. 54 (6), see HALSBURY'S STATUTES. Second Edn., Vol. 8, p. 197.

Cases referred to:

- D
(1) *London County Council v. Stansell*, (1935), 154 L.T. 241; 100 J.P. 54; Digest Supp.
(2) *Woodward v. Oldfield*, [1928] 1 K.B. 204; 96 L.J.K.B. 796; 136 L.T. 731; 91 J.P. 151; Digest Supp.
(3) *Hance v. Burnett*, (1880), 45 J.P. 54; 19 Digest 564, 62.

CASE STATED by the Liverpool stipendiary magistrate. E

On June 27, 1953, the respondent, Thomas Alker, clerk to the Liverpool education authority, preferred an information against the appellant, Catherine Plunkett, and against James Plunkett, her husband, charging that they, on May 15, 1953, were the parents of Christopher Plunkett, a pupil in attendance at Prince Rupert County School, Liverpool, whose person, after cleansing under the order of the medical officer of health had been carried out, was again found to be infested with vermin while in attendance at the said school, and that the said condition of his person was due to neglect on the part of the appellant and the said James Plunkett, contrary to the Education Act, 1944, s. 54 (6). F

At the hearing of the information on Aug. 5, 1953, no evidence was offered against the said James Plunkett, and the information was amended to read against the appellant only. It was proved or admitted that the appellant was the mother of the said Christopher Plunkett; that on June 1, 1951, he was a pupil at Hayworth Street School and, on May 15, a pupil at Prince Rupert County Secondary Modern School; that on June 1, 1951, the hair of the boy was examined by a school nurse under s. 54 (2) and was found to be infested with vermin; that a notice under s. 54 (3) of the Act of 1944 was posted to the appellant and her husband, requiring them within twenty-four hours to cleanse the hair of the boy to the satisfaction of the nurse; that the hair was not so cleansed and a compulsory cleansing order was made under s. 54 (3); that a notice was posted to the appellant and her husband, informing them that the hair of the boy had been cleansed and drawing their attention to the provisions of s. 54 (6) of the Act; that the appellant and her husband, the parents of the boy, lived together as man and wife with the boy at all material times in Liverpool; that on June 11, 1951, the nurse visited and spoke to the appellant who admitted receipt of the notice. G
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and advised and instructed her about the cleansing of hair; that on May 15, 1953, the nurse examined the boy and his hair was again found to be infested with vermin; that the appellant admitted to the nurse that she had not attended to the hair of the boy for a week, saying that she had been kept busy canvassing for her husband's business; and that the condition of the hair of the boy was due to neglect on the part of the appellant.

- A On behalf of the appellant it was contended that where the parents of a child were living together in the same house with their child the father was the "parent" of the child for the purposes of the Education Act, 1944, and that, accordingly, the present proceedings against the mother were not competent. On behalf of the respondent it was contended (i) that the appellant was the parent of the child within the meaning of s. 54 (6) and s. 114 (1) of the Act of 1944; (ii) that the authorities relied on by the appellant, namely, *London County Council v. Stansell* (1) and *Woodward v. Oldfield* (2), were no longer of binding force inasmuch as they were decided under the Education Act, 1921, which was repealed and replaced by the Act of 1944 with changes of wording sufficient to remove the binding force of those authorities; (iii) that s. 54 (6) of the Act of 1944 imported the element of neglect as an integral part of the offence thereunder and that the term "parent" for the purposes of the said section meant or included the person within the meaning of the definition of the term "parent" laid down by s. 114 (1) to whose neglect the condition complained of is due.

The magistrate was of opinion that the contention of the respondent was correct and that the appellant was properly charged in these proceedings. Accordingly, he convicted the appellant and fined her 10s.

- D *Collinson* for the appellant.
D. B. McNeill for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The Education Act, 1944, s. 54 (6), provides:

- E "If, after the cleansing of the person or clothing of any pupil has been carried out under this section, his person or clothing is again found to be infested with vermin or in a foul condition at any time while he is in attendance at a school maintained by a local education authority or at a county college, and it is proved that the condition of his person or clothing is due to neglect on the part of his parent, or in the case of a pupil in attendance at a county college to his own neglect, the parent or the pupil, as the case may be, shall be liable on summary conviction to a fine not exceeding 20s."

The word "parent" is defined in s. 114 (1) as follows:

" 'Parent', in relation to any child or young person, includes a guardian and every person who has the actual custody of the child or young person."

- G That sub-section does not say that the mother is not a parent, and I take it that if a child is living with, say, an aunt or grandparent so that that person has the actual custody of the child, that person might be answerable under s. 54 (6). I think it is at least a reasonable interpretation of those words in s. 114 (1) that the legislature is drawing a distinction between actual and legal custody, and that the words "actual custody" show that the person responsible is that person who at the time of the summons really has the child in his or her custody. We have also to remember that, unless the contrary intention appears, the Interpretation Act, 1889, s. 1 (1) (b), requires us to read the singular as including the plural. Therefore, the word "parent" must be construed as "parents" unless the contrary intention appears.

H If, therefore, the matter were free of authority I do not think I should have any hesitation in holding that, if the magistrate finds as a fact, as he must be taken to have done in the present case, that the condition of the child was due

to the neglect of the mother, she, as a parent, contravenes s. 54 (6). If the child is living with and is in the care of the mother, I think it can be said that she has the actual, though she may not have the legal, custody. But whether or not she has the actual custody, as I have already said, s. 114 (1) does not exclude the mother, but merely says who may be included in the word "parent". In the present case the mother was found to be responsible for the condition of the boy, but it is said that this court is bound by *London County Council v. Stansell* (1) which was a decision under the Education Act, 1921, s. 87 of which provides:

"(1) A local education authority for elementary education may direct their medical officer, . . . to examine in any public elementary school . . . the person and clothing of any child attending the school, and, if on examination the medical officer, . . . is of opinion that the person or clothing of any such child is infected with vermin . . . the local education authority may give notice in writing to the parent of the child, requiring him to cleanse properly the person and clothing of the child within twenty-four hours . . .

(4) Where, after the person or clothing of a child has been cleansed by a local education authority under this section, the parent of the child allows him to get into such a condition that it is again necessary to proceed under this section, the parent shall be liable to a fine not exceeding 10s."

In *Stansell's* case (1) the mother was summoned, and the justices, on the authority, as they stated in their Case, of *Hance v. Burnett* (3) and *Woodward v. Oldfield* (2), held that the father, and not the mother, was the person who ought to have been summoned. On appeal this court held that the justices came to a right decision. LORD HEWART, C.J., giving the judgment, said (154 L.T. 242):

"The justices were clearly right. They came to the conclusion that the 'parent' referred to in s. 87 of the Education Act, 1921, where the father and mother were living together and the child was living with both of them, was the father. They have set out their reasons for their decision, and I think that they have come to the right conclusion for the reasons which they have given."

Both SINGLETON, J., and I agreed. I say at once that, having further considered that case, I am in doubt whether or not we were right. The Interpretation Act, 1889, does not seem to have been brought to the attention of the court nor did the court remind itself of that Act.

The justices in that case said that they followed *Hance v. Burnett* (3) and *Woodward v. Oldfield* (2). *Woodward v. Oldfield* (2) was a case of a defective child over seven years old residing with and in the actual custody of her mother, and the father was serving a sentence of penal servitude. The mother was held by the court to be the parent of the child within the meaning of Part V of the Education Act, 1921, so that steps could be taken under s. 54 (1) of that Act requiring her to send the child to a special school, because she had the custody of the child while the father was in prison. In *Hance v. Burnett* (3) it was decided that a mother could be made liable for not sending a child to school if the father was a seaman and was away at sea at the time, because he could not possibly attend to the matter. With regard to many of the offences under the Education Act, 1921, it may be that both father and mother are liable, but we are now dealing with a section of the Act of 1944 in which the word "neglect" is used. If the condition of the child is due to the neglect of the mother, who, as I have already pointed out, is, undoubtedly, a parent, I have difficulty in seeing why the mother does not commit the offence which is mentioned in s. 54 (6). Supposing the father had been summoned, he might have said: "It is not a question whether I have 'allowed' it [see s. 87 (4) of the Act of 1921]. It is a question whether or not the condition of the child is due to my neglect. I do not wash the child, and I do not brush the child's hair. All that is done by his mother. I am not called on to examine the child every day or every week to see if his

- hair has got vermin in it. I have not neglected my duty as a parent because I have not inspected the child to that extent, because I am entitled to rely on my wife ". I can see that in many cases under the Act of 1944 the father would have a defence on the ground that he had not been negligent. I have doubt whether or not *London County Council v. Stansell* (1) was rightly decided, and, in any case, we now have another Act which contains other words, and I think we can treat the present case as *res integra* and put our own construction on the words of s. 54 (6).
- A I do not say that, if both parents were summoned, they might not both be convicted, provided the court came to the conclusion that both had neglected the child, but, in coming to the conclusion whether or not there has been neglect, the court would have to take into account, as in all cases of negligence, the circumstances of the case. I can quite well see in a case of this sort that justices could come to the conclusion that a father had not been guilty of neglect, though
- B the mother had, and, I suppose, in some circumstances they might find the other way round. There are frequently cases under the Children and Young Persons Act, 1933, s. 1 (1), in which a father and mother are charged with neglecting a child so as to cause unnecessary suffering or injury to health apart from actual cruelty. The words of s. 1 (1) of that Act certainly refer to "... any person who ... has the custody, charge or care of any child ". In theory of law,
- C if the father is living in the house, he is the person who has the custody, and, I suppose, may be said to have the charge and to some extent the care of the child, but the mother can also be, and frequently is, charged under that sub-section. I have never yet heard it suggested that the mother cannot be charged if she is responsible for the neglect of the child, although her husband may also be charged.
- D I think that in the present case we can say that, the magistrate having found as a question of fact, and it not being suggested there was no evidence on which he could so find, that the condition of the boy's head was due to the neglect of the mother, she is answerable under this sub-section. Therefore, I think the magistrate came to a right decision on the facts he found, and that this appeal fails.
- E BYRNE, J.: I agree. I think there is such a difference between the wording of s. 54 (6) of the Act of 1944 and that of s. 87 (4) of the Act of 1921 that this court is not bound by the decision in *London County Council v. Stansell* (1), and I am of opinion that the learned magistrate was right.

PARKER, J.: I agree.

- F Solicitors: *W. F. Foster, Hedge & Clare*, agents for *A. S. Cawson*, Liverpool (for the appellant); *Cree, Godfrey & Wood*, agents for *Thomas Alker*, town clerk, Liverpool (for the respondent).

Appeal dismissed.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NATIONAL ASSISTANCE BOARD *v.* PRISK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 29, 1954.]

National Assistance—Husband and wife—Deed of separation—Grant of national assistance to wife—Liability of husband to National Assistance Board—National Assistance Act, 1948 (c. 29), s. 42 (1) (a), s. 43 (2).

The respondent and his wife separated in 1938, and under a deed of separation, dated Mar. 11, 1938, he agreed to pay her £1 a week for maintenance, which sum he had paid regularly. On Dec. 17, 1952, justices dismissed a complaint by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the respondent had wilfully neglected to maintain her. In 1953 the wife applied for, and was granted, assistance by the National Assistance Board, she having been forced to cease working owing to ill health, and the board sought to recover the amounts which they had paid to the wife from the respondent.

HELD: the existence of a deed of separation and the fact that the respondent had made his payments in full under the deed did not debar the wife from taking proceedings in respect of maintenance: *Tulip v. Tulip* ([1951] 2 All E.R. 91), and *Dowell v. Dowell* ([1952] 2 All E.R. 141), applied; under the National Assistance Act, 1948, s. 42 (1), the respondent remained liable to maintain his wife even though he was paying a weekly sum under the deed of separation, since that sum was not reasonable maintenance, and, therefore, the appellants were entitled to recover from him under s. 43 (2) of the Act of 1948, the money which they had paid to the wife by way of assistance.

The case must be sent back to the justices for them to inquire what would be a reasonable sum for the respondent to pay under s. 43 (2).

National Assistance Board v. Wilkinson ([1952] 2 All E.R. 255), explained.

FOR THE NATIONAL ASSISTANCE ACT, 1948, s. 43, see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 969.

Cases referred to:

- (1) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 2nd Digest Supp.
- (2) *Dowell v. Dowell*, [1952] 2 All E.R. 141; 116 J.P. 350; 3rd Digest Supp.
- (3) *National Assistance Board v. Wilkinson*, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.
- (4) *R. v. Flintan*, (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 233, 255.
- (5) *Jones v. Newtown & Llanidloes Union*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 37 Digest 233, 254.

CASE STATED by Cornwall justices.

At a court of summary jurisdiction sitting at Penzance on Aug. 5, 1953, the appellants, the National Assistance Board, preferred two complaints against the respondent, William Prisk, alleging that he was the husband of Elizabeth Moon Prisk, whom he was liable to maintain pursuant to the National Assistance Act, 1948, s. 42, and by reference to whose requirement (i) assistance under Part II of that Act, amounting to £27 19s., was given at the Post Office, Cornor Downs, Hayle, between Jan. 19, 1953, and July 13, 1953, and (ii) assistance under Part II of the Act was given at the Post Office, Cornor Downs, Hayle, on Mar. 3, 1953, and divers other days, and was continuing to be given at the weekly rate of 21s. 6d., and they applied for summonses to be served on the respondent to show cause why orders should not be made on him under s. 43 (2) of the Act of 1948 (i) to repay the £27 19s., and (ii) 21s. 6d. weekly or otherwise, as the court might think appropriate.

The following facts were found. The respondent was lawfully married to Elizabeth Moon Prisk on July 13, 1920. On Mar. 11, 1938, they entered into a

separation agreement whereby they agreed to live apart and the respondent agreed to pay her the weekly sum of £1 in respect of her own maintenance, together with a weekly sum of 10s. being 5s. each for the maintenance of the two children of the marriage. The respondent complied regularly with the agreement and all payments due thereunder had been made to date. The children were now over sixteen years, and the payments in respect of them had ceased. The respondent's wife had supplemented her allowance by employment, but she decided to live with her aged mother, and was forced to relinquish her employment owing to her own and her mother's ill health. The respondent's wife was in need of assistance and had received it to the extent and in the manner alleged in the complaints. On Dec. 17, 1952, the respondent was summoned to appear before justices to answer a complaint by his wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that he had wilfully neglected to maintain her. The summons was dismissed. It was applied for on the advice of the appellants. The respondent's wife was not prepared to resume cohabitation with him. He was employed as a road foreman by Cornwall County Council, and received an average gross wage of £7 2s. a week, which included £1 7s. for travelling to work. Out of his weekly wage he paid £1 to his wife, £2 10s. for his board and lodging, and £2 5s. under a hire-purchase agreement relating to his motor bicycle which he used for his work as a road foreman. He also had other expenses in connection with his work.

It was contended on behalf of the appellants that, for the purposes of the National Assistance Act, 1948, the respondent was liable to maintain his wife, unless she had committed a matrimonial offence. The respondent's wife had committed no matrimonial offence. Even if she had failed to obtain an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the appellants were entitled to orders against the respondent under the National Assistance Act, 1948, s. 43. The existence of the separation agreement of Mar. 11, 1938, with which the respondent had regularly complied, was no bar to the appellants' obtaining an order under s. 43 of the Act of 1948. It was contended on behalf of the respondent that the liability under s. 43 of the Act of 1948 was subject to the common law defence open to him. The existence of the separation agreement, with which he had regularly complied, was a bar to the appellants' obtaining an order under s. 43. The matter had been considered by the court on the hearing of the summons of Dec. 17, 1952, brought at the appellants' instance, and had been determined in the respondent's favour, and there was no fresh evidence now offered at the hearing of Aug. 5, 1953, to justify any order. Having regard to the evidence adduced as to the respondent's means, the court should not consider it reasonable to make an order.

The justices dismissed the complaints and the appellants appealed.

J. P. Ashworth for the appellants.

H. E. Park for the respondent.

LORD GODDARD, C.J.: It appears that the respondent and his wife separated nearly sixteen years ago when the value of money was very different from what it is today. Under the deed of separation the respondent undertook to pay his wife £1 a week, and 10s. a week for the two children of the marriage. The obligation to pay 5s. a week for each child has ceased, but that is not a ground on which we are going to decide the case in any respect, although it may be a matter for the justices to consider when it is sent back to them.

The wife took proceedings before the justices in December, 1952, alleging wilful neglect to maintain. At first sight it looks rather odd that a husband should be said to be wilfully neglecting to maintain his wife if he is paying money due under a deed, but it is too late to argue that now. "Wilful" means, in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, "deliberate", that is to say, deliberately refusing to pay, with no excuse except the deed. It was decided in *Tulip v. Tulip* (1) and in *Dowell v. Dowell* (2),

that the existence of a deed, and the fact that a husband has made his payments under the deed, is no bar to the wife's taking proceedings in respect of maintenance, either before the justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, or before the High Court under the Law Reform (Miscellaneous Provisions) Act, 1949. If one analyses those cases, the reason why the deed cannot be set up as an answer is that the respondent still remains liable to maintain his wife unless, of course, she has committed a matrimonial offence. He remains liable to maintain his wife because of the common law relationship of husband and wife. It may be shown that the fact that he has covenanted to pay her £1 a week does not provide her with adequate maintenance and, of course, one object of these orders that are made against husbands in respect of their wives is to prevent the wives becoming a charge on public funds. So the courts have held in the two cases which I have mentioned (which are binding on this court and which, if I may say so, seem to me to lay down most excellent law) that, as long as the obligation remains on the husband to support his wife, the fact that the deed provides that the husband shall pay £1 a week to his wife does not prevent the court saying: "That is not now adequate maintenance, and, as you are bound to provide adequate maintenance, notwithstanding that £1 a week has been agreed, we shall make an order against you." The order would take into account the £1 a week, and it would be a matter for the justices to find what is a fair and adequate sum in all the circumstances of the case, among the circumstances being the husband's means.

Counsel for the respondent has asked us to say that *National Assistance Board v. Wilkinson* (3) lays down that if the husband would have had any defence at common law or under any statute, it is still open to him if the National Assistance Board take proceedings. I will say a word about the National Assistance Board's position in the matter in a moment. So far as the relationship of husband and wife is concerned, *Wilkinson's* case (3) merely laid down that the husband could always show, whether he was prosecuted by the National Assistance Board or taken to court by his wife, that his obligation to maintain his wife had ceased. It would not be sufficient to show merely that they had separated under a deed, for that does not terminate the husband's obligation to maintain his wife. No husband is obliged to support his wife if she has committed adultery. That has been laid down ever since the earliest times in our law, and I see that in *Wilkinson's* case (3) I cited a well-known dictum of LITTLEDALE, J., in *R. v. Flintan* (4) (1 B. & Ad. 230):

"[the wife] having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married",
and (*ibid.*, 231):

"If the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is 'legally bound to maintain her'."

In a case where the wife has deserted her husband, the law is different. It was laid down in *Jones v. Newtown & Llanidloes Union* (5), that the right of the wife who is in desertion of her husband to maintenance is only suspended, and if she returns to her husband then she has a right to be maintained: but, as long as she is in desertion, the husband is under no obligation to support her. In *Wilkinson's* case (3) there was desertion by the wife. The husband provided a perfectly proper and adequate home for the wife, but she wanted to live elsewhere and would not go and live with him. The husband was not bound to support her so long as she lived apart from him. That is what *Wilkinson's* case (3) decided, and it decided nothing else. It was left open to the husband to say that he was under no obligation to maintain her.

The only other question is whether the appellants, in these circumstances, can obtain an order against the respondent for such amount as the court may

think reasonable that he should, in addition to the sum under the deed, provide for his wife. In my opinion, they can because the National Assistance Act, 1948, s. 43, provides:

A “(1) Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted. (2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate.”

The liability is perfectly clear ; a husband is liable to maintain his wife.

B In this case, the wife applied to the justices in December, 1952, and they, wrongly in our opinion, felt that they could not order any maintenance because the respondent was paying under the deed. The result was that the wife was left with £1 a week—and one has only to state the amount to show that she could not live on that. What was she to do ? She had to obtain relief, the respondent still remaining liable to maintain her. If the appellants have paid money to her, they can go to the respondent, who is liable to maintain her, and say: “You must repay us the money that we have paid to your wife because you are in default. You are not maintaining your wife by paying her reasonable maintenance; you are only paying her the money under the deed. We have had to pay her, and, therefore, we ask that you should repay us and pay us that which we shall have to pay her in the future.” The case must, therefore, go back to the justices and they must inquire what would be a reasonable amount for the respondent to pay.

E Attention has been called to the presence in the deed of what I may call a set-off clause, that is to say, if the respondent made his payment under the deed the wife had to discharge all her debts and liabilities out of that, and if he, by her pledging his credit, had to pay anything in addition, he would be entitled to deduct it from what he had to pay under the deed. Of course, we do not intend this case to go back to the justices with the absurd result that, if the justices come to the conclusion that the respondent should pay £1 a week in addition to the £1 a week that he is paying, that is a total of £2 a week, he should set off against the £1 that he pays under the deed the amount that he is ordered to pay by the justices. What we intend is that the appellants shall show the justices F what they have paid, and, if they think that sum is reasonable, the respondent must pay it, or, at any rate, so much of the sum as they think is reasonable, in addition to the £1 a week which he has been paying. If the justices find that the amount of £27 which was paid by the appellants between January and July, 1953, was a reasonable amount, they will make an order on him to pay that amount and he will have to pay it and will not get the right to set-off. If the justices G then go on to say that, in future, he is to pay £1 a week in addition to the £1 he has paid under the deed, then, so long as he pays £2 a week, he will discharge his obligation. Should the wife in some way manage to pledge his credit after she has received the £2 a week, then it seems to us that he may be able to set-off something against the £2 a week, but not against the £1 a week.

H For these reasons, we think the justices came to an erroneous conclusion in point of law and the case must go back to them with a direction that they must find what sum it is reasonable that the respondent should pay, first, in respect of the arrears, and, secondly, in respect of the future.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, National Assistance Board* (for the appellants); *Jaques & Co., agents for Stephens & Scown*, St. Austell (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

HARRISON *v.* METROPOLITAN-VICKERS ELECTRICAL CO.,
LTD. SAME *v.* SAME.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), January 18, 19, 1954.]

Factory—Floor—Opening—Hole in sand ground level at edge of steel-flagged gangway—Factories Act, 1937 (c. 67), s. 25 (3).

A
A factory used for making castings had a ground level of sand on portions of which castings were made and also steel-flagged gangways six feet wide. A hole over three feet deep forming part of the bed of a casting had been cut out of the sand area at the edge of the gangway where it turned at right angles. While walking backwards carrying one end of a shank bearing a ladle of molten metal, a workman stepped off the gangway and over the edge of the hole and was injured. B

C
HELD: the sand surface of the factory in which the hole was cut was its floor and the hole was an opening therein within the meaning of s. 25 (3) of the Factories Act, 1937, and the occupiers of the factory were, therefore, liable for breach of statutory duty in failing to fence it securely under the section.

FOR THE FACTORIES ACT, 1937, s. 25 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1017.

APPEAL by the defendants and CROSS-APPEAL by the plaintiff against an order of STABLE, J., dated May 5, 1953, in an action for damages for breach of statutory duty and for negligence. D

The defendants were the occupiers of a factory in which the plaintiff, an employee, had been injured through falling into a hole at the edge of a steel-flagged gangway at ground level. STABLE, J., held that the defendants were in breach of their statutory duty to fence securely the hole as an opening in the floor of the factory under s. 25 (3) of the Factories Act, 1937, but that they were not guilty of negligence at common law, and that the plaintiff was guilty of contributory negligence. The defendants contended that the area in which the hole was did not constitute part of the floor of the factory within the meaning of the sub-section. E

Laski, Q.C., and Atkinson, Q.C., for the defendants.

Marven Everett, Q.C., and J. Ritchie for the plaintiff. F

G
H
SINGLETON, L.J.: The defendants have a large factory at Trafford Park, Manchester, in which they make castings of various kinds and sizes. The plaintiff was employed in the factory as a core-maker, and on Nov. 27, 1951, he met with an accident when he was working for the defendants. He and a man named Hatton had to fill core moulds with molten metal. The molten metal was carried to the mould in a ladle which was suspended on a double-handled shank, and one of the men was at each end of the shank. The time came when the contents of the ladle became too cool, or too stiff, for the operation of pouring to be continued successfully, and it was necessary for the men to return to the supply ladle. That meant that one of them had to walk backwards down a narrow way on to a six feet wide steel-flagged gangway, which was at a right angle to the course they had been taking. The plaintiff walked backwards on this occasion. The shank was seven feet, two inches in length, so that there was not much room for the turn across the gangway towards the supply ladle, and at the edge of the gangway there was a hole which formed, or part of which formed, the bed of another casting. There was a sheer drop from the gangway of at least three feet, four inches. As the plaintiff was backing he stepped a shade beyond the gangway and into this hole, and some of the metal went on his face and he received injuries. There was no warning of any kind and no guard, and the

fact that the hole was flush with the gangway deprived the plaintiff of the warning which he might have had if the hole had been further from the gangway.

The plaintiff brought this action claiming damages for negligence, and also for breach of statutory duty under the Factories Act, 1937, s. 25 (3) of which provides:

A "All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable."

The plaintiff's case is that the hole into which he stepped was an opening in the floor. The defendants' reply is that the hole was not an opening in the floor in that the hole was not in the floor. It is not disputed that it would have been practicable to fence the space. Indeed, that was done after the accident. Thus, the question is what is a floor within the meaning of s. 25 (3) of the Factories Act, 1937.

B The defendants' factory at ground level was mostly sand. The photographs show castings and the like on portions of what appears to be the floor. In certain parts of the factory there are steel-flagged gangways which, according to the defendants' argument, constitute the floor for the purposes of the section. I find it difficult, if not impossible, to say that by constructing such gangways the defendants took away the character of the ground level of the factory so as to make what would normally be considered to be the floor something other than the floor. It is true that portions of the sand floor are used for castings, but the normal level of sand is the same as the level of the gangways. A floor may be of stone, or concrete, or wood, or steel, or earth, or sand, or it may be a combination of several substances. The making of a gangway does not mean that the remainder of the ground level ceases to be part of the floor. Photograph No. 2 shows a number of things on the left of the photograph stacked. If they are not stacked on the floor, I do not know how it would be proper to describe where they are stacked.

E Counsel for the plaintiff drew our attention to the proviso to reg. 10 of the Grinding of Metal (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904). The regulation itself, in para. (b), makes use of the word "floor". It reads:

"In every room, or part thereof, in which *cleaning of castings* is done—. . . (b) all accessible parts of the floor shall be properly swept or otherwise cleaned at least once every day and for this purpose the floor shall be maintained in a smooth and firm condition so as to permit of such proper sweeping or cleaning. Provided that this regulation shall not apply to—(i) *cleaning of castings* done upon the foundry floor at or near the place where the metal for the said castings is poured."

G The foundry floor in this case was mostly sand, and parts of the foundry floor were used from time to time for the making of castings, which meant interference with the floor. The floor at the ground level, though it was sand, was still the floor of the factory, and, in my view, it was a floor for the purposes of s. 25 (3) of the Act. The word "floor" was used during the evidence and in a question addressed by counsel for the defendants to Mr. Beech, a witness called for the defendants, and, furthermore, document 9, a plan made for the defendants, described the place where the sand is as "floor level". I think that this level of the factory, though it was of sand, constituted the floor of the factory. In the floor there was an opening into which the plaintiff stepped when going backwards. That was an opening in the floor. In my view, the judge rightly held that that opening in the floor constituted a breach of s. 25 (3) of the Factories Act, 1937, and that the defendants were responsible for damages in this action.

H [His LORDSHIP said that a further head of claim by the plaintiff under s. 26 (1) of the Factories Act, 1937, had not been argued, but had been kept open, held that there was no ground for disturbing STABLE, J.'s findings as to negligence

and contributory negligence, and continued:] It follows from what I have said that, in my judgment, the judge was right in holding that the plaintiff was entitled to succeed on the basis that there had been by the defendants a breach of the duty they owed to him under s. 25 (3) of the Act, and it follows, too, that the cross-appeal ought to be dismissed. I think each should be dismissed with costs.

JENKINS, L.J.: I agree. In my view, there is no sufficient reason for holding that the so-called sand floor of the foundry in this case was not a floor within the meaning of s. 25 (3) of the Factories Act, 1937. It is true that it was a floor made of sand as distinct from materials such as timber or cement, but, nevertheless, it seems to me that it was a floor, and a floor of such a kind that pits or openings could be made in it and re-filled at will as the exigencies of the work demanded. I think, therefore, that the hole into which the plaintiff fell was an opening in a floor within the meaning of s. 25 (3) of the Act. It is not disputed that it would have been perfectly practicable to protect this opening by means of a fence, and, accordingly, in my view, the learned judge was right in holding that there was in this case a breach of that statutory duty.

[His LORDSHIP held that they should not disturb the conclusion of STABLE, J., on the question of negligence, and contributory negligence, and said that both appeal and the cross-appeal should be dismissed].

HODSON, L.J.: I think these appeals fail for the reasons which have been already sufficiently given by my Lords.

Appeal and cross-appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Cobbett, Wheeler & Cobbett*, Manchester (for the defendants); *W. H. Thompson* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. HIGHGATE JUSTICES. *Ex parte* PETROU.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 27, 1954.]

Club—Striking off register—Summons against secretary to show cause—Order for costs for sum in excess of costs of prosecution.

The applicant, the secretary of a club, was summoned before justices to show cause why the club, registered in accordance with the Licensing (Consolidation) Act, 1910, s. 91 and s. 92, should not be struck off the register under s. 95 (1). At the same time there were ten summonses against the manager, five relating to the sale of liquor without a justices' licence, contrary to s. 65 (1) of the Act of 1910, and five relating to the supply of liquor during other than permitted hours, contrary to the Licensing Act, 1921, s. 4 (a). At the conclusion of the hearing, the justices inquired the costs of the prosecution and were told twenty-one guineas. They then convicted the manager, fined him £10, and ordered him to pay a total of twenty guineas costs, ordered the applicant to pay £100 costs, and ordered the club to be struck off the register. On a motion by the applicant for an order of certiorari,

HELD: the justices had no power to inflict on the applicant a penalty in the guise of costs, and, therefore, an order for certiorari would go.

AS TO THE POWER OF JUSTICES TO AWARD COSTS, see HALSBURY, *Hailsham* Edn., Vol. 21, p. 622, para. 1080; and FOR CASES, see DIGEST, Vol. 33, p. 365, Nos. 741, 742.

MOTION for an order of certiorari.

The applicant, Helen Costas Petrou, was the owner of certain premises which she let to one Frank Reeves for use as a club, known as the Sportsmen's Club and registered pursuant to the Licensing (Consolidation) Act, 1910, s. 91 and s. 92, the applicant being the secretary thereof.

A On the complaint of the respondent, Philip Scott, a superintendent of police, ten summonses were issued against the said Reeves charging him, as manager, with the offences in connection with the club stated in the headnote and calling on him to show cause why the club should not be struck off the register under s. 95 (1) on the ground that it was not conducted in good faith as a club, that illegal sales of intoxicating liquor had taken place on the club premises, and that the supply of intoxicating liquor was not under the control of its members; and one summons was issued against the applicant, as secretary, to show cause why the club should not be struck off the register. At the conclusion of the hearing B on Dec. 9, 1953, the justices inquired the costs of the prosecution and were told twenty-one guineas. The justices then convicted the said Reeves, fined him £10, and ordered him to pay two guineas costs on each of the ten summonses, ordered the applicant to pay £100 costs, and ordered the club to be struck off the register. The applicant now applied for an order of certiorari to quash the order made against her on the grounds (i) that under the Licensing (Consolidation) Act, C 1910, s. 95, the justices had no power to inflict a fine or penalty on the applicant; (ii) that, by ordering the applicant to pay £100 costs after they had already made an order for payment by another person of twenty guineas of the twenty-one guineas that was the total amount of the costs of the prosecution, the justices were in substance imposing a fine on the applicant; and (iii) that they had exceeded their jurisdiction and acted improperly.

D *N. R. King* for the applicant.
S. A. Morton for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The justices were not imposing costs on the applicant. They were imposing a penalty on her when she had not been convicted of any offence, but had only come before E the court to show cause why the premises should not be struck off the register. Under the guise of making an order for costs, the justices inflicted what could only have been intended as a penalty, since they had made an order dealing with all but one guinea of the costs asked for. Certiorari will go. I shall direct that the papers be sent to the Lord Chancellor, and we shall give costs against the justices.

F *Certiorari granted.*

Solicitors: *A. L. Philips & Co.* (for the applicant); *Sir Clifford Radcliffe*, Clerk of the Peace, Middlesex (for the justices).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GLUCHOWSKA v. TOTTENHAM BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 19, 29, 1954.]

Rent Control—Furnished house—Excess rent—Rent of premises fixed and registered—Subsequent letting of part of premises at rent exceeding that registered—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 4 (1) (a).

A rent tribunal fixed the rent of three furnished rooms and a kitchen with the use of a bathroom at £1 7s. per week, and that rent was registered pursuant to s. 3 (2) of the Furnished Houses (Rent Control) Act, 1946. Afterwards the landlord let one of the rooms and the kitchen at a weekly rent of £2, later reduced to £1 15s., and occupied the remainder of the premises herself. She was convicted under s. 4 (1) (a) of the Act of 1946 of receiving rent for the premises in excess of the registered rent.

HELD (LORD GODDARD, C.J., dissenting): the words "those premises" in s. 4 (1) (a) of the Act of 1946 referred to the subject-matter of the original letting referred to the tribunal in respect of which the rent was fixed and registered; the payments received by the landlord were made with regard to different premises, albeit part of the premises originally let; and, therefore, no offence was committed.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1088.

Cases referred to:

- (1) *London County Council v. Aylesbury Dairy Co., Ltd.*, [1898] 1 Q.B. 106; 67 L.J.Q.B. 24; 77 L.T. 440; 61 J.P. 759; 42 Digest 728, 1507.
- (2) *Hewett v. Hattersley*, [1912] 3 K.B. 35; 81 L.J.K.B. 878; 107 L.T. 228; 76 J.P. 369; 25 Digest 113, 370.
- (3) *Barnard v. Gorman*, [1941] 3 All E.R. 45; [1941] A.C. 378; 110 L.J.K.B. 557; 165 L.T. 308; 105 J.P. 379; 2nd Digest Supp.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction, sitting at Tottenham, on June 4, 1953, the respondents, Tottenham Borough Council, preferred twenty informations against the appellant, Wladyslawa Kazimiera Gluchowska, charging that she, on twenty occasions between Dec. 6, 1952, and Apr. 18, 1953, received excessive rents, contrary to the Furnished Houses (Rent Control) Act, 1946, s. 4.

At the hearing on June 18 and 25, 1953, it was proved or admitted that the respondents, as local authority, had prepared a register of rents in pursuance of s. 3 of the Act of 1946; that in March, 1949, a contract between Michael Gluchowski and August Sikora for the letting of three fully furnished rooms and a kitchen in the basement of a dwelling-house situate at No. 9, Willoughby Lane, Tottenham, under the terms of which the lessee had the use of the bathroom in the said dwelling-house in common with other persons, was referred to the rent tribunal for the district and the rent was reduced to £1 7s. per week, and on Mar. 10, 1946, an entry to that effect was made in the register; that on Sept. 22, 1951, the appellant, who was then and at all times thereafter the owner of the dwelling-house, let fully furnished one room and a kitchen in the basement to one Arnold Edward Hayes at a rent of £2 per week which was subsequently reduced to £1 15s. per week, the said room being one of the three rooms, and the kitchen being the same kitchen, mentioned in the entry in the said register; that, although the rent included payment in respect of board, the value of such board did not form a substantial proportion of the whole rent (whether £2 or £1 15s. per week); that from Dec. 6, 1952, till Jan. 1, 1953, the appellant received from Hayes £2 per week on account of rent and from Jan. 10 till Apr. 15, 1953, the sum of £1 15s.; that on Jan. 28, 1953, Hayes referred the said contract to the rent tribunal, and the tribunal entered on the reference but adjourned it sine die; that the two rooms forming the remainder of the premises in respect of which the rent was

entered in the register were at all times occupied by the appellant and her family; that the total amount by which the rent received by the appellant on the twenty occasions exceeded the registered rent of £1 7s. was £9.

A On behalf of the appellant it was contended that no offence had been committed in that the premises on account of which rent was received were not the premises for which a maximum permitted rent was registered. On behalf of the respondents it was contended (i) that the whole included the part and that, therefore, rent received on account of the premises let was received on account of the registered premises; (ii) that the contract between the appellant and Hayes defeated the object of the rent tribunal and contravened the spirit of the Act of 1946; (iii) that the letting of part only of the premises was a change of circumstances within the meaning of s. 2 (3) of the Act of 1946 in respect whereof B the appellant should have referred the contract to the rent tribunal and asked them to determine the rent properly payable in respect of the said room and kitchen. The justices were of the opinion that the contentions of the respondents were correct; convicted the appellant and fined her £2 in respect of each of the twenty offences; and ordered her to pay £5 5s. costs and to repay to the said Hayes £9 (being the total amount paid in excess of the registered rent of £1 7s. C per week).

J. F. Donaldson for the appellant.

Widgery for the respondents.

Cur. adv. vult.

Jan. 29. The following judgments were read.

D LORD GODDARD, C.J.: PARKER, J., will read the first judgment.

E PARKER, J.: The judgment I am about to read is the judgment of BYRNE, J., and myself. This is an appeal by way of a Case stated by Middlesex justices before whom the appellant was charged under twenty informations with receiving on twenty occasions excessive rents, contrary to the Furnished Houses (Rent Control) Act, 1946, s. 4 (1) (a). Though the total of the excess amounted to only £9, which was ordered to be repaid to the tenant, the appellant was fined no less than £40 (a fine which seems out of all proportion to the offences found proved) and ordered to pay £5 5s. costs. Section 4 of the Act of 1946, as amended by the Landlord and Tenant (Rent Control) Act, 1949, s. 12 (4), provides as follows:

F “(1) Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—
(a) on account of rent for those premises in respect of any period subsequent to the date of such entry . . . payment of any sum in excess of the rent so entered . . . (2) Where any payment has been made or received in contravention of the foregoing sub-section, the amount thereof shall be recoverable G by the person by whom it was made.”

[HIS LORDSHIP read the facts and continued:] The short point for the decision of the court is whether or not the receipt by the appellant of the rents complained of constituted offences, and this depends on the meaning to be given to the words “receive on account of rent for those premises” in s. 4 (1) (a) of the Act.

H “Those premises” clearly refer back to the premises the subject of the contract referred to the tribunal, and to the specification of those premises which has under s. 3 (2) (b) to be entered in the register. The specification entered in the register in the present case is of the original letting, namely, three rooms and kitchen in the basement together with use of a bathroom. That is the unit in respect of which the rent is fixed and registered. The receipts from Hayes were on account of rent, not for that, but for a different, unit of letting, namely, one room and kitchen, albeit part of the premises originally let. Accordingly, on the natural meaning of the words in the sub-section it would appear to us that

no offences were committed. It is urged, however, for the respondents that we should construe the words "those premises" in s. 4 (1) (a) to mean "those premises or any part thereof" in that, it is said, it would be contrary to the spirit of the Act, and to common sense, if a landlord were to be permitted to re-let part of the premises at a rent in excess of that registered for the whole premises. It is true that in penal as well as other statutes words should be read in their widest sense if to do otherwise would result in a failure to suppress the mischief aimed at by the legislation. At the same time, to use the words of WRIGHT, J., in *London County Council v. Aylesbury Dairy Co., Ltd.* (1) ([1898] 1 Q.B. 109), the court

"... ought not to do violence to ... language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

In our opinion, even if the words in s. 4 (1) (a) are capable of being read in the wide sense contended for, we ought not to read them in that sense. A tenant in the position of Hayes can at once refer his contract to the tribunal, and on such a reference the tribunal would have to fix a rent for the premises let to him, and cause it to be registered. It would then become an offence for the landlord to receive rent for the premises so let in excess of that registered rent. Accordingly, it is unnecessary, to suppress the mischief aimed at, to read the words in the wide sense contended for by the respondent. Accordingly, we would allow this appeal.

LORD GODDARD, C.J.: While I regret there should be a difference of opinion in the court on a matter which, as here, does not admit of appeal, since I have formed a definite opinion I feel bound to express it with diffidence though not with hesitation. Unless I am satisfied that there is a *casus omissus* in the Act, it would appear to me unfortunate to be obliged to hold that, while it would be an offence to let three rooms and a kitchen at a rent in excess of that which is registered, no offence is committed if only one of the three rooms and the kitchen is let at a rent which exceeds that registered in respect of the four. I entirely agree that the court ought not to read into an Act, and more especially into one which carries penal consequences, words which are not there because it would seem convenient so to do or to effect what the court may think Parliament intended but has failed to say. But it is possible when construing a statute to expand the literal meaning of words if it appears that an extended meaning must have been intended.

By way of illustration I will cite two cases, namely, *Hewett v. Hattersley* (2), where the words "so condemned" in a prosecution relating to unsound food were read as "so liable to be condemned", and *Barnard v. Gorman* (3), where, in a prosecution under the Customs Consolidation Act, 1876, s. 186, the court had to construe the words "the offender may either be detained or proceeded against by summons", and the word "offender" was held to include "a person who is suspected on reasonable grounds to have committed the offence". This is but an application of the maxim "ut res magis valeat quam pereat". There is another well-known maxim that the greater includes the less, a rule of logic which has become a rule or maxim of law. These considerations, in my opinion, entitle the court to expand the word "premises" so as to include any part of the premises without reading additional words into the sub-section. Moreover, the matter can be regarded in another, though, perhaps, rather technical, light. As is well-known, at common law rent issues out of the land demised and out of any part of it. The registered rent takes the place of the contractual rent and so issues out of any part of the property demised. Accordingly, it issues as much out of any one of the rooms as it did out of all. One of the rooms out of which a registered rent of £1 7s. per week issued has been let at a rent in excess of that sum and that seems to me to support the view that it is possible to read the

word "premises" as including "part of the premises", or, in other words, to say that in this statute the greater does include the less.

I would mention one other matter on which I differ from the opinion of the other members of the court. I cannot agree that because the tenant can take the new contract before the tribunal and obtain a reduction this gets rid of the mischief aimed at by the sub-section. The tenant appears to have paid the increased rent for a period of twenty weeks. If it is an overpayment he can, under s. 4 (2), recover the excess by action, but if the tribunal were now on a fresh reference to reduce the rent the reduction would be effective only from their decision, and he, accordingly, would not be able to recover under that sub-section the excess which he has paid. On another point I am in complete agreement with my brothers. I regard the penalties inflicted by the justices as excessive, and, indeed, I would say oppressive, especially when it is remembered that, had the convictions been affirmed, the tenant could have recovered under s. 4 (2) the amount adjudged to have been overpaid. As the convictions are quashed it is not necessary to say more about this matter.

Appeal allowed.

Solicitors: *Windsor & Co.* (for the appellant); *M. Lindsay Taylor*, town clerk, Tottenham (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

D *Re* ELSIE INGLIS (LONDON) MEMORIAL FUND.

[CHANCERY DIVISION (Harman, J.), January 19, 1954.]

Charity—Stamp duty—Petition on breach of trust—Liability to duty—Charities Procedure Act, 1812 (c. 101), s. 3.

The fee payable by way of impressed stamps on an originating petition under the Charities Procedure Act, 1812, s. 1, is a court fee which remains payable, and is not a stamp duty remitted by s. 3 of that Act.

FOR THE CHARITIES PROCEDURE ACT, 1812, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 829.

ORIGINATING PETITION under the Charities Procedure Act, 1812, s. 1.

On the hearing of the petition the question arose whether the fee of 50s. payable on the petition by way of impressed stamps was a stamp duty which had been remitted by s. 3 of the Act, or whether it was a court fee and as such remained payable.

Denys B. Buckley for the Attorney-General.

W. F. Waite for the Official Solicitor.

J. L. Arnold for the trustee of the charitable fund.

HARMAN, J.: I have been dealing with a petition entitled (*inter alia*) "In the matter of the Charities Procedure Act, 1812". That Act was passed under the tutelage, or, rather, under the advocacy, of LORD ROMILLY, and has been known of recent years as Lord Romilly's Act. The Act in question is entitled:

"An Act to provide a summary remedy in cases of abuses of trusts created for charitable purposes."

The object of the Act was to allow remedies for breaches of trust to be sought before the Lord Chancellor, the Master of the Rolls or the Court of Exchequer in a summary manner by petition and to be heard on affidavit. The petition had to be signed by the persons preferring it, attested by the solicitor or the attorney for the petitioners, and allowed by the Attorney-General's or Solicitor-General's

fiat before it could be presented. In fact, nowadays the Attorney-General presents such petitions as come under the aegis of that Act. Section 3, as amended by the Statute Law Revision Act, 1888, s. 1, is in these terms:

"And . . . neither the petitions, nor any proceedings upon the same or relative thereto, nor the copies of any such petitions or proceedings, shall be subject or liable to the payment of any stamp duty whatever."

When I asked what stamp duty was then payable on the petitions or proceedings on the same or copies thereof, I was referred to the Probate and Legacy Duties Act, 1808, then comparatively recently passed, which is entitled:

"An Act for repealing the stamp duties on deeds, law proceedings, and other written or printed instruments, and the duties on legacies and successions to personal estate upon intestacies now payable in Great Britain, and for granting new duties in lieu thereof."

That was a comparatively elaborate Act which altered the various rates of duty, including the one familiar to us until quite recently, namely, stamp duty under the Legacy Duty Act, 1796. At that time, documents had to be copied on stamped paper specially purchased for the purpose, and, in that way, the Commissioners of Stamps collected a large part of their revenue. When I look at Part II of the schedule to that Act I see that there are set out the duties on law proceedings

"in the courts of law and equity at Westminster . . . and in other courts in England . . . and also before the Lord High Chancellor . . ."

I also find, in Part II of the schedule, among other things, a fee of 2s. 6d. payable on a petition in any suit or action in any of the courts of equity at Westminster or before the Lord Chancellor in matters of bankruptcy and lunacy. That was a stamp duty which was clearly remitted by Lord Romilly's Act. There were, at that time, other fees payable by suitors; the petitioner would have had to pay to the clerks in chancery, so far as I can ascertain, certain fees by way of court fees for the assistance which they gave him and which they retained as their remuneration. It follows, then, that, although in 1812 the stamp duty was remitted, the court fee was not.

A further Act of 1824 (5 Geo. 4, c. 4) made certain amendments in the duties, as they were called, in law proceedings, and also in so-called duties on the parchment or vellum on which certain documents had to be copied. In 1833, I am told, certain reforms were made in the Court of Chancery under which the clerks in chancery were no longer entitled to retain such fees as they could obtain, but they must account for the surplus over and above such sum as was necessary to pay their salaries and pay that surplus into the consolidated fund.

By an Act of 1866 (29 and 30 Vic. c. 76), an arrangement was made whereby many court fees could, if the Treasury thought fit, be paid by stamps instead of in cash. That Act was repealed by the Public Offices Fees Act, 1879, s. 8, which shows the then method of collecting fees in public offices. Section 2, as amended by the Statute Law Revision Act, 1894, s. 1, provides:

"The fees payable in any public office shall be collected either in money or by means of stamps, or partly in one way and partly in the other way, according as may be from time to time directed by order of the . . . Treasury."

The Treasury was empowered to make regulations relating to the manner in which the fees taken were to be accounted for and paid over and for determining the use of impressed or adhesive stamps and the mode of cancellation of adhesive stamps. Therefore, from that time onwards their lordships of the Treasury could determine how fees payable, including court fees, could be discharged—whether in cash or by means of stamps. Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 213, the power of regulating those matters was

vested in the Lord Chancellor with the concurrence of the judges. The section reads:

"(1) Subject to the provisions of this Act, the Lord Chancellor, with the advice and consent of the judges of the Supreme Court or any three of them, and with the concurrence of the Treasury, may by order fix the fees and percentages to be taken in the High Court . . ."

A In accordance with that provision, the Supreme Court Fees Order, 1930 (S.R. & O., 1930, No. 579), is now the regulating instrument, which, by virtue of the Act of 1925, has statutory force. By that order the Lord Chancellor directs by art. 1 that the fees and percentages set out in the second column of sched. I to the order are to be taken in the Supreme Court. Under art. 5 (1),

B "The fees and percentages prescribed by this order shall, subject to the other provisions of this and the next following paragraph, be taken by impressed stamps."

There are certain exceptions to that, for instance, some stamps are to be adhesive stamps, and art. 6 provides that in the district registries of the High Court, other than in Manchester, fees are to be taken in cash and not in stamps at all.

C That being the position, it is said, that, as in the High Court fees on an originating petition, being, I think, 50s., are payable by way of impressed stamps in the ordinary course, that is a duty payable in stamps, and, therefore, a stamp duty, and, therefore, within the words of s. 3 of Lord Romilly's Act which speaks of "any duty whatsoever". In my judgment, that is not so. Stamp duties are one thing: court fees another. It is notable that in the Stamp Act, 1891, which is now the code for all stamps, court fee stamps, judicature stamps, are excluded.

D It seems to me that the fact that fifty or sixty years after Lord Romilly's Act was passed certain judicature stamps were ordained to witness the collection of court fees is irrelevant and does not enlarge the ambit of exemption which Lord Romilly's Act sought to confer. In my judgment, the ordinary fees are payable on a petition under that Act.

Solicitors: *Treasury Solicitor; Official Solicitor; Hancock & Willis* (for the trustee of the charitable fund).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

HIGGINS AND ANOTHER v. NORTH WEST METROPOLITAN REGIONAL HOSPITAL BOARD AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pilcher, J.), January 15, 18, 19, 29, 1954.]

Public Authority—Limitation of action—Action for negligence against medical specialist at hospital administered by hospital board—Limitation Act, 1939 (c. 21), s. 21 (1).

The second defendant was a part-time specialist in charge of the physical medicine department at a hospital administered by the first defendants (the hospital board). The board were entitled to control and criticise the second defendant's work with regard to the administration and organisation of his department, but had no control over him in regard to treatment which he gave or prescribed. On July 17, 1949, the female plaintiff attended the hospital as an out-patient for treatment which was administered to her by the second defendant and consisted of an injection into her left trapezius (a neck muscle). It was alleged by the plaintiffs that by reason of the second defendant's negligence, the needle penetrated the female plaintiff's pleural cavity as a result of which she became seriously ill. The writ in an action against the board and the second defendant alleging negligence by the second defendant was issued by the plaintiffs on Feb. 13, 1952, and by his defence the second defendant pleaded (inter alia) that he was protected by the Limitation Act, 1939, s. 21 (1), since at all material times he had acted in pursuance, or execution, or intended execution of the National Health Act, 1946, or of a public duty, and the action had not been commenced before the expiration of one year from the date on which the cause of action accrued. On trial of this issue as a preliminary point,

HELD: the treatment given by the second defendant was an act done on behalf of and with the authority of the hospital board in the execution or intended execution of a public duty which had been imposed on the board by the Act of 1946 and the orders made thereunder, and, therefore, he was entitled to the protection of the Limitation Act, 1939, s. 21 (1).

Nelson v. Cookson ([1939] 4 All E.R. 30) and *Griffiths v. Smith* ([1941] 1 All E.R. 66) applied.

FOR THE LIMITATION ACT, 1939, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1180.

Cases referred to:

- (1) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.
- (2) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.
- (3) *Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board*, [1952] 2 All E.R. 219; [1952] 2 A.C. 452; 3rd Digest Supp.
- (4) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820; 78 L.J.K.B. 958; *sub nom. Hillyer v. London Corpn.*, 101 L.T. 368; 73 J.P. 50; 13 Digest 406, 1277.
- (5) *Gold v. Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 2nd Digest Supp.
- (6) *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633; [1947] K.B. 598; [1947] L.J.R. 789; 176 L.T. 456; 111 J.P. 272; 2nd Digest Supp.
- (7) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.
- (8) *Roe v. Ministry of Health*, (1954), 98 Sol. Jo. 30.
- (9) *Nelson v. Cookson*, [1939] 4 All E.R. 30; [1940] 1 K.B. 100; 109 L.J.K.B. 154; 161 L.T. 346; 103 J.P. 363; 2nd Digest Supp.

(10) *Tilling (T.), Ltd. v. Dick, Kerr & Co., Ltd.*, [1905] 1 K.B. 562; 74 L.J.K.B. 359; 92 L.T. 731; 69 J.P. 172; 38 Digest 30, 167.

(11) *Greenwell v. Howell*, [1900] 1 Q.B. 535; 69 L.J.Q.B. 461; 82 L.T. 183; 38 Digest 105, 751.

(12) *Western India Match Co., Ltd. v. Lock*, [1946] 2 All E.R. 227; [1946] K.B. 601; 2nd Digest Supp.

(13) *Freeborn v. Leeming*, [1926] 1 K.B. 160; 95 L.J.K.B. 114; 134 L.T. 117; 90 J.P. 53; 38 Digest 130, 955.

(14) *Venn v. Tedesco*, [1926] 2 K.B. 227; 95 L.J.K.B. 866; 135 L.T. 108; 90 J.P. 185; 36 Digest 210, 1109.

(15) *Goodisson v. Byrne*, [1938] I.R. 580.

PRELIMINARY POINT in action for damages for negligence.

The first defendants were the board appointed under the National Health Service Act, 1946, to administer Mount Vernon Hospital, Northwood. The second defendant was the doctor in charge of the physical medicine department at that hospital. The plaintiffs were husband and wife. On July 17, 1949, the second plaintiff (Mrs. Higgins) attended at the hospital for treatment which was prescribed and administered by the second defendant, and consisted of an injection into her left trapezius (a neck muscle). It was alleged by the plaintiffs that, as a result of the second defendant's negligence, the needle which he was using penetrated the second plaintiff's pleural cavity and caused a traumatic pneumothorax as a result of which she became seriously ill and was unable to work for two years.

The writ in the action was issued on Feb. 13, 1952 (i.e., more than two and a half years after the occurrence). Paragraph 5 of the second defendant's defence was in the following terms:

"This defendant at all material times was acting in pursuance or execution or intended execution of an Act of Parliament, namely, the National Health Service Act, 1946, and/or a public duty or authority, and these proceedings were not commenced before the expiration of one year from the date on which the cause of action accrued. This defendant relies on s. 21 of the Limitation Act, 1939."

The hospital board put in a defence denying negligence, but did not claim the protection of the Limitation Act, 1939, s. 21 (1). On May 11, 1953, an order was made that the point raised by the above paragraph of the second defendant's defence be tried as a preliminary point, to determine whether he was entitled to the protection of the Limitation Act, 1939, s. 21 (1). The terms of the second defendant's appointment and his contract with the board appear in the judgment.

Blackledge, Q.C., and *Andrew Rankin* for the plaintiffs.

J. Stirling for the hospital board.

Cumming-Bruce for the second defendant.

Cur. adv. vult.

Jan. 29. **PILCHER, J.**, read a judgment in which he stated the facts and continued: The second defendant was called, and his evidence can be summarised as follows:

"I am a registered medical practitioner, a master of arts, a doctor of medicine of the University of Oxford, a member of the Royal College of Surgeons, and I hold a diploma of physical medicine. I was qualified in 1926, and specialise in physical medicine. Before July 5, 1948, which was the 'appointed day' under the National Health Service Act, 1946, I was the consultant physician in charge of the physical medicine department at the Mount Vernon Hospital. This hospital then was, and still is, a general hospital with some eight hundred beds. Before the appointed day it was a voluntary hospital. The hospital is organised in departments, of which the

physical medicine department is one. The functions of this department are to supply facilities for the rehabilitation of patients by means of physiotherapy, remedial gymnastics, occupational therapy, etc. Patients are referred to me by members of the consultant staff of the hospital, and by medical practitioners outside the hospital. As physician in charge of the department, I was at all times responsible for the organisation and internal administration of my department, the general supervision of patients presented to me for treatment, the supervision of diagnoses and actual diagnosis in cases which I considered to require my personal attention. I also myself gave treatment in cases when I considered this desirable. Immediately under me I had a medical registrar, a part-time house physician for patients in the ward and a team of medical auxiliaries qualified to give treatment prescribed by myself. I myself was at all material times the hospital's recognised specialist in physical medicine. I did not, before the appointed day, and do not since, recognise the right of anyone to control the way I do my work. Before the appointed day I was paid a salary. I was supposed to work at the hospital for seven hours a week, but as a rule I worked there considerably longer than this. After the appointed day I entered into a contract with the hospital board to carry on the same duties at the hospital as I had previously performed. In fact, I worked considerably longer at the hospital than I had before the appointed day. Under my contract with the board, I was supposed to devote two 'notional half days' to my work at the Mount Vernon Hospital, and on this basis I was at the material time paid at the rate of £400 per annum by cheque monthly. My appointment at the Mount Vernon Hospital was that of a part-time specialist. In July, 1949, I held similar appointments at other hospitals, and was devoting eight-elevenths of my time to hospital work. The remainder of my time was spent in attending to my private consulting practice in Devonshire Place. I specialise in rheumatic diseases as well as physical medicine. Under the terms of my contract with the board, I can be required, within certain limits, to attend at other hospitals in the region. If the board so desired, they would be entitled to criticise and control my work in so far as it consists of internal hospital administration. [The female plaintiff] was an out-patient of the hospital. She was referred to me for treatment. I diagnosed her case, prescribed the treatment, and, on July 17, 1949, gave her the injection complained of. I do not recognise that any official of the board had any right to control my actions in any way in regard to the way in which I gave the injection. I have taken the oath of Hippocrates to do my work as well as I can. I am classed as an 'employed person' for the purposes of National Health Insurance. I subscribe out of the salary which I receive from the hospital board towards a superannuation fund."

I have thought it desirable to summarise Dr. Bach's evidence fairly fully in order that a reasonably clear view of his position and duties at the Mount Vernon Hospital may be presented.

On June 23, 1948, the hospital board sent a printed form of letter to Dr. Bach. This was headed:

"North West Metropolitan Regional Hospital Board. National Health Service Act, 1946. Medical and dental staff of the hospital and specialist services; arrangements from the appointed day."

The letter then proceeds as follows:

"By virtue of the provisions of the Regional Hospital Boards, etc. (Functions) Regulations, 1948, and regulations to be made under s. 14 (2) of the Act, it will be for regional boards to appoint specialist staff including staff senior to the grade of registrar--and for management committees to appoint other medical and dental staff. Specialists will be remunerated by

the regional boards. . . . The invitation to take part in the service on the basis of the remuneration and conditions now proposed is made for a limited period only in order to allow of review and the substitution of firm contracts on a permanent basis as soon as possible Broadly, the position under the National Health Service Act is that medical and dental staff engaged whole-time in hospital, clinic, etc., work, will be transferable to the service of the board and no new contract will be required; but that part-time staff will not, in general, be transferable and a new contract will be necessary in each case. The following paragraphs set out the position in more detail."

I merely pause there to say that Dr. Bach was a member of the part-time staff. Transferable staff and non-transferable staff are then defined in detail, and the necessity for making short-term arrangements is gone into. The question of remuneration for specialists is referred to in the following terms:

"The contract with each part-time specialist and the remuneration paid to him will cover all services rendered to the board other than domiciliary visits (which are referred to below). The scale of remuneration which the Ministry of Health have directed the board to offer is set out in the appendix, together with the conditions of service which will be applied provisionally. To arrive at the appropriate remuneration, the average time given to the various activities has been assessed and aggregated in terms of half days per week."

A number of further provisions follow with regard to the remuneration of medical officers acting under this form of contract, and in the schedule at the end of the form Dr. Bach is appropriated, if that be the correct word, to the Mount Vernon Hospital, and his duties are said to be the

"Existing duties as physician in charge of the physical medicine department",

on two half days per week. Dr. Bach signed the form at the end of that letter and sent it back to the board, and, in substance, continued to perform his duties in exactly the same fashion as he had before he signed that document.

On Feb. 28, 1949, a further letter was addressed to the second defendant which, in effect, provided that the interim arrangements arrived at under the document to which I have referred should be extended from the contemplated date of Mar. 31, 1949, to July 4, 1949. On June 22 a further document of the same nature was addressed to Dr. Bach by the hospital board, which had the effect of continuing the provisional arrangement after July 4, 1949, on the same terms as had been entered into before. Finally, on Mar. 14, 1950, a more permanent arrangement was arrived at with Dr. Bach on substantially the same terms, except as to remuneration, and it is quite unnecessary that I should say anything about that. The matters out of which this case arise having taken place on July 17, 1949, it was while carrying on his duties at the hospital under the provisional arrangements set out in the board's original letter to which I have referred that the second defendant gave the treatment to Mrs. Higgins which gave rise to these proceedings.

It is common ground that the first defendants in the action, the hospital board, are a public authority. Section 21 (1) of the Limitation Act, 1939, is in the following terms:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

I am not now concerned whether the second defendant was or was not negligent in giving the treatment which he did to the female plaintiff, nor am I concerned whether the relationship of the second defendant to the hospital board was such

as to render the board liable for the negligence, if any, of the second defendant on the principle of respondeat superior. My only task is to determine whether, in the particular circumstances of this case, the second defendant is entitled to claim the protection of s. 21 (1) of the Limitation Act.

It was not really in dispute that, in giving to Mrs. Higgins the injection which he did, the second defendant was acting in the ordinary course of his duty as a part-time specialist under the National Health Service Act in charge of the physical medicine department of the Mount Vernon Hospital. For the purposes of this case I assume that the duty of treating patients within the region which they administer, as well as the duty of administering the health service provided under the Act, was on the hospital board, which was itself a public authority and entitled to the protection of s. 21 (1) of the Limitation Act. If the second defendant, who was a part-time specialist at the hospital, can properly be regarded as a servant of the hospital board, and if he was at the material time performing or purporting to perform, as the servant of the board, a public duty laid on the hospital board by statute, it is not in dispute that he is entitled to the protection of s. 21 (1) of the Limitation Act. The plaintiffs, however, contend that, in giving the treatment which he did, the second defendant was not the servant of the hospital board, but was in the position of an independent contractor in respect of whose negligence, if any, the board was not responsible on the basis of respondeat superior. They contend that principals can only act through servants, for whose acts they are legally responsible, or through independent contractors, for whose acts they are not responsible. Admitting that the servants of a public authority, while performing a public duty on behalf of the authority, are protected by the section, they deny that persons in the position of the second defendant, who are, it is said, independent contractors in the sense that they are uncontrolled and uncontrollable in the exercise of their professional duties, are entitled to any protection.

The argument presented on behalf of the second defendant ran along these lines. In giving the treatment which he did, he was performing on behalf of the hospital board one of the very duties which it had been directed to perform by the Minister. This duty was a public duty and one which the board (on the assumption that the duty had been properly delegated to them) could only properly perform by the hand of an experienced doctor. The second defendant, in giving the treatment in question, was in no sense performing an act collateral to the duty of the board: see *Bradford Corpn. v. Myers* (1). I do not propose to spend time on this branch of the argument advanced on behalf of the second defendant, because I am satisfied that it is correct. In support of this view, I need only refer to *Griffiths v. Smith* (2), and, in particular, to the passages in the speech of VISCOUNT SIMON, L.C. ([1941] 1 All E.R. 71, 72). I also refer to *Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board* (3). The act of which the plaintiff complains in the present case was, in my view, clearly an act done by the second defendant on behalf of the hospital board in execution or intended execution of a public duty. It was an act in respect of which the hospital board, if they are responsible in law for the negligence of the second defendant, would have been entitled, had they thought fit, to claim the protection of s. 21 (1).

I was referred during the course of the argument to a long line of cases dealing with the responsibility in law of hospitals of different constitutions for the negligent acts of their "staff", using that word in its widest sense. This line of cases starts with *Hillyer v. St. Bartholomew's Hospital (Governors)* (4). Until *Gold v. Essex County Council* (5) came before the Court of Appeal, *Hillyer's* case (4) was regarded as having decided that the only duty owed by the governors of a public hospital towards a patient was to exercise due care and skill in selecting their medical staff, that the relationship of master and servant did not exist between the governors and the medical staff, and that the nursing staff, when

assisting at an operation performed by a consulting surgeon, ceased to be the servants of the governors. *Gold's* case (5) in effect reversed what had hitherto been regarded as the effect of the decision in *Hillyer's* case (4), and since the decision in *Gold's* case (5), which concerned the negligence of a competent whole-time radiographer on the staff of a hospital, the law has been that a public hospital, whether administered by a local authority or by a board of governors, owes to a patient the duty to nurse and treat him carefully and is liable for the negligence of its whole-time staff with the possible exception of honorary physicians and surgeons.

In *Gold's* case (5) LORD GREENE, M.R., says ([1942] 2 All E.R. 242):

"The question which presents itself in the present case may therefore be formulated as follows. When a patient seeking free advice and treatment such as that given to the infant appellant knocks at the door of the respondents' hospital, what is he entitled to expect? He will find an organisation which comprises consulting physicians and surgeons, presumably also house physicians and surgeons, a staff of nurses, equipment for administering Grenz-ray treatment and a radiographer, Mead, employed to give that treatment. So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the respondents precludes the drawing of an inference that the respondents undertake responsibility for their negligent acts. The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it. The position of the nurses again, though no doubt analogous, is not strictly relevant; but, if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions, I cannot myself see any sufficient ground for saying that the respondents do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse. Nursing, it appears to me, is just what the patient is entitled to expect from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients."

In *Collins v. Hertfordshire County Council* (6) HILBERY, J., found the hospital authority responsible for the negligence of a resident non-qualified junior house surgeon. In *Cassidy v. Ministry of Health* (7) the Court of Appeal in effect decided that a qualified medical practitioner, in that case a whole-time assistant medical officer at Walton Hospital, Liverpool, was a person for whose negligence the hospital authority were responsible. DENNING, L.J., in an interesting judgment, went further than this and clearly took the view that hospital authorities, in every case when the patient did not select his own physician or surgeon, were liable on the basis of respondeat superior for the negligence of part-time consulting staff as well as permanent full-time staff. This point was not necessary for the decision of *Cassidy's* case (7), but it would seem that the learned lord justice would, in the case with which I am dealing, have been prepared to hold the hospital board responsible for any negligence proved against Dr. Bach. In *Roe v. Ministry of Health* (8) McNAIR, J., took the view that the hospital authority would not be responsible for the negligence of a part-time consultant anaesthetist, who was, I suppose, a specialist in much the same position as the second defendant.

I hope that I have made it quite clear that I am not now concerned with the question whether or not the hospital board in the present case are vicariously responsible for any negligence which may be proved against the second defendant, and I have only referred to the line of cases dealing with the vicarious responsibility of hospital authorities for the negligence of their staff because these cases were cited to me in argument and tend to show the way in which the view of the courts has changed since the decision of the Court of Appeal in *Gold's* case (5)

in regard to the vicarious responsibility of hospital authorities for the negligence of their staff.

I will now turn to cases which have a more direct bearing on the point which I have to determine, starting with *Nelson v. Cookson* (9), which was a decision of ATKINSON, J. The facts of the case were as follows. In March, 1937, the infant plaintiff entered a county hospital and was operated on for the removal of tonsils and adenoids by the defendants, who, at the time, were assistant medical officers of the institution. After the operation the second defendant, who acted as anaesthetist, placed a gag in the mouth of the patient to enable an examination of her throat to be made, and by reason of the gag, which was taken from a sterilizer, being too hot, the girl suffered severe burning of her left cheek, which resulted in a permanent scar. It was admitted that the hospital was an institution which the county council were empowered by the Local Government Acts, 1888 and 1929, to maintain for public health purposes, and, the writ in the action having been issued more than six months after the act complained of, the defendants, while denying negligence, pleaded that the action was barred by s. 1 of the Public Authorities Protection Act, 1893. It will be seen that this case raises very much the same point as I have to determine in the present case, there being no difference, for my purposes, between the terms of s. 1 of the Public Authorities Protection Act, 1893 and the terms of s. 21 (1) of the Limitation Act, 1939. It is to be observed that *Nelson v. Cookson* (9) was decided some three years before *Gold's* case (5) and at a time when the responsibility or lack of responsibility of hospitals for the negligence of their permanent staff was regarded as being settled by the decision in *Hillyer's* case. The fact that this was then the situation is referred to by ATKINSON, J., in his judgment in a passage which I will presently quote. Recognising that, as the law then stood, a hospital was not in general terms vicariously responsible for the negligence of its permanent staff, ATKINSON, J., none the less came to the conclusion that two whole-time medical officers of the hospital in question were entitled to the benefit of s. 1 of the Public Authorities Protection Act. It was argued on behalf of the plaintiff in *Nelson v. Cookson* (9) that it was anomalous to confer on medical practitioners, for whose negligence, on the law as then understood, the hospital was not responsible, the protection afforded to the hospital by the Act. It was submitted that the two defendant doctors in that case were in the position of independent contractors, and reliance was placed on the case of *T. Tilling, Ltd. v. Dick, Kerr & Co., Ltd.* (10), where a firm of independent contractors, carrying on work on behalf of the London County Council under contract, were held not to be entitled to the protection of the Act. This argument was rejected summarily by ATKINSON, J.

Unless *Nelson v. Cookson* (9) can be distinguished from the case now before me on its facts or on principle, it is a decision which binds me and a decision with which, if I may say so with respect, I agree. The only distinction which is sought to be drawn between the facts of the case which I have to decide and the facts in *Nelson v. Cookson* (9) is that in the present case the second defendant was a part-time specialist, whereas the defendants in *Nelson v. Cookson* (9) were whole-time medical officers on the permanent staff of the hospital and, as such, more in the category of "servants" than was the second defendant in this case. Even if it be assumed that the second defendant is now a person for whose negligence the hospital board are not vicariously responsible, the defendants in *Nelson v. Cookson* (9) were, at the time of the decision of that case, regarded as being in precisely the same position. This fact in itself does not, therefore, in my view, afford any distinction between the present case and *Nelson v. Cookson* (9). I think, moreover, that the development of the law since the decision in *Hillyer's* case (4) in regard to the vicarious responsibility of hospital authorities for the negligence of their medical staff serves rather to support than to weaken the decision in *Nelson v. Cookson* (9).

Counsel for the plaintiffs submitted that, in so far as actions in tort were concerned, a person carrying out a duty on behalf of another must be either a servant for whose negligence the principal was responsible or an independent contractor for whose negligence the principal was not responsible. He submitted that the second defendant, who did not admit the right of the hospital board to control the way he did his professional work, should be regarded as an independent contractor. He submitted that there was no decided case in which the protection of the Public Authorities Protection Act or the Limitation Act had been held to cover the deliberate act or negligence of anyone who could not properly be called a servant of the public authority. He referred to *Greenwell v. Howell* (11), where the protection of the Act was granted to a county surveyor and a deputy clerk of a council who were in fact the servants of the council, although in the case they are referred to also as "officials" and "subordinates".

- A
- B It seems to me that in this connection the decision of LORD GODDARD, C.J., in *Western India Match Co., Ltd. v. Lock* (12), is, perhaps, of some interest. In that case three defendants, the representative at Basra of the Minister of War Transport, a sea transport officer, and the divisional sea transport officer at Bombay, were held entitled to the protection of the Limitation Act although the exact position of two of these officers in relation to the Minister of War Transport was never precisely defined and nowhere in the report are they referred to as servants.
- C

Reverting to *Nelson v. Cookson* (9), I respectfully adopt the reasoning of ATKINSON, J., in that case. He says ([1939] 4 All E.R. 32):

- "It is curious that the precise point never seems to have been argued before. It has been recognised, I think, as law for a long time that if a public duty, or an act done in pursuance of a public authority, is being carried out by a public authority through some servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have. That, certainly, I think, has been recognised as the law for some time. It was treated as good law in *Greenwell v. Howell* (11). I think common sense would indicate that that must be the position.
- D
- E Every public authority has to act by an agent or delegate or servant, and it would be idle merely to protect the public authority itself if the party complaining could bring an action against the actual person who had performed the act complained of. I do not gather that it is challenged in this case that that as a general principle is undoubted law; but it is said that it is equally clear law that local authorities or hospital authorities under a county council are not responsible in law for the negligence of their medical officers and that, therefore, as the authority could not be sued, the medical officers as individuals can . . . But it is said that, where you get cases of acts done by servants or agents or delegates, . . . in circumstances which would not render the authority liable to any action, the person acting cannot claim the benefit of this statute. That, I think, would be quite an interesting point to discuss, and I do not know that one might not have been disposed to give some weight to that argument if it were not that the contrary seems to have been recognised as law in quite a number of cases."
- F
- G

- The learned judge then refers to *Freeborn v. Leeming* (13), and *Venn v. Tedesco* (14), in both of which it was conceded that medical officers on the staff, in the one case of a workhouse infirmary and in the other of a public hospital, were entitled to the protection of the Public Authorities Protection Act. He goes on (*ibid.*, 33):
- H

"It is very difficult to ask a court of first instance . . . to take a different view . . . when one finds that for quite a long time a certain rule has been accepted as law, it would take a great deal to convince one that it was wrong, and I am not satisfied that it is wrong. I think it is right. It seems to me that these two gentlemen were exercising what was really a

public authority. It was an authority given to the Middlesex County Council to provide and conduct this hospital and to maintain medical services . . . they cannot do it with their own hands. The county council has not got its own hands. It has to act through other people, and this particular authority was being exercised by these two different men. It seems to me, therefore, that it is idle to say that they were not in fact acting in pursuance of a public duty or authority conferred on the Middlesex County Council. They were; they were performing this public duty or public authority, whichever you like to call it, as agents for, or as delegates for and on behalf of, the council, and I think they are entitled to the benefit of the Act."

Dealing with *T. Tilling, Ltd. v. Dick, Kerr & Co., Ltd.* (10), ATKINSON, J., said (*ibid.*, 34):

"It seems to me hopeless to regard them [the defendants] as I am asked to do, as independent contractors. The case relied upon for that proposition is *T. Tilling, Ltd. v. Dick, Kerr & Co.* (10), where the independent contractors were held not to be entitled to the benefit of the Act. In the judgment of WARRINGTON, J. ([1905] 1 K.B. 570) there is this passage: 'It has been held that the protection of the [Public Authorities Protection] Act extends to the officers of a public body and to persons acting under their direct mandate . . .'. It seems to me really almost an absurdity to ask me to regard them as independent contractors. They are not; they are officers of a public body performing a public duty imposed upon the county council, a duty which can only be performed through and by individuals."

I entirely agree with what is said by ATKINSON, J., in this last passage, and I would add that since the decision in *Nelson v. Cookson* (9) the development of the law along the line that a doctor's uncontrollability in the exercise of his professional functions does not take him out of the servant category to which the principle of respondeat superior applies tends to weaken any argument which can properly be advanced on the authority of such cases as *T. Tilling, Ltd. v. Dick, Kerr & Co., Ltd.* (10).

While it is not binding on me, *Goodisson v. Byrne* (15) is interesting. In that case the Supreme Court in Ireland decided that the defendant, a house surgeon at the material time in the whole-time service of the county hospital at Wexford, which was a public authority, was entitled to the protection of the Public Authorities Protection Act. FITZGIBBON, J., delivering the judgment of the court, held that any "person" to whom a public authority or the performance of a public duty has been lawfully delegated is entitled to the protection of the Act if the delegation be that of a master to a servant or of a principal to an agent, the words of the Act applying not only to bodies corporate but also to persons identifiable with them.

It is not necessary for me to precisionise what the second defendant's position was in relation to the hospital board. He was certainly acting as an agent for the board at the material time. He would, no doubt, be properly described as an officer of the board. He may have been the servant of the board. At the material time I am satisfied that he was a person acting on behalf of the hospital board in the execution or intended execution of a public duty. The duty which he was performing or intending to perform, was, moreover, one which, for the purposes of this case, I take to have been imposed on the hospital board by the National Health Service Act, 1946, and the orders made under the Act. The second defendant is, accordingly, in my view, entitled to the protection of s. 21 (1) of the Limitation Act, and I determine the preliminary point submitted to me in his favour.

Judgment for the second defendant.

Solicitors: *R. I. Lewis & Co.* (for the plaintiffs); *J. Tickle & Co.* (for the hospital board); *Hempsons* (for the second defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

R. v. BRIGHTON AND AREA RENT TRIBUNAL. *Ex parte*
SLAUGHTER AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 20, 21, 29, 1954.]

Rent Control—"Dwelling-house"—Premises containing shop and dwelling accommodation—Covenant by tenant not to use premises save as shop for greengrocer's business—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1).

The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, apply to any premises which are let to a tenant for the purpose of his living in them as his home, provided (a) that he is not a service tenant, and (b) that the premises are within the ambit of the Acts by reason of their rent or rateable value.

By a lease, dated Oct. 16, 1950, premises, which consisted of a shop, office, store room and kitchen on the ground floor, and a self-contained flat, approached by an outside staircase, on the first floor, were let for a term of twenty-one years at a rent of £350 a year. The two floors had never before been let together and were separately assessed for rates. The first floor flat, which contained three rooms and a bathroom and water closet, had always been used for residential purposes. The lease of 1950 contained, inter alia, the following covenants by the tenant: (a) not to "use the demised premises or any part thereof save as a shop only nor [to] permit the demised premises or any part thereof to be used otherwise than for the business of a . . . greengrocer . . ."; (b) not to "keep the demised premises closed for a longer period than fourteen days at any one time during any one year of the . . . term without first obtaining the consent" of the landlord; and (c) not to make any alteration to the demised premises without the written consent of the landlord. The tenant carried on business in the shop premises and lived in the flat. In 1953 he applied to the rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), to fix a reasonable standard rent for the premises, but the tribunal held that they had no jurisdiction to do so as the premises did not constitute a "dwelling-house" within the meaning of the Rent Restrictions Acts. On a motion by the tenant for an order of mandamus,

HELD: the premises were let both for residential and business purposes, and the covenant by the tenant in regard to user did not prohibit him from living on the premises, provided that he carried on the business of a greengrocer in the shop, and, therefore, as the premises were let to the tenant for the purpose of his living in them as his home, they constituted a "dwelling-house" within the meaning of the Rent Restrictions Acts, and the tribunal had jurisdiction to fix a reasonable standard rent under the Landlord and Tenant (Rent Control) Act, 1949, s. 1.

Whiteley v. Wilson ([1952] 2 All E.R. 940), applied.

AS TO PREMISES USED PARTLY FOR BUSINESS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 20, p. 315, para. 371, and 1953 Supp.; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 647-649, Nos. 7517-7527.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1, see *ibid.*, p. 1094.

Cases referred to:

- (1) *Epsom Grand Stand Assocn., Ltd. v. Clarke*, (1919), 35 T.L.R. 525; 31 Digest, Replacement, 704, 7935.
- (2) *Hicks v. Snook*, (1928), 93 J.P. 55; 31 Digest, Replacement, 648, 7521.

(3) *Whiteley v. Wilson*, [1952] 2 All E.R. 940; [1953] 1 Q.B. 77; 3rd Digest Supp.

(4) *R. v. Folkestone Rent Tribunal. Ex p. Webb*, (1953), post, p. 427.

(5) *Burns v. Radcliffe*, [1923] 2 I.R. 158; 31 Digest, Replacement, 650, 2531.

MOTION for an order of mandamus directed to the Brighton and Area Rent Tribunal requiring them to hear and determine an application by the applicants under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), to fix a reasonable standard rent for premises of which the applicants were the tenants. A

The applicants, who held the premises under a lease dated Oct. 16, 1950, carried on business in a shop on the ground floor and lived in a residential flat on the first floor. At the hearing before the tribunal it was submitted by the landlords that the tribunal had no jurisdiction to fix a rent under s. 1 (1) of the Act of 1949 as the premises were not a "dwelling-house" within the meaning of the Rent Restrictions Acts. In support of their submission, they contended that the tribunal could look only at the lease to ascertain whether the premises were let as a dwelling-house and were not entitled to have regard to the actual user or to any other of the surrounding circumstances, and that, on the true construction of the lease, the tenants were entitled to use the premises only as a shop, and that the user of more than half the premises as a dwelling-house was a breach of covenant. The tribunal accepted the landlords' submissions and held that they had no jurisdiction. B C

Stogdon for the tenants.

H. B. Grant for the landlords.

J. P. Ashworth for the rent tribunal.

Cur. adv. vult.

Jan. 29. **LORD GODDARD, C.J.**, read this judgment of the court. In this case counsel moves on behalf of the applicants, tenants of premises known as No. 195, Tarring Road, Worthing, for an order of mandamus directed to the Brighton and Area Rent Tribunal to hear and determine an application made by them to the said tribunal to fix a reasonable standard rent for the said premises under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949. The facts, which are not in dispute, are as follows. By a lease, dated Oct. 16, 1950, Selsdon Trust, Ltd., let the said premises to one Jack Rumsey for a term of twenty-one years from Sept. 29, 1950, at a rent of £350 per annum. At some time prior to Aug. 15, 1951, Selsdon Trust, Ltd., assigned their rights as lessors to Dawes & Co. (Mitcham), Ltd., the present landlords. On Aug. 15, 1951, Rumsey assigned the lease with the consent of the landlords to the applicants. In April, 1953, the applicants applied to the tribunal to fix a standard rent for the premises under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949. A hearing took place and the matter was hotly contested, the landlords alleging that the tribunal had no jurisdiction. Ultimately, on July 21, 1953, the tribunal informed the parties that they had decided that they had no jurisdiction and dismissed the application. At all material times the premises consisted of a shop, office, store room and kitchen on the ground floor forming shop premises, and on the first floor, approached by an outside staircase, there were three rooms together with a bathroom and a water closet, forming a self-contained flat. The premises, until the date of the lease in question, had never been let as a whole, and the two floors were separately assessed for rates, the rateable value of the ground floor being £51, and of the first floor £19. The applicants carry on business in the shop premises and make their home in the flat. Accordingly, if the premises so let fall to be considered as a dwelling-house within the meaning of the Act, they were the proper object of an application to the tribunal and the tribunal would be bound to fix a reasonable standard rent for them. If, on the other hand, the premises do not constitute such a dwelling-house, as the landlords maintain and as the tribunal have found, then the tribunal acted rightly in refusing jurisdiction. D E F G H

A dwelling-house within the meaning of the Act of 1949, which is to be read

with the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, is any house or part of a house let as a separate dwelling (subject to the rateable value not exceeding certain limits), and by s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, it is provided that:

“ Subject to the provisions of para. (a) of the last preceding sub-section, the application of the [Rent Restrictions] Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . . ”

A Section 3 (2) (a) is immaterial for the present purpose. It is unnecessary to set out the remainder of s. 3 (3), which has been held to cover only leases where the dwelling-house is let with land or other buildings separate from the dwelling-house. The passage set out above is that applicable where what is being considered is a single, though composite, structure. Whether or not a single structure used partly as a dwelling-house and partly for business purposes is a dwelling-house within the Rent Restrictions Acts has been the subject of a great number of decisions of the Court of Appeal, beginning with *Epsom Grand Stand Assocn., Ltd. v. Clarke* (1) and, after that decision became incorporated in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (ii), with *Hicks v. Snook* (2) and ending with *Whiteley v. Wilson* (3). For reasons which will appear hereafter in this judgment, we do not feel it is now necessary to go in detail through the various decisions.

C The argument advanced by the landlords in this case is based on the presence of a covenant which appears in cl. 2 (11) of the lease. It reads as follows:

D “ The lessee will not use the demised premises or any part thereof save as a shop only nor permit the demised premises or any part thereof to be used otherwise than for the business of a fruiterer greengrocer and florist . . . ”

Reliance is also placed on cl. 2 (19):

“ The lessee will not keep the demised premises closed for a longer period than fourteen days at any one time during any one year of the . . . term without first obtaining the consent of the lessor thereto in writing.”

E The principle, as we understand it, is this. If the covenant debars the use of the whole of the premises for the purposes of a dwelling-house so that the tenant can be restrained from such user, that is conclusive against the premises being a dwelling-house apart from any assent to change of user. It appears to us that, apart from the covenant in cl. 2 (11) of the lease, the facts in the present case are really indistinguishable from those in *R. v. Folkestone Rent Tribunal. Ex p. Webb* (4), which was before this court on May 1, 1953. We relied in that case on the judgments in *Whiteley v. Wilson* (3). It was a case where the premises were a shop with living rooms above, and there is no substantial difference between the premises in that case and those in the present. In *Webb's* case (4) we held that the facts gave the tribunal jurisdiction. We decided that it was immaterial to inquire into questions relating to dominant user, and that, if the tenant was making the structure, to use a neutral expression, his dwelling and was doing nothing improper in so doing, that was enough. No appeal was brought against our judgment and it binds this court unless the covenant which we have mentioned distinguishes it. In *Webb's* case (4) there was a covenant not to carry on any business but that of a tobacconist, while in the present case the covenant is, no doubt, wider as it provides that the premises are not to be used save as a shop for a greengrocer's business. In *Whiteley v. Wilson* (3), on which, as we have said, this court relied, it is true that ROMER, L.J., did, in his judgment ([1952] 2 All E.R. 944), except the case where a purpose is specified in the agreement, and in the present case it is said that the effect of the covenant is to except, that is, to prohibit, the premises from being used as a dwelling. The rule with regard to the construction of a covenant is conveniently stated in FOA'S LANDLORD AND TENANT, 7th ed., p. 111, and, as we think the passage accurately

states the law, we will quote it instead of setting out the various cases which deal with this point:

"A covenant, like any other contract, is to be construed according to the intent of the parties as expressed by their own words, and by regard to the whole of the instrument, and the surrounding circumstances of the case, it being also a rule that if the words be doubtful, that construction is to be taken which is most strong against the covenantor."

Bearing that in mind, it is, in our opinion, impossible to construe this covenant so as to prohibit the tenant from living on the premises. Provided that the tenant carries on a greengrocer's business, it would, in our opinion, be impossible, and, indeed, absurd, to say that he was in breach of his covenant because he lived on the premises. So to hold would mean that the whole of the upper part was sterilised, at least to the extent that the rooms could be used only as a store or for some such purpose, and not for that which they were designed although the tenant is under covenant to preserve and not to alter them. To show the absurdity of such a construction we need only point to the covenant to repair (cl. 2 (5)), which provides that the tenant is among other things to grain, varnish, whitewash and colour such parts as are usually so treated and to paper with paper of suitable quality such parts as are usually papered. You do not paper greengrocer's shops. The premises are obviously let both for residential and shop purposes, and a shop is to be maintained there because they are in a shopping street and, if they were not used as such, their value would or might be impaired. No shopkeeper would be likely to pay £350 a year for these premises, nor would a lessor expect to get that rent, if everything but the ground floor is to be sterilised in the sense that the upper part is not to be used for the purpose for which it is designed. Even if the contract was worded so strongly that the court was constrained to construe it as prohibiting the tenant from living on the premises, it seems to us probable that the landlord here could not insist on that construction. The uncontradicted evidence is that the upper part has always been used as a residence and this must have been known to both the original lessors and to the present landlords who bought their reversion. But as this point was not fully argued before us we will say no more about it, though it will be open to the tenant if this case goes higher.

Cases in which the demise was of a barn or a warehouse, but in which the lessee squatted, to use a convenient expression, or lived as a caretaker are not in *pari materia* with the present. To use a convenient phrase borrowed from the judgment of MOORE, L.J. ([1923] 2 I.R. 162) in *Burns v. Radcliffe* (5):

"... the nature of the business is not incompatible with the residence of the tenant ... [and] I can see no reason for holding that the whole premises were not [his] dwelling-house."

This conclusion is, we think, in accordance with the decision of the Court of Appeal in *Hicks v. Snook* (2). Accordingly, we do not find it necessary to go through the numerous cases which have been cited to us because each must depend on its particular facts. The principle which we would endeavour to state is that, be the premises what they may, if it appears that they were let to a tenant for the purpose of his living in them as his house, provided that he is not a service tenant, then they come within the Rent Restrictions Acts, subject, of course, to their rental or rateable value. No doubt, a difficult problem here confronts the tribunal, for the Acts do not direct that separate rents are to be found for the business part and for the residential part. This, however, does not directly arise on the present motion. In our opinion, the tribunal had jurisdiction in this case and an order of mandamus should issue.

Order for mandamus.

Solicitors: *Hastewood, Hare, Shirley Woolmer & Co.*, agents for *Basley & Co.*, Brighton (for the applicants); *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. FOLKESTONE RENT TRIBUNAL. *Ex parte* WEBB.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, J.J.), May 1, 1953.]

Rent Control—"Dwelling-house"—Premises containing shop and dwelling accommodation—Covenant by tenant to use premises for no business other than that of a tobacconist—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3)—Landlord and Tenant (*Rent Control*) Act, 1949 (c. 40), s. 1 (1).

Case referred to:

A (1) *Whiteley v. Wilson*, [1952] 2 All E.R. 940; [1953] 1 Q.B. 77; 3rd Digest Supp.

MOTION for an order of mandamus directed to the Folkestone Rent Tribunal (now part of the Kent Rent Tribunal) to hear and determine an application by the applicant, under the Landlord and Tenant (*Rent Control*) Act, 1949, s. 1 (1), to fix a reasonable standard rent for premises known as No. 72, High Street, Folkestone, of which the applicant was the tenant. The premises consisted of a shop on the ground floor and dwelling rooms on the two upper floors. The residential part, to which there was a separate entrance, consisted of a kitchen, a living room, and a water closet on the first floor, and two bedrooms on the second floor. The services to the premises consisted of gas, electricity, and water. These services were not provided separately and independently for the shop. The lease contained a covenant by the tenant not to carry on any business on the premises other than that of a tobacconist. The rent tribunal held that they had no jurisdiction to entertain the application as the premises were let to the applicant as business premises.

B
C L. A. Blundell for the applicant.
McCreery for the landlord.
J. P. Ashworth for the tribunal.

LORD GODDARD, C.J.: The case raises the familiar question whether premises are business premises or whether they are a dwelling-house. It is a question whether or not the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), applies. Section 3 (3) provides:

D "Subject to the provisions of para. (a) of the last preceding sub-section, the application of the [Rent Restrictions] Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the [Rent Restrictions] Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

E [HIS LORDSHIP stated the facts and continued:] It is impossible, I should have thought, to suppose that the living part of these premises could be described as anything else than a dwelling-house. There is a separate entrance, a kitchen, a sitting-room, bedrooms, sanitary arrangements and everything of that nature which one would expect to find. But the chairman of the tribunal, giving the decision of the tribunal, said:

F "My colleagues and I feel that when the tenant took these premises and was a willing payer of £300 a year, he took them as business premises, and, moreover, he understood that these business premises were to carry out a certain business throughout the period of his tenancy, and, therefore, in the light of the terms of the Rent Acts and case law which has been expounded, we have decided not to accept jurisdiction in this matter."

G It is only fair to the tribunal to say that, at the time when they gave that decision, *Whiteley v. Wilson* (1) had not been heard. I think that, if they had had the advantage of reading that case, they would have probably come to a different decision. In his judgment, SIR RAYMOND EVERSHERD, M.R., showed that, if the premises are in one block, i.e., if the building is a single structure, and one finds that a substantial part is used as a dwelling-house so that one can say that there is a dwelling-house there, the Rent Restrictions Acts will apply. If, however, to give an example, the premises are a block of offices, one corner of which is occupied by a caretaker, it may be that the Acts would not apply. But it is no longer enough to apply the "dominant user" test.

H ROMER, L.J., said ([1952] 2 All E.R. 944):

"I agree that no question of dominant purpose arises in the present case. The question in such cases as this, where the subject-matter of the tenancy is one building used partly as a dwelling-house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded, on the one hand, as a dwelling-house which is partly or even substantially used as a shop, or, on the other hand, as a shop which is used in part for residential purposes. If the former, then the building is within the Rent Restrictions

Acts, by reason of the first part of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and will not be taken out of it because of the general provision at the end of the sub-section. If, on the other hand, the common sense of the matter is that the building is a shop, then it is outside the first part of the sub-section and will not be brought within the Act by virtue of the second part. In my opinion it is only in cases in which the first part of the sub-section is inapplicable that the effect of the second and third parts need be considered, and these apply, as I think, mainly, if not wholly, to land or other premises let together with a dwelling-house and not forming a part of its structure."

In the present case, although there is a covenant in the lease that the only business that may be carried on is that of a tobacconist, it is clear that the premises were let partly as a dwelling and partly as a shop. For these reasons, if the tribunal had properly directed themselves, they would have held that this was a dwelling-house. As they did not, an order of mandamus should issue.

LYNSKEY, J.: I agree.

PARKER, J.: I also agree.

Order for mandamus.

Solicitors: *Bartlett & Gregory*, agents for *A. D. & L. J. D. Brockman*, Folkestone (for the applicant); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Rootes & Alliott*, Folkestone (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

F.G.

CAVE v. CAPEL.

[COURT OF APPEAL (Somervell, Birkett, L.J.J., and Upjohn, J.), January 25, 26, 27, 1954.]

Execution—Sheriff—Protection—"Action in respect of seizure and possession of goods"—Withdrawal from possession of goods claimed—Action for trespass by person in position of claimant—"Substantial grievance" of claimant—R.S.C., Ord. 57, r. 16A.

A sheriff's officer, in pursuance of two warrants, was instructed to levy execution on the goods of a judgment debtor. At the address of the judgment debtor he found a caravan in which the plaintiff, the mother of the judgment debtor, resided. Believing the caravan to be the property of the judgment debtor, the sheriff's officer removed it to the premises of the judgment creditor where he placed it in a barn. The plaintiff, who had locked herself in the caravan, subsequently left the judgment creditor's premises. Some days later, the true owner of the caravan notified the sheriff that it was her property and the sheriff withdrew from possession. The plaintiff issued a writ against the sheriff for damages for wrongful execution, false imprisonment, trespass and assault, and the sheriff took out a summons under R.S.C., Ord. 57, r. 16A, for an order "protecting him from any action in respect of the said seizure and possession of the said goods . . ."

HELD: a sheriff was entitled to the protection afforded by Ord. 57, r. 16A, only where the claimant had suffered no substantial grievance as a result of the seizure of the goods; on the facts, the plaintiff, who was, for the purpose of r. 16A, the claimant, had suffered a substantial grievance by the removal of the caravan, and the sheriff was not entitled to protection under the rule.

Smith v. Critchfield (1885) (14 Q.B.D. 873), applied.

Decision of ORMEROD, J. ([1953] 2 All E.R. 929), reversed.

FOR R.S.C., ORD. 57, r. 16A, see the ANNUAL PRACTICE, 1953, p. 1233.

Cases referred to:

(1) *Moore v. Hawkins*, (1894), 43 W.R. 235; 29 Digest 466, 148.

(2) *Winter v. Bartholomew*, (1856), 11 Exch. 704; 25 L.J.Ex. 62; 26 L.T.O.S. 226; 156 E.R. 1013; 29 Digest 468, 162.

(3) *Smith v. Critchfield*, (1885), 14 Q.B.D. 873; 54 L.J.Q.B. 366; 54 L.T. 122; 29 Digest 468, 163.

(4) *De Coppett v. Barnett*, (1901), 17 T.L.R. 273; 29 Digest 486, 360.

APPEAL by the plaintiff from an order of ORMEROD, J., dated July 31, 1953, and reported [1953] 2 All E.R. 929.

A The defendant was at all material times high sheriff of the county of Somerset. On Oct. 29, 1952, a bailiff, William Hext, acting on behalf of the defendant as sheriff's officer, in pursuance of two warrants was instructed to levy execution on the goods of one A. H. Cave in respect of two judgments. At the address of the judgment debtor the bailiff found no property on which to levy execution except a caravan in which Mrs. Cave, the plaintiff, the judgment debtor's mother, was residing. She informed the bailiff that the caravan was not the property of her son, but refused to say to whom it belonged and declined to leave it. The bailiff made inquiries of the judgment creditor's solicitor and others, and concluded that it was his duty to levy execution on the caravan. Accordingly, B on Oct. 30, 1952, he removed the caravan to the judgment creditor's farm. The plaintiff had refused to leave the caravan and had locked herself in. At the farm the caravan was put in a barn with the plaintiff still inside and the main doors of the barn were locked, but a side door was left open through which the plaintiff eventually left. On Oct. 31, 1952, notice was given to the bailiff by a Mrs. F. M. Carr or her solicitors that she was the owner of the caravan, and the C sheriff withdrew from possession. On Apr. 24, 1953, the plaintiff issued a writ against the defendant claiming damages for wrongful execution, false imprisonment, trespass and assault. The defendant took out a summons under R.S.C., Ord. 57, r. 16A, claiming protection under that order. Protection was refused by the master, and, on appeal from the master, ORMEROD, J., held that the defendant was entitled to protection under Ord. 57, r. 16A.

D J. Stirling for the plaintiff.
E. S. Fay for the defendant.

SOMERVELL, L.J., stated the facts and continued: The writ having been issued by the plaintiff, the defendant sheriff applied for protection under R.S.C., Ord. 57, r. 16A. The first Act for the protection of sheriffs to which we were E referred was the Interpleader Act, 1831, which enabled sheriffs to take advantage of the interpleader procedure. Its provisions are now substantially reproduced in Ord. 57. As was pointed out, quite rightly, by counsel for the sheriff, there are two aspects to interpleader proceedings: first, they enable the issue as to title between two contending parties to be conveniently tried; secondly, they F give protection in the ordinary case to someone who is in the position of a stakeholder and who claims no interest in the property himself. If proceedings are started against him, interpleader proceedings enable him, in a proper case, to have them stayed. On the other hand, the order may prevent proceedings being taken against him. Indeed, Ord. 57 emphasises that aspect of the matter by commencing with the words "Relief by way of interpleader may be G granted—". Order 57, r. 1, reads:

"Relief by way of interpleader may be granted . . . (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person H other than the person against whom the process is issued."

In *Moore v. Hawkins* (1) the sheriff had seized goods. There had then been a claim which the execution creditor had admitted and the sheriff, having received notice of the claim, had withdrawn from possession. Apart from that, it was an ordinary case of the type in which, I think, relief would have been given had interpleader procedure been applicable. The court, however, held that as the sheriff had withdrawn from possession the procedure was inapplicable and it

could not protect him. He had not, as it were, the corpus, which is the foundation of interpleader relief which normally an applicant is agreeing to hold at the disposal of the court. Both POLLOCK, B., and GRANTHAM, J., decided that that was the position. Since the sheriff had elected to withdraw his execution, the matter was at an end, and he no longer had the right to take steps for his own protection as he might have done had he remained in possession. It was obviously thought—and there is no dispute about this—that that was an anomaly and that where an execution creditor is satisfied and the sheriff at once takes the proper course of withdrawing from possession he should be entitled to protection if it were the type of case in which he would have had protection had he interpleaded in the ordinary way. In consequence of that case, r. 16A was added to Ord. 57, and it is that rule with which we are now concerned, because the sheriff in the present case withdrew from possession. Rule 16A reads:

“When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from the possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the judge or master may make any such order as may be just and reasonable in respect of the same: Provided always that the claimant shall receive notice of such intended application, and, if he desires it, may attend the hearing of the same, and if he attend, the judge or master may, in and for the purposes of such application, make all such orders as to costs as may be just and reasonable.”

At the same time, we were told, words were inserted in r. 2 which now provides:

“The [person seeking relief by interpleader] must satisfy the court or a judge by affidavit or otherwise . . . (c) That the applicant, except where he is a sheriff or other officer charged with the execution of process by or under the authority of the High Court who has seized goods and who has withdrawn from possession in consequence of the execution creditor admitting the claim of the claimant under r. 16 of this order, is willing to pay or transfer the subject-matter into court or to dispose of it as the court or a judge may direct.”

Counsel for the sheriff said, and, if I may say so, I agree with his submission, that the words that I have just read in r. 2 (c) indicate that an applicant under r. 16A is regarded as an applicant within the order. Of course, the special conditions provided by r. 16A have to be satisfied, but he is, nevertheless, a type of applicant for relief under the order. There is no dispute between counsel, and I think they were clearly right in admitting that the type of case in which relief would be given under the normal interpleader procedure is that in which it would be given under r. 16A. If one came to the conclusion that relief would not have been granted had the sheriff been in a position to interplead, one would not give it under r. 16A, and vice versa. It was at one time suggested by the plaintiff that, as she was not the owner of the caravan, but only the occupier, she could not be regarded as the claimant within r. 16A. I agree that she did not write a formal letter, but her claim was clearly a claim through Mrs. Carr, the real owner of the caravan. She was saying that she occupied by virtue of a contract with Mrs. Carr and I have no doubt that Mrs. Carr wrote at her instigation. I think, so far as that is concerned, that the sheriff was in order in saying that that condition of this rule had been satisfied and that the plaintiff was a claimant.

I will now turn to the authorities which indicate the circumstances in which protection would be given in what I call the normal interpleader case, because, as I have said, the same considerations must apply to r. 16A. The first case to which we were referred was *Winter v. Bartholomew* (2), which was fully considered

in *Smith v. Critchfield* (3). The point which arose in the latter case was whether protection could be given against an action for trespass, the trespass being, if I may so describe it, a mere trespass incidental and necessary to the seizure, the seizure obviously being the main matter of complaint. It was held by the court (14 Q.B.D. 873) that:

"Where the sheriff in the execution of a fi. fa. enters the premises of a person other than the execution debtor and there seizes goods believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered."

It is quite clear from the judgment that those last words are not meant to qualify solely the protection against trespass but are necessary if relief is to be given at all. SIR WILLIAM BRETT, M.R., said (*ibid.*, 878):

"It is not, of course, in every case that the judge will protect the sheriff. He will be protected when he has only made an honest mistake in executing the process of the court, and but for such mistake everything that he has done would have been justified by the writ."

He then considered whether the sheriff was to be protected against a necessary trespass as well as the seizure. Then he said (*ibid.*):

"It seems to me that the sheriff is entitled to protection in respect of the whole of the act which through error he has wrongfully done under the writ, that is, in respect of his having entered the house and seized the goods."

He then referred to *Winter v. Bartholomew* (2) and approved what was said there and he put it in his own words (*ibid.*):

"... it is said that the sheriff may be protected in such a case as this in respect both of the trespass to the land and that to the goods where no real grievance has been sustained by the claimant. It is obvious that that cannot mean where there is no legal wrong, because by the hypothesis a tortious act must have been committed. It is clear, therefore, that by 'no real grievance' is meant no substantial grievance beyond the mere entry and seizure of the goods, such as might exist if the sheriff's officer were guilty of insolent or oppressive conduct in excess of his duty, and not justified by the writ."

BOWEN, L.J., referred (*ibid.*, 881) to *Winter v. Bartholomew* (2), and again he reiterated the phrase "no substantial grievance". He then quoted PLATT, B., in *Winter v. Bartholomew* (2) and said (*ibid.*):

"PLATT, B., said that s. 6 of the Act [of 1831] authorised the judge to make such decision as should appear to be just according to the circumstances of the case, and that nothing could be more just than to prevent the sheriff being harassed by an action in which no more than nominal damages could be recovered. MARTIN, B., said '... If indeed the sheriff in execution of the writ has committed any real grievance the court will allow the injured party to bring an action, but if he has done no real wrong the court will stay proceedings against him'."

One has an example of such a case in *De Coppett v. Barnett* (4), where it was held that the sheriff was not entitled to protection where a substantial grievance had been done. I agree that in one sense, at any rate, the extent of the grievance, and in some cases its existence, must depend on the decision as to the issues raised in the action, but on what is admitted here it seems to me that this case is wholly outside the type of case for which r. 16A was made. It is quite sufficient to decide the case, in my opinion, to state that on the sheriff's own affidavit the caravan which this plaintiff rightly occupied, under a contract with the true

owner, was removed from the site where she had it and put in a barn, the main doors of which were kept locked, for four days. No one can say that that was not a "real grievance".

It was suggested that we might consider adjourning the application under this order for protection until the trial of the action so that the judge, presumably, having heard the case might then say: "Having heard all I have now heard I think this is a case under which protection might have been given." As a matter of procedure, I do not think that is right. I am not deciding that in no circumstances could an issue be ordered to be tried under this rule. That can be dealt with if the need arises. In my view, the rule is intended to apply in cases where, on the evidence before the court, it is clear that protection should be given before a trial and the investigation which a trial involves. It is absurd to suggest that a rule which is intended to be used to stop a trial can, as it were, be kept in vacuo, or in a state of suspense, until the trial has been concluded and then be relied on for some purpose on the question of the order to be made as to costs. That does not appeal to me, but for the reasons which I have given (and I hope that I have said nothing that in any way would pre-judge the issues which may arise), I do not think this is a case for protection under Ord. 57, r. 16A.

I should say a word now about what happened below. The learned master took the view which I have taken and he made no order except that the time for the defence was extended for fourteen days. The learned judge made an order that the

"appeal be allowed and that the defendant be given protection against the claim of the plaintiff pursuant to the provisions of Ord. 57, r. 16A, and that all further proceedings herein be stayed."

Counsel for the sheriff said that he did not submit to the judge that any such order could be made at that stage. He said he submitted that there must be an issue to determine certain facts. No doubt, there may have been a misunderstanding, but the matter became clearer before us and counsel did not seek to support the order in that form. He agreed that, there being a dispute between the affidavit and the statement of claim, there must be an issue. For the reasons which I have given I think the master's order should be restored.

BIRKETT, L.J.: I am of the same opinion. The facts in this case were, admittedly, most unusual. It so happened that the plaintiff made her home in the caravan which was the subject-matter of a dispute. Although she made a claim that she should be undisturbed, nevertheless, the caravan containing herself and her belongings was taken away from the premises of the judgment debtor to the premises of the judgment creditor and put in a barn for some days and so suffered some humiliation. I think it is quite impossible to say on those facts that this was the ordinary case to which Ord. 57, r. 16A, was intended to apply. On any view of the case the plaintiff here had a substantial grievance. As I read Ord. 57, r. 16A, it was designed to protect a sheriff in what I may call the ordinary or almost inevitable circumstances which are bound to arise in the course of the sheriff's duty. It is almost inevitable that a sheriff will at some time seize goods which ultimately turn out to belong to some claimant. Under r. 16A, when the execution creditor has admitted the claim,

"... the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the judge or master may make any such order as may be just and reasonable in respect of the same."

I understand that to mean that when a sheriff has, in fact, seized goods in the name of the judgment creditor which in truth belong to the claimant, there

would, in the ordinary way, be a cause of action against him at least for nominal damages. The design of this rule, in my view, is to say: "In those circumstances we think it right and proper that the sheriff should be protected". But it was clear from *Smith v. Critchfield* (3) that SIR WILLIAM BRETT, M.R., was saying that it is not in every case that the judge will protect the sheriff. It would depend on the facts of the particular case. I myself think that the learned judge was unduly influenced by the decision in *Smith v. Critchfield* (3). That was
A a case where one would have said: "If the sheriff has, in fact, wrongfully seized goods he must have entered on the land in order to do so". The learned Master of the Rolls was saying: "You cannot separate the two things like that; they are really one and indivisible". The judge in the present case said, in effect, "In this case there can be no separation: if you find that the sheriff has in fact seized goods—in this case this caravan—you cannot separate that from the taking away of the plaintiff inside the caravan to the land of the judgment creditor".
B Indeed, he says ([1953] 2 All E.R. 931):

"After some consideration I have come to the conclusion that the words of the rule must be taken to mean what on the face of them they do mean, and that the sheriff is entitled to apply for an order protecting him from any action in respect of the seizure, and not merely from an action in respect of the seizure which may be brought by the claimant."
C

In my view, Ord. 57, r. 16A, was intended to apply to a case where there was admittedly a cause of action because of a mistaken seizure by the sheriff, a cause of action in which nominal damages could be awarded, and in such a case the rule provides protection, but where, as in this case, there was a substantial grievance, I do not think this rule applies. Therefore, for the reasons which have been
D given by my Lord, I am entirely of the same opinion, and I think that the order of the master should be restored.

UPJOHN, J.: I agree. Order 57, r. 16A, confers on the court a valuable discretionary power to protect sheriffs who have wrongfully seized goods under a writ of fi. fa. The order that the court may make is "such order as may be just and reasonable." That is the test we have to apply. In my judgment, those
E words mean that the order must be just and reasonable, not only from the point of view of the sheriff, but also from that of the claimant (in this case the plaintiff). It may well be just and reasonable to make an order in the ordinary case where the plaintiff or claimant has suffered no real grievance and whose only claim is for nominal damages. I do not propose to refer to the facts, but
F it is clear that this is not the ordinary case, and, in my judgment, it would be neither just nor reasonable to preclude the plaintiff from pursuing such remedies at law as she may have against the sheriff. I agree that the order of the master should be restored.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.* (for the plaintiff); *Church, Adams, Tatham & Co.* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

WAKEHAM v. WAKEHAM.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), January 14, 1954.]

Divorce—Custody—Child taken out of jurisdiction by deserting wife—Custody to husband without prejudice to question regarding care and control.

In December, 1950, the wife, who had deserted the husband, in breach of an undertaking given by her took the younger child of the marriage to South Africa. In October, 1953, the husband was granted a decree nisi on the ground of the wife's desertion and an order was made in his favour for the custody of both children of the marriage. On an application by the wife for a variation of that order by granting to her the custody of the younger child,

HELD: to accede to the application would be to put the husband at a disadvantage if he sought the custody of the younger child in the South African courts, and the application would be refused, but the original order for custody granted to the husband would be amended by providing that it was without prejudice to any question regarding the care and control of the child.

AS TO CUSTODY OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 10, pp. 721, 722, paras. 1102-1104; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 500-504, Nos. 4432-4473.

APPEAL by the husband against an order of COLLINGWOOD, J., dated Dec. 10, 1953.

The parties were married in South Africa on Oct. 28, 1943, the husband at that time being in the Royal Air Force stationed in Southern Rhodesia. The wife had been born in England, but had been taken to South Africa at the age of three months and had resided there ever since. There were two children of the marriage, Peter Ronald, born on Feb. 1, 1947, and Brian Vincent, born on Oct. 20, 1948. In July, 1945, the husband was transferred to England, and in October, 1945, the wife came to join the husband at the home of his parents. On Oct. 6, 1949, the wife, with the husband's permission, took the two children to Broadstairs for a holiday with the wife's mother and grandmother who were temporarily in England. The wife never returned to the husband. In January, 1950, she wrote to ask him if he would object to her returning to South Africa with the children. He replied that he would object. The wife then wrote and stated that she would not take them away without informing him and without a court order. In May, 1950, the elder son, Peter Ronald, was returned by the wife to the husband, and in December, 1950, the wife, having given her solicitors specific instructions not to disclose her intention to the husband, returned to South Africa, taking with her the younger son, Brian Vincent. On May 15, 1953, the husband filed a petition for dissolution of the marriage on the ground of the wife's desertion. The petition was not defended, and on Oct. 7, 1953, His Honour JUDGE ENGELBACH, sitting as a divorce commissioner, granted the husband a decree nisi and ordered that he be granted the custody of the two children. On Oct. 15, 1953, the wife, who had intended to defend as to custody, but who had expected this question to be referred to the registrar, applied for a variation of that order by granting the custody of Brian Vincent to her. On Dec. 10, 1953, COLLINGWOOD, J., ordered that the custody of Brian Vincent be given to the wife. The husband appealed.

Ranking for the husband.

Ackner for the wife.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: There is no question that, in taking the child with her to South Africa, the wife deliberately broke her promise to the husband, and counsel for the wife has not

sought to palliate that conduct on her part. That unquestioned desertion was the basis of the decree granted in October, 1953.

A A period of approximately three years had elapsed from the time when the breach of her undertaking by the wife became clear and irrevocable to the time of the decree, and during that time I think there is no doubt that the husband did little—if, indeed, he did anything—to inform himself of the well-being, or even the whereabouts, of the child. I get the impression that the husband was accepting as a fait accompli the position that each would have the care and control of one child. But the husband did ask for and obtain, on the making of the decree, an order for custody of both. From the practical point of view, so long as the wife remains in the Union of South Africa it is clear that nothing effective could in any case be done by the husband unless he took proceedings in the courts of that country. And so again I state my impression that if nothing further had happened, matters would have continued thus, perhaps, indefinitely. B But the wife took out a summons which came before COLLINGWOOD, J., who varied the order dated Oct. 7, 1953, of His Honour JUDGE ENGELBACH sitting as a divorce commissioner, ordered that the younger child should remain in the custody of the wife until further order, and directed that the wife should have leave to keep that child out of the jurisdiction of the court, that direction being indefinite in point of time.

C It is a striking and arresting fact that the wife, coming back to this court to ask for a variation of the order of Oct. 7, 1953, made no suggestion or offer in her evidence to the effect that, if the court accepted her application, she would obey any further order about the child that the court might make. Indeed—D and once more I must state my impression—although the summons by the wife before COLLINGWOOD, J., and the present appeal by the husband relate to the child, and although, therefore, the arguments have naturally been punctuated by assertions on both sides that the only concern of the two parties is the welfare of the child, nevertheless, it seems to me that these proceedings are really in the nature of manoeuvres by the husband and the wife to gain tactical advantages. The result of COLLINGWOOD, J.'s order is, undoubtedly and admittedly, that E the husband is, and will be, put at a substantial disadvantage if ever he should see fit to go to South Africa and ask for a return of the younger child. Counsel for the wife says it is right that he should be at such a disadvantage, at any rate if the court is, as was COLLINGWOOD, J., satisfied that for the moment it is in the best interests of that child that he should remain in South Africa with his mother. It is clear that the learned judge's mind was directed exclusively to the question whether it was better that the child should remain, at any rate F for the present, with his mother, or should be transported back to England. On that matter, after considering the somewhat serious conduct of the wife, the fact that she was a deserter, and the husband's lack, or apparent lack, of serious concern about the child during the past two years of his life, COLLINGWOOD, J., thought that the better argument was clearly in favour of the child remaining G where he was—that a young boy who had always been with his mother and would not know his elder brother, or, perhaps, even his father, ought not to be sent back now to England. But counsel for the husband has made it clear that he is not asking this court to express any view whether or not the child now or at some future date ought to come back to England, and I confess that any view that we expressed would be largely futile, because it would be incapable of being made effective unless the court in South Africa should take a similar view.

H I feel the force of COLLINGWOOD, J.'s opinion that, for the moment at any rate, this child is better where he is. Only one matter is not mentioned by him, which seems to me to be not without substance, namely, that this child (who is English by birth) has an elder brother, and a matter which at some time will have to be considered is whether it is not right that he should be brought up to be aware of that fact and to have the advantages of brotherhood as well as fatherhood made available to him. But more on that topic I do not propose to say,

for I have come to the conclusion that whatever be, now or hereafter, the right answer to the problem of the care and control of the child, I am not satisfied that it was right to vary the order made on Oct. 7, 1953, when the decree nisi was granted and to give the legal custody to the mother on the ground (for so it must be taken) that she in fact had possession of the child, she in fact took him out of England, she in fact has got him and has brought him up, I understand, well. I do not think, in the circumstances of this case, that it is right, or to the child's advantage, that the husband should be put technically in that disadvantageous position, and, therefore, without saying more, I think that the proper course is to let the original order in this respect stand, namely, to let the husband have the legal custody of the child, but to make it clear—and in the circumstances of this case I think it should be made clear by express statement in the order—that the order as to custody is without prejudice to any question as regards the care and control of this child. If, then, the husband chooses to make an application to the South African courts, the matter will, no doubt, be considered by those courts on its merits, but the husband will not, at any rate, start with the unfair disadvantage that it would be said: "The courts in England have said that the mother ought to have the legal custody of this child". Without more, therefore, I should allow this appeal, and restore, with the qualification that I have mentioned, the order originally made as regards the custody of the child, Brian Vincent, in the decree nisi. A B C

DENNING, L.J.: Cases often arise in the Divorce Court where a guilty wife deserts her husband and takes the children with her, but the father has no means of bringing them up himself. In such a situation the usual order is that the father, the innocent party, is given the custody of the child or children, but the care and control is left to the mother. That order is entirely realistic. By giving the father the custody, it recognises that he, the innocent party, is at least entitled to a voice in the bringing up of the child or children, and also to the consideration of the court when any question arises as to what is to be done for the child. The paramount, but not the only, consideration when the court comes to consider the matter is, of course, the welfare of the child, but the father's views are also entitled to consideration, and that is why the order for custody should be given to him, although, solely for practical reasons, the mother may have the care and control. I think the judge erred in this case because there can be no doubt whatever on the facts before us that the father was the innocent party, and that the wife took a child of two years of age out of the country both in breach of an undertaking which she had deliberately given that she would not do so and contrary to the advice of her then solicitor, who told her that she ought not to do it without communicating with the father. I am of opinion that the custody ought to be given to the father, without prejudice, as **SIR RAYMOND EVERSHERD, M.R.**, has said, to any question of care and control, which, no doubt, will be dealt with by the courts in South Africa. I agree that the appeal should be allowed accordingly. D E F

ROMER, L.J.: I agree. It was suggested that, if we interfered, as we are asked to do by the husband, with **COLLINGWOOD, J.**'s order, we should, in effect, be overruling the discretion which was vested in him and which he exercised. But that is not so. The point that we are deciding today is different from the point to which **COLLINGWOOD, J.**, was addressing his mind when he said: "I cannot see any argument at all which would justify me in saying that this little boy in his own interest should be taken away from his mother and brought back to England". He gave effect to that view without hesitation and said that he would not make the order. We are now being asked to put the husband into a position in which he can approach, on terms of equality with his former wife, the South African courts if any question in regard to the welfare or control of the child comes up for determination. As the matter stands at the moment, the wife having the legal custody as well as the physical control of the child, I G H

take the view that the husband would be gravely prejudiced, and in a difficult position in regard to the South African courts, if, in the face of that order, he made an application which he might well make to them on some matter affecting the child. Today we are merely removing that disadvantage and putting him on equal terms with the wife in any application that may be made. Counsel for the wife said that if we made the order which my Lord has indicated it would be giving the husband an advantage over the wife, but I do not take that view.

- A The words which are to be put into the order, "without prejudice to any question of care or control", will and plainly are intended to leave the matter open, and will, no doubt, receive that interpretation in the South African courts. I, accordingly, agree that the appeal should be allowed.

Appeal allowed.

- Solicitors: *Lewis, Holman & Lawrence* (for the husband); *Braund & Hill*,
B agents for *Walmsley & Barnes*, Broadstairs (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

RICHARDSON v. JACKSON AND ANOTHER.

- C [CHANCERY DIVISION (Danckwerts, J.), February 3, 1954.]

Real Property—Restrictive covenant—Modification—Application for leave to apply to Lands Tribunal and for stay of proceedings when granted—Law of Property Act, 1925 (c. 20), s. 84 (9).

- D Where proceedings are taken to enforce a restrictive covenant and the defendant applies to the court under the Law of Property Act, 1925, s. 84 (9), for leave to apply to the Lands Tribunal to modify the covenant and for an order staying the proceedings pending the result of the application to the tribunal, the court should not make an order under s. 84 (9) if it is clear on the evidence that the application to the tribunal would not be successful, but if it appears that the defendant would have some chance of obtaining from the tribunal the modification which he seeks, and if the application under s. 84 (9) has been made promptly, the court should, normally, make the order which is asked for, as the modification of covenants is not within its power, and, therefore, it would seem unfair to deprive the defendant of his chance to obtain the modification from the tribunal.

- E AS TO DISCHARGE OR MODIFICATION OF RESTRICTIVE COVENANTS, see HALSBURY, Hailsham Edn., Vol. 29, p. 452, para. 660, and 1953 Supp.; and FOR CASES, see DIGEST, Vol. 40, p. 331, No. 2807, and Digest Supps.

Case referred to:

- (1) *Feilden v. Byrne*, [1926] Ch. 620; 95 L.J.Ch. 445; 135 L.T. 107; 40 Digest 331, 2807.

ADJOURNED SUMMONS by the defendant in an action to enforce a restrictive covenant.

- G The plaintiff was the owner and occupier of premises, known as No. 25 Warley Road, Scunthorpe, Lincolnshire, where he carried on the business of a grocer and general dealer, and the defendants were the occupiers of No. 33 Warley Road. In 1937 both properties formed part of the Warley Road estate which belonged to one Jennison, and which had not then been developed. By a conveyance, dated Nov. 15, 1937, Jennison conveyed No. 25 to the plaintiff's predecessor in title and covenanted with him and the persons deriving title under him, with the intent and so as to bind the whole of the Warley Road estate into whosoever hands it might come, that not more than one further shop should be built on the estate, and that the second shop should not be used for the business of a grocer and provision merchant and/or general dealer, but should be used only for the sale of greengroceries, tobacco, cigarettes and matches, together with one only of seven specified groups of trades or businesses. The second shop which was

built on the estate was at No. 33 Warley Road, and this property was conveyed to the defendants with notice of the covenant, which was registered as a land charge, class D (ii), under the Land Charges Act, 1925. The defendants carried on the business of a greengrocer and tobacconist on their property, and also sold certain other articles there.

On May 27, 1953, the plaintiff commenced an action for, inter alia, an injunction restraining the defendants from using their property for the business of a grocer and provision merchant and/or general dealer. By the statement of claim, which was delivered on June 6, 1953, he alleged, inter alia, that, notwithstanding the covenant in the conveyance of Nov. 15, 1937, the defendants were carrying on, on their property, the business of a grocer and provision merchant and of a general dealer, and threatened and intended to continue the same. By their defence, which was delivered on July 31, 1953, the defendants pleaded, inter alia, that the covenant was imposed as part of a scheme for the development of the Warley Road estate, and that since 1937 the character of the neighbourhood of the estate had changed in that the surrounding land, which was then vacant and undeveloped, had been greatly developed and built up and was in the course of further development which would result in it being entirely built up. The defence went on to say:

"If, which is not admitted, the defendants have committed any breach of the covenant relied on by the plaintiff . . . the defendants will contend that by reason of the alteration in the character of the neighbourhood . . . the object of the said covenant is substantially at an end and the . . . covenant ought to be deemed obsolete or, alternatively, that the continued existence thereof would impede the reasonable user of the defendants' property for private purposes without securing practical benefit to other persons or unless modified as hereinafter mentioned would so impede such user and that the discharge or modification of the covenant would not injure the plaintiff or other persons entitled to the benefit thereof and that in the above circumstances the same should be wholly or partially discharged or modified to the extent necessary to permit the sale by the defendants of "

sixty-nine specified articles (being those already sold by the defendants). The defendants further pleaded that their predecessor in title throughout his occupation of the property from October, 1947, to August, 1952, had sold thereat, to the knowledge of the plaintiff and his predecessors in title, all but eight of the sixty-nine specified articles; that neither the plaintiff nor his predecessors in title had taken any steps to prevent such sale; and that, therefore, if the sale of the articles involved any breach of the covenant, the plaintiff and his predecessors in title had acquiesced in the breach and impliedly assented thereto, and the plaintiff was precluded from enforcing the covenant.

On Dec. 15, 1953, the defendants took out the present summons, under the Law of Property Act, 1925, s. 84 (9), asking for leave to apply to the Lands Tribunal (to whom the jurisdiction conferred on the "authority" under s. 84 of the Act of 1925 was transferred by the Lands Tribunal Act, 1949, s. 1 (4) (a)) to modify the covenant and for an order staying all further proceedings in the action pending the result of the application to the Lands Tribunal.

A. F. M. Berkeley for the defendants.

R. O. Wilberforce for the plaintiff.

DANCKWERTS, J.: This is an application under the Law of Property Act, 1925, s. 84 (9), by the defendants in an action brought by the plaintiff for the enforcement of a restrictive covenant. There is no doubt that the covenant is binding on the defendants, because they had notice of it when the property was conveyed to them, and, moreover, the covenant was registered in pursuance of the Land Charges Act, 1925. By their defence the defendants pleaded (a) that the covenant was obsolete and should be discharged or modified on the

grounds mentioned in s. 84 (1) of the Law of Property Act, 1925, and (b) acquiescence. By the present application they asked for leave to apply to the Lands Tribunal to modify the covenant and for an order staying all further proceedings in the action pending the result of the application to the tribunal.

It appears that an order under s. 84 (9) of the Act of 1925 is in the discretion of the court, but the sub-section does not give any indication as to the considerations which should affect the decision of the court in regard to such an application.

- A *Feilden v. Byrne* (1), which came before EVE, J., is the only reported case on the subject. The matter is not very clear, even after the decision of EVE, J., and I feel some difficulty in deciding exactly the grounds on which the order should be made. It is, I think, clear that the proceedings should not be stayed for the purpose of an application to the Lands Tribunal for modification of the covenant if, on the evidence, it is plain to the court that such an application would have no real chance of succeeding, but, apart from that consideration, it seems to me that, normally, an application under s. 84 (9) should be acceded to, because the modification of covenants is not within the power of this court, and it would seem, therefore, unfair to deprive the defendants of their chance to obtain a modification from the tribunal, if they are able to make out a case. On the other hand, it seems to me plain that the application under s. 84 (9) should be made promptly when proceedings are brought. I do not think that it is necessary that the defendants should have applied to the tribunal before the issue of proceedings, because, until the plaintiff has proceeded with his action, the defendants may well think that the plaintiff does not propose really to attempt to enforce the covenants, but, once the action has been begun, then, if the defendants wish to take advantage of the procedure which is created by s. 84 of the Law of Property Act, 1925, they should apply promptly to the court.

- D In the present case the writ was issued on May 27, 1953. The statement of claim was served on the defendants on June 6, 1953, so that they then knew definitely what was the complaint which was made against them, and the defence in the action was delivered on July 31, 1953. The present application was not made until Dec. 15, 1953. It is not really possible to compare the present case with the procedure in *Feilden v. Byrne* (1), because nowadays no order under a summons for directions is required for pleadings, whereas at the time of *Feilden v. Byrne* (1), pleadings would not normally be delivered until the issue of the summons for directions and the hearing on it. I have felt some doubt whether I ought not to say that the defendants have not proceeded with due dispatch in the present case. On the other hand, it must be recognised, I think, that the advisers of the defendants were entitled to some time in which to examine the circumstances and to obtain evidence, so that they can decide and advise the defendants whether an application to the Lands Tribunal under s. 84 would have any reasonable chance of success. While I feel that the defendants may be open to some criticism in the present case—their application would, in my opinion, have been free from objection if it had been made, for instance, in October, instead of in December—yet, on the whole, I do not think it is a case in which I ought to deprive them of their chance of applying to the tribunal for the modification of the covenant. Accordingly, proceedings will be stayed for the purpose of enabling the defendants to apply promptly to the Lands Tribunal under s. 84, and the costs of this application will be costs in the action.

Order accordingly.

Solicitors: *Collyer-Bristow & Co.*, agents for *Hett, Davy & Stubbs*, Scunthorpe (for the defendants); *Bird & Bird*, agents for *Sergeant & Collins*, Scunthorpe (for the plaintiff).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. YORK, HARROGATE, RIPON AND NORTHALLERTON
AREAS RENT TRIBUNAL. *Ex parte* INGLE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 26, 29, 1954.]

Rent Control—Furnished house—Occupation as “residence”—Use by tenant partly for business purposes and partly as residence—Boarding house—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (1).

The principles which are set out in *R. v. Brighton & Area Rent Tribunal. Ex p. Slaughter* (ante, p. 423) as those to be applied in determining whether premises, which are intended to be used partly as business premises and partly as a dwelling-house, constitute a “dwelling-house” for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and the Landlord and Tenant (Rent Control) Act, 1949, s. 1, are also applicable in determining whether furnished premises are within the Furnished Houses (Rent Control) Act, 1946, notwithstanding the difference in the wording of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that of s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946.

By an agreement in writing, dated Mar. 1, 1953, furnished premises were let to the tenant as a “boarding house” at a rent of £327 12s. per annum. There was no covenant restricting user, and the tenant and her family occupied the basement and one bedroom on the ground floor as their home and conducted the rest of the premises as a boarding house. On a reference by the tenant to a rent tribunal to fix the rent payable for the premises under the Furnished Houses (Rent Control) Act, 1946, s. 2, the tribunal held that they had no jurisdiction on the ground that the premises were let as business premises and not as a residence. On a motion for mandamus,

Held: under the contract the tenant was within her rights in occupying the premises as a residence, as they were intended to be used by her partly for business purposes and partly as a dwelling-house, and, therefore, she had been granted “the right to occupy as a residence a house or part of a house,” within s. 2 (1) of the Act of 1946 and the tribunal had jurisdiction to consider the reference.

R. v. Brighton & Area Rent Tribunal. Ex p. Slaughter (ante, p. 423), applied.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 2, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1086.

Cases referred to:

- (1) *R. v. Brighton & Area Rent Tribunal. Ex p. Slaughter*, ante, p. 423.
- (2) *Epsom Grand Stand Assocn., Ltd. v. Clarke*, (1919), 35 T.L.R. 525; 31 Digest, Replacement, 704, 7935.

MOTION for an order of mandamus directed to the York, Harrogate, Ripon and Northallerton Areas Rent Tribunal requiring them to hear and determine a reference made to them by the applicant under the Furnished Houses (Rent Control) Act, 1946, s. 2.

By an agreement in writing dated Mar. 1, 1953, the applicant became the tenant of premises described as “the boarding house situated at 19, New Queen Street, Scarborough . . . with the fixtures, fittings and furnishings as per inventory”, at a rent of £327 12s. per annum, for a term of one year with an option to renew for a further twelve months, the tenant to pay all rates and taxes except the landlord's property tax. The premises were substantially furnished. There was no covenant restricting user of the premises, and the applicant and her family occupied the basement and one bedroom on the ground floor as their home and conducted the rest of the premises as a boarding house. On Sept. 2,

1953, the applicant applied to the rent tribunal to fix the rent payable for the premises under s. 2 of the Act of 1946. At the hearing of the reference on Oct. 16, 1953, it was contended on behalf of the landlord that the tribunal had no jurisdiction because the premises were let as business premises and not as a residence. The tribunal acceded to that contention, and, accordingly, declined jurisdiction.

Van Oss for the applicant.

A *Moylan* for the landlord.

J. H. L. Royle for the tribunal.

Cur. adv. vult.

Jan. 29. **PARKER, J.**, read this judgment of the court. In this case counsel moves on behalf of the applicant, the tenant of furnished premises
B situated at 19, New Queen Street, Scarborough, for an order of mandamus directed to the York, Harrogate, Ripon and Northallerton Areas Rent Tribunal to hear and determine a reference made by her to the tribunal to fix a rent for the premises under the Furnished Houses (Rent Control) Act, 1946, s. 2.

[His LORDSHIP stated the facts and continued:] In the judgment just delivered in *R. v. Brighton & Area Rent Tribunal. Ex p. Slaughter* (1) the
C court set out the principles which, in their view, should be applied in determining whether particular premises, intended to be used partly as business premises and partly as a dwelling-house, constitute a dwelling-house for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and the Landlord and Tenant (Rent Control) Act, 1949, s. 1. If those principles are applicable to determine whether furnished premises are within the Furnished Houses (Rent
D Control) Act, 1946, it is clear that the premises in this case are within the Act. It is contended, however, on the part of the landlord that those principles are inapplicable since, whereas by s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Rent Restrictions Acts apply to "a house or a part of a house let as a separate dwelling", the Act of 1946 applies to "a house or part of a house" in respect of which "the right to occupy as a residence"
E has been granted [s. 2 (1) of the Act of 1946]. In our opinion, however, this difference in wording does not prevent the application of those principles. If anything, the wording in s. 2 (1) of the Act of 1946 admits more easily of their application since the Act is expressly applied to contracts under which the lessee is within his rights in occupying the premises as a residence. Nor does it, in our view, make any difference that under the Rent and Mortgage Interest Restrictions Acts there is an express provision that any dwelling-house shall not be
F excluded by reason only that part of the premises is used for business purposes [s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939]. The principles to which we have referred were adopted by the Court of Appeal in *Epsom Grand Stand Asscn., Ltd. v. Clarke* (2) before there was any such statutory provision. Indeed, the Act of 1920 only gave statutory recognition to that decision. In
G our view, therefore, the tribunal here had jurisdiction, and an order of mandamus should issue.

Order for mandamus.

Solicitors: *Jaques & Co.*, agents for *Whitfield, Bell & Smith*, Scarborough (for the applicant); *Williamson, Hill & Co.*, agents for *Moody & Co.*, Scarborough (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

STYLE v. STYLE AND KEILLER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), January 28, 29, 1954.]

Divorce—Settlement of wife's property—Payments to be secured on investments in this country and not on income received from abroad—Power to order payments to be secured from past date—Power of court to order deed settled by conveyancing counsel—Matrimonial Causes Act, 1950 (c. 25), s. 24 (1).

On May 3, 1950, a decree nisi of divorce pronounced against the wife on the ground of adultery was made absolute and the wife subsequently married the co-respondent. On Feb. 1, 1951, the husband served on the wife notice of an application for a portion of her property to be settled on him under s. 24 (1) of the Matrimonial Causes Act, 1950. The wife's net capital was £484,000, of which £54,000 represented investments in this country and the rest a share of property in the United States of America. Her income from all sources was between £11,000 and £12,000 a year, £2,000 being from free investments in this country. On June 18, 1953, the registrar reported that the wife should be ordered to settle a fund producing a gross sum of £1,500 a year, as from the date of the decree absolute, for the husband's life, to be provided out of securities to be agreed by the parties or determined by a registrar. The report was varied by BARNARD, J., on motions by both parties to provide that one half of the £1,500 should be secured on the wife's free investments in this country and one half by a charge on her income receivable in this country, and that the settlement should date only from the date of its execution. On appeal,

HELD: (i) in view of the impracticability of charging the income receivable in this country from abroad, notwithstanding the consequential tying up of the wife's free investments in this country, the order of the judge should be provided to provide that the whole £1,500 should be charged on those investments.

(ii) the court had power under s. 24 (1) of the Matrimonial Causes Act, 1950, to order the annual payments to be secured to the husband under the settlement from some past date—in this case the date of the service of the husband's application, and effect should be given to such order by increasing the annual sum to be secured for the first seven years by an amount sufficient to discharge the arrears.

Judgment of BARNARD, J., on these issues ([1953] 2 All E.R. 836), reversed.

Semle, the court cannot of its own motion refer the drafting of such a settlement to conveyancing counsel of the court, though able to do so by consent.

AS TO SETTLEMENT OF PROPERTY OF GUILTY WIFE, see HALSBURY, Halsbury's Laws of England, Vol. 10, p. 797, paras. 1265, 1266; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 637-640, Nos. 5989-6031.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 24 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 411.

APPEAL by the husband from an order of BARNARD, J., dated July 29, 1953, and reported [1953] 2 All E.R. 836, varying a report of the registrar submitting that the wife should be ordered to settle on the husband, as from the date of the decree absolute of divorce which he had obtained, a fund producing a gross sum of £1,500 for his life, and that this should be provided from securities to be agreed by the parties or in default of agreement directed by a registrar. BARNARD, J., directed that £750 of the £1,500 should be secured on the wife's free investments in this country and the remaining £750 by a charge on her income receivable in this country from property in the United States of America, and he held that the court had no power to ante-date the settlement to the date of the decree absolute, and that it became effective only as from its date. The husband appealed.

Beyfus, Q.C., Phillimore, Q.C., and Elverston for the husband.
Laskey for the wife.

SINGLETON, L.J.: The petitioner, Charles Richard Style, was married to Gabrielle Muriel Style, the respondent, in 1938, when he was thirty-seven and the wife was thirty years old. There is no issue of the marriage, but the wife has a child by an earlier marriage who is now eighteen or nineteen years old. In 1950 the husband divorced his wife on the ground of her adultery with the co-respondent, who was ordered to pay, and did pay, £5,000 damages. The decree was made absolute on May 3, 1950, and the wife has since married the co-respondent.

The husband is a sick man. He has an income of £1,550 a year gross, of which £1,000 is what has been described as a voluntary pension paid to him by his former employers. The wife has considerable income and assets, most of which came to her in or about 1943. Her financial position, as it was about the beginning of 1953, is shown in schedules attached to a letter from her accountants, dated Jan. 14, 1953. The schedules show that at Apr. 5, 1952, her net capital could be taken as something over £484,000. The greater part of that is a share in property in Texas. She had in this country, as shown by sched. B, investments which were then of a capital value of £54,000. Her income from all sources was between £11,000 and £12,000 a year, mostly from her share of the property in America.

On July 3, 1950, the husband's solicitors took out a summons showing the husband's intention to apply to the court for an order that the wife should make such provision by way of settlement as might be reasonable for the benefit of the husband. Notice of the application was not served on the wife's solicitors until Feb. 1, 1951, as shown by a letter of that date. There had been extended inquiries and negotiations as to income tax and surtax arising out of the wife's income. Demand notes had been served on the husband, and they had been passed in turn to the wife's solicitors, and some years were occupied in discussions before ultimately the wife, I think first by an indemnity, and later by payment, discharged her responsibility thereunder and thus freed the husband. No doubt, it was by reason of the tax position that service of the summons did not take place earlier. After service there were long discussions again, but ultimately the husband's application made under s. 24 (1) of the Matrimonial Causes Act, 1950, came before the registrar. The sub-section reads:

"If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

In the report of the registrar dated June 18, 1953, he sets out particulars of the income of both, and other matters and after stating his findings generally, reports:

"In all the circumstances I think that the wife should be ordered to settle upon him, as from the decree absolute, funds producing a gross sum of £1,500 for his life; and that this should be provided from securities to be agreed by the parties, or, in default of agreement, directed by a registrar. There are ample stocks and shares available for this purpose within the jurisdiction."

The report came before BARNARD, J., on July 29, 1953, and both parties raised questions on it. The judge varied the report in two respects. On the method by which payments should be secured he said ([1953] 2 All E.R. 838):

"... I only propose to vary the registrar's report by giving slightly more

detailed instructions as to how the property is to be settled. I think it correct to order the wife to execute a settlement of her property to produce £1,500 a year gross payable to the husband during his life, one moiety, that is to say, £750 a year, to be secured on the wife's free investments in this country and, as to the other moiety, the remaining £750 a year, by a charge on her income receivable in this country."

It had been pointed out to the judge that to secure the whole yearly sum of £1,500 on the wife's investments in this country would tie up a very considerable part of those investments, and the judge assented to that and ordered only the sum of £750 a year to be secured on the free investments in this country, and the remaining £750 a year to be secured by a charge on her income receivable in this country. In this court it has been shown that there is difficulty in securing an annual sum by a charge on income receivable from abroad. Counsel for the husband read to us an opinion given by his junior counsel, which sets out the position quite clearly, and I take this sentence from it:

"... accordingly it seems to me, if the views I have expressed above are correct, the order of BARNARD, J., so far as it directs a settlement of the [wife's] income receivable in this country, may be of no effect for want of jurisdiction, or as having been made per incuriam."

It is common ground that there are difficulties in securing an annual sum on the income to which the wife is entitled in Texas, and which may, or may not, be received in this country. Such an order, even if it could be enforced, as to which I have some doubt, would add to the costs of everyone, and would mean continuous inquiries and would not be, as I think, to the advantage of either party. The fact remains that the wife has both a very considerable income and assets in Texas. In the circumstances, I feel that it is right that, if this court is to make an order under s. 24 (1), the amount ought to be secured on the free investments which she has in this country. The order of BARNARD, J., should be varied accordingly.

The other variation made by BARNARD, J., arises on the date from which the income should run or should be secured. The report was that the wife should be ordered to settle on him as from the decree absolute funds producing a gross sum of £1,500 a year for his life. BARNARD, J., on that said ([1953] 2 All E.R. 838):

"... the wife says that the settlement ought not to take effect as from the decree absolute, and she also objects to the sum being settled on the husband for his life. With regard to that latter objection it is well within the jurisdiction of the court to order a settlement for the life of the husband, and I think it is very right and proper in this case. As to the other matter I feel grave difficulty. I do not think myself on looking at the section that the court really has any jurisdiction either to ante-date the settlement or to ante-date the effect of the settlement."

The judge read s. 24 (1) and said (*ibid.*):

"That is different from the wording of s. 19 (2) which deals with maintenance, and which commences: 'On any decree for divorce.' I cannot help feeling that the court has no jurisdiction to do anything except to order the wife to settle the property. That, I think, must mean that it only becomes effective as from the date of the settlement."

The section appears to me to give the injured husband a right to ask the court to order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party. If application is not made until some considerable time after the decree absolute has been granted, I do not think that the court should order a settlement which would have the effect of securing income as from the date of the decree absolute. On the other hand, I cannot think it is right to say, as counsel for the wife submitted, that

where the hearing of an application by the injured party is held up for one reason or another, perhaps for years, the court has no power to deal with the period elapsing between the notice of application and the execution of the settlement. The rights of the injured party, the husband, might be entirely defeated if that were so. He might be dead before the litigation ended, or before a settlement was executed. Once notice of application is given to the wife, the court ought to regard that as done which ought to have been done, if and when the court comes to a conclusion that the settlement ought to have been ordered. It is only thus that the section can be made effective and given its true meaning. In those circumstances, I feel that the court should say that the order should apply as from Feb. 1, 1951, i.e., the date on which notice of application was given to the wife's solicitors.

The remaining question is one of more difficulty. The court may order such settlement as it thinks reasonable. If the court thinks it reasonable to order that £1,500 a year should be secured as from Feb. 1, 1951, but no settlement has yet been executed or will be for a little time, provision must be made for the period between Feb. 1, 1951, and the date on which the settlement is executed. Three years have elapsed now. That means a gross sum of £4,500. I indicated to counsel for the wife in the course of the argument that we were most anxious to consider how we could secure that any order made was carried out most conveniently for the wife, but counsel was unable to say how we could best help his client. One reason for my question was that the form of order might affect the wife's position with the tax authorities. The order will provide that the annual sum is payable from Feb. 1, 1951, and sufficient of the free investments in this country will be settled to bring that about. It may be doubtful whether the court can order the payment of a lump sum as part of the settlement. I have reached the conclusion that the best way to ensure the carrying out of this decision is to order that a greater proportion of the free investments in this country shall be settled so as to secure that, over a period of, perhaps, seven or eight years, increased payments may extinguish the £4,500, which might be described as arrears, or as sums which would have been paid if the settlement had been executed on Feb. 1, 1951. Consequently, the settlement will embrace a larger proportion of the free securities than is necessary to secure a payment of £1,500 a year. But the settlement should further provide that, as and when the arrears are extinguished, a proportionate amount of the securities will be freed from the settlement and returned to the wife. In that way I feel that the court will be able to carry out the provisions of the section.

One other question was raised. R.S.C., Ord. 51, r. 7, provides:

"The court or a judge may refer to the conveyancing counsel of the court any matter relating to the investigation of the title to an estate with a view to an investment of money in the purchase or on mortgage thereof, or with a view to sale thereof, or to the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or any other matter which the court or judge may think fit to refer, and may receive and act upon the opinion given in the matter referred."

Rule 80 of the Matrimonial Causes Rules, 1950, provides:

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

It was submitted that the court might refer the drafting of the settlement to conveyancing counsel of the court, although no provision to that effect is made in s. 24 of the Matrimonial Causes Act, 1950. In s. 19 (2) of the Act, which deals with alimony and maintenance in cases of divorce and nullity of marriage, there is an express power to refer such a question to conveyancing counsel of the court.

In view of the omission of any such power from s. 24, I find it difficult to see how we can of our own motion so refer the question which arises here. Learned counsel have been most helpful in this matter. Counsel for the wife agrees that the question of the drafting of the settlement shall be referred to conveyancing counsel of the court, provided that the court approves, and that it is open to either side to bring the matter before the court. I think it is right that that should be done, and, consequently, I would direct, by consent, that the drafting of the settlement be referred to conveyancing counsel of the court, subject to the right of either party to apply with regard to any question arising on the draft. In my judgment, this appeal should be allowed in the respects which I have mentioned. A

JENKINS, L.J.: I agree. The registrar's conclusion was to this effect:

"In all the circumstances I think that the wife should be ordered to settle upon him [the husband], as from the decree absolute, funds producing a gross sum of £1,500 a year for his life; and that this should be provided from securities to be agreed by the parties, or, in default of agreement, directed by a registrar. There are ample stocks and shares available for this purpose within the jurisdiction." B

While upholding the registrar's view that £1,500 a year was the proper annual amount to be provided for the husband, the judge varied his recommendation in two respects. The first variation had the effect of providing that the £1,500 a year, instead of being wholly secured on the wife's free investments in this country, should be secured as to £750 a year in that way, and as to the remaining £750 a year by a charge on the wife's income receivable in this country, meaning thereby the income from the wife's American assets. It appears that both before the registrar and before the judge counsel for the husband had contended that the court had power to direct the making of an effective charge on the wife's American income. On the other hand, counsel for the wife contended that this could not be done. The judge took the view that the American income receivable in this country could be effectively charged, and, holding that view, made the variation to which I have referred. The argument of counsel for the wife has, I think, consistently been that, as the American income cannot be effectively charged, the only available security consists, for practical purposes, of the wife's free investments in this country, and that it would be wrong to fix the payment to be made to the husband at as large a sum as £1,500 a year, inasmuch as that would involve taking out of the wife's disposition substantially the whole of her free investments in this country. It now appears (and I do not think it is seriously disputed on either side) that it is impracticable to provide for an effective charge on the wife's American income receivable in this country, so that the judge, in varying the registrar's report in that respect, was proceeding under a misapprehension. Nevertheless, the judge agreed with the registrar that the proper figure to be provided for the husband was £1,500 per annum, and counsel for the wife did not contend before us that this sum, considered simply with reference to the relative means of the parties, was excessive. In these circumstances, it seems to me that this court must do the best it can to see that the £1,500 per annum is effectively secured to the husband on such assets of the wife as are available for the purpose. The American assets not being so available, I think our order should proceed on the footing that the settlement securing the £1,500 per annum should be a settlement of the wife's free investments in this country, or a competent part thereof. C D E F G H

The second matter on which the judge varied the registrar's report was in so far as the report provided that the settlement should be made on the husband as from the decree absolute. As to that the judge said ([1953] 2 All E.R. 838):

"I do not think myself on looking at the section that the court really has any jurisdiction either to ante-date the settlement or to ante-date the effect of the settlement."

If, in expressing the view that the court had no jurisdiction to "ante-date the settlement", the judge meant that it was not possible for the court to order that specific stocks should be settled as from a certain past date, I would not differ from him, for, in the nature of things, it is not possible to put back the clock and treat investments as having been settled on some past date, when in fact the income arising from them during the past period in question has been spent. Even so, I think it is wrong to say that the settlement can only operate from the date on which it is actually executed, for I am satisfied that it is perfectly competent to the court to direct a settlement which will take effect with respect to the investments to be settled as from the date of the order directing the settlement.

So far as the learned judge expressed the view that the court has no jurisdiction to "ante-date the effect of the settlement", I cannot agree. The court's power under s. 24 (1) is expressed in these terms. In the circumstances set out

"the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

If, in all the circumstances of a case, the court thinks it reasonable that a settlement should be made for the benefit of an innocent husband, that the benefit to be taken by him thereunder should be in the form of an annual payment, and that the annual sum should be payable during his life and be computed from some past date, I find nothing in the construction of the section, and no ground in principle, against holding that the court has jurisdiction under the section to give effect to that view. The date from which one should compute the benefit given to a husband under a settlement ordered to be made in any particular instance must, of course, depend on all the circumstances of the case. In the present case I agree with my Lord that the reasonable date to fix is the date of the service of the application for a settlement, i.e., Feb. 1, 1951. The result, therefore, is that the proper settlement to be here directed is a settlement comprising the wife's free investments in this country, or a competent part thereof, and it will be so framed that the husband will receive under it £1,500 a year for his life, together with an additional yearly sum of such amount as will give him an aggregate sum equal to the yearly sum of £1,500 computed from the date of the service of the application down to the execution of the settlement.

The only other matter is the period over which the payments required to give the settlement retrospective effect (if I may use that expression) shall be spread. I agree that it would be reasonable, and I think it might be advantageous to the wife from the point of view of income tax, if the period fixed for that purpose was seven years, and I also agree that the settlement should be framed so as to allow surplus investments to be released to the wife after the additional payments for giving the settlement retrospective effect have all been made. Accordingly, I agree with my Lord that this appeal should be allowed, and that an order should be made in the sense he proposes, the draft being referred, in accordance with the consent of the parties, to conveyancing counsel of the court, subject to the parties' right to raise before the judge any question that they may conceive to arise on the draft.

HODSON, L.J.: I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband); *Edwin Coe & Calder Woods* (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

In the Estate of CAMPBELL (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), January 13, 1954.]

Will—Charging clause—Remuneration of professional trustee—Trustee changed by codicil—Right of substituted trustee to charge for services.

By a will dated Mar. 14, 1944, the testator appointed as the executors and trustees thereof two solicitors and directed that they should be entitled to be paid their ordinary professional charges. On Aug. 6, 1953, the testator executed a codicil in which he stated that he wished to change the executors and trustees named in the will to the W. bank "whom I now appoint executors and trustees."

HELD: the codicil created a valid appointment of the bank as sole executor and trustee under both will and codicil, and, as the will expressly provided for the payment of their professional charges to the solicitors who were then appointed executors and trustees, the testator must have intended that the bank, who would be acting in the same capacity, should also be entitled to payment for their services.

AS TO OF WHAT PROBATE MAY BE GRANTED, see HALSBURY, Hailsham Edn., Vol. 14, pp. 192-205, paras. 316-337; and FOR CASES, see DIGEST, Vol. 23, pp. 93-98, Nos. 863-908.

PROBATE MOTION.

By a will dated Mar. 14, 1944, the testator appointed two partners in a firm of solicitors to be the executors and trustees of the will and devised and bequeathed to them his estate in trust for Alice Dillon Malcolm Longbotham (widow) and Mary Davison (married woman) for life and on their death to Arthur Davison for life with remainders over. The testator directed that the solicitors should be paid their ordinary professional charges for the work they did in connection with the trust. On Dec. 30, 1948, one of the solicitors died. On Aug. 6, 1953, the testator wrote a codicil on the two sides of a sheet of note-paper, stating, *inter alia*:

"I wish to change the executors and trustees named in my will from Messrs. Parson, Lee & Co. . . . to the Westminster Bank whom I now appoint executors and trustees."

J. A. Brightman for the Westminster Bank, Ltd.

R. W. Vick and *Michael Bowles* for the beneficiaries under the will.

Marshall-Reynolds for the Greater London Fund for the Blind (interested under the codicil).

WALLINGTON, J., stated the facts, held on the facts that the codicil was duly executed and valid, and continued: Questions have been raised as to (i) whether or not there is a valid appointment of the Westminster Bank, Ltd., as sole executor and trustee under both will and codicil, and (ii) whether the bank should be given the right to charge for their services as executor and trustee under the will and codicil. In my opinion, it is clear that the codicil contains an express and unambiguous appointment of the bank as executor and trustee under both will and codicil. It is the plain intention of the testator to place the administration of his whole estate in the hands of the bank on the basis of both the testamentary documents. The only reference in the will to any question of charges is a provision that the solicitors for the testator (who under the will were appointed as executors and trustees) should be paid their ordinary professional charges. Obviously that provision cannot apply to the bank. It is, however, plain that the testator intended that the bank should be the executor and trustee and would not have wished them so to act *con amore*. Moreover, since the testator stated in the will that his solicitor executors and trustees should be entitled to charge their ordinary professional charges for their work in that

capacity, when in the codicil he expressed a wish to change the executors named in his will from the solicitors to the Westminster Bank, Ltd., it follows that he changed from one professional executor to another who would act in the same capacity and with the same right to be paid. It is plain, to my mind, that the testator never contemplated the appointment of an unpaid executor or that the bank would accept the appointment on a gratuitous footing. Further, there is ample authority that the court is entitled in cases of this kind to order that the bank acting in the capacity of executor and trustee should be entitled to make their ordinary charges for the work they do in administering the estate. I, therefore, decree that probate of both the will and codicil be granted to the Westminster Bank, Ltd. and that the bank, when acting under the grant, so act on their standard terms and conditions in force at the date of the said codicil including those governing the bank's remuneration in accordance with their scale of fees.

Solicitors: *Parson, Lee & Co.* (for the Westminster Bank, Ltd.); *William Sturges & Co.* and *Woodhouse-Smith & Co.* (for the beneficiaries under the will); *Gregory, Rowcliffe & Co.* (for the Greater London Fund for the Blind).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

BARCLAYS BANK, LTD. v. BIRD AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 20, 22, 26, 1954.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—

Mortgage of matrimonial home by husband before desertion—Equitable mortgage—Claim for possession by equitable mortgagee—Wife's right to remain in matrimonial home.

On Feb. 10, 1947, the husband executed an equitable charge on the matrimonial home in favour of a bank, and, by cl. 8 thereof, irrevocably empowered the bank to appoint one of its officials to be his attorney for the purpose of executing a legal mortgage in the bank's favour. In December, 1952, the husband deserted his wife, who, on Mar. 11, 1953, obtained under the Married Women's Property Act, 1882, s. 17, from the master an order that she and her children be permitted to reside in the matrimonial home and that the husband should not create any right in any other person to evict them or interfere with their residence therein. On May 6, 1953, the husband was adjudicated bankrupt, and on July 9, 1953, in pursuance of the power of attorney conferred by cl. 8 of the charge, a legal mortgage of the property was executed in favour of the bank. On a summons for possession by the bank,

Held: (i) before any right of the wife to remain in the matrimonial home could have arisen on the husband's desertion, the bank's right to possession arose on the creation of the equitable mortgage, and the fact that the bank was only an equitable mortgagee made no difference to its right to ask the court for possession; and, therefore, the wife's right was subject to the rights of the bank as mortgagee, which was entitled to possession.

Lloyds Bank, Ltd. v. Oliver's Trustee ([1953] 2 All E.R. 1443), followed.

(ii) by virtue of the power of attorney conferred by cl. 8 of the charge, the bank had an absolute right to have the legal mortgage executed, and the order restraining the husband, the donor of the power, from creating rights in the property in any person other than the wife, in no way affected the rights of the bank.

Tingley v. Müller ([1917] 2 Ch. 144), applied.

AS TO RIGHTS OF EQUITABLE MORTGAGEE TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, p. 358, para. 535; and FOR CASES, see DIGEST, Vol. 35, p. 399, Nos. 1407, 1408.

Cases referred to:

- (1) *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest, Replacement, 694, 7865.
- (2) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.
- (3) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.
- (4) *Ferris v. Weaven*, [1952] 2 All E.R. 233; 3rd Digest Supp. A
- (5) *Lloyds Bank, Ltd. v. Oliver's Trustee*, [1953] 2 All E.R. 1443.
- (6) *Ex p. Bignold, Re Keer*, (1832), 2 Deac. & Ch. 398; 1 L.J.Bey. 100; 4 Digest 366, 3396.
- (7) *Tingley v. Müller*, [1917] 2 Ch. 144; 86 L.J.Ch. 625; 116 L.T. 482; 2 Digest 142, 163.
- (8) *Vaughan v. Vaughan*, [1953] 1 All E.R. 209; [1953] 1 Q.B. 762. B

SUMMONS for possession of the premises known as 38, Crownhill Road, Woodford Bridge, Essex, which were charged to the plaintiff, Barclays Bank, Ltd., by an equitable charge dated Feb. 10, 1947.

Plowman for the plaintiff bank.

P. E. Whitworth for the second defendant, the trustee in bankruptcy of the husband. C

J. L. Arnold for the third defendant, the wife.

The first defendant, the husband, did not appear.

HARMAN, J.: This summons raises once more the question of the position of the deserted wife in the matrimonial home, a matter much canvassed recently. It is now the law that there are circumstances in which a wife who has been deserted by her husband can assert the right or privilege of remaining in the matrimonial home. Had the matter been *res integra* I should have preferred to look on her as being in a position *vis-à-vis* her husband analogous to that of tenants, so-called, under the Rent Restrictions Acts who have no estate or interest in the land, but have, as LUSH, J., said in *Keeves v. Dean, Nunn v. Pellegrini* (1) ([1924] 1 K.B. 686), a "status of irremovability". That status can be explained by the fact that a husband cannot sue his wife in tort as GODDARD, L.J., pointed out in *Bramwell v. Bramwell* (2) which lies at the foundation of these cases. The wife's right has recently been held by the Court of Appeal in *Bendall v. McWhirter* (3) to hold good as against the trustee in bankruptcy of the husband. That decision was reached on the footing that the trustee takes the property of the bankrupt subject to all the bankrupt's disabilities and liabilities. As the husband could not procure the wife's removal by action, but only by an application under the Married Women's Property Act, 1882, s. 17, so the trustee was in a similar, although, perhaps, a worse, position because he could not apply under that Act. It was said in the course of the judgment ([1952] 1 All E.R. 1311) that the wife has something in the nature of a licence to remain in the house. I do not think that was necessary to the decision, but there it is, and I cannot help thinking that the law is taking a dangerous path. It has since been held by JONES, J., in *Ferris v. Weaven* (4) that the wife's status of irremovability holds good as against a purchaser from a husband, but not a purchaser in good faith. In that case, the purchaser, knowing of the husband's difficulties and to help him terminate the wife's occupation, pretended to purchase the house for £30 in order that the husband might sell it to his advantage. It was not unnatural that the judge held that such a person could not be in a better position than the husband. I think the law has not yet gone beyond that point. D

In a recent decision, *Lloyds Bank, Ltd. v. Oliver's Trustee* (5), UPHOHN, J., decided that the wife's right or privilege did not hold good against a person having a legal mortgage created before the date when the desertion occurred. A much larger claim was there made for the wife, on whose behalf it was argued E
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that her rights, whatever they be, arise directly after she and her husband enter a house as their matrimonial home, but only, as it were, crystallise when desertion occurs. The learned judge rejected that submission as fantastic. It seems to me that any extension of this privilege of the wife may, in the end, prove detrimental to the public interest, because money will not be lent to men who have houses for fear they may have deserted or may thereafter desert their wives and so rob their creditors of their security. I should, of course, follow that decision of UPJOHN, J., but the case now before me differs from that which he decided.

In this case, on Feb. 10, 1947, the husband, the first defendant, while living with his wife, created an equitable charge on the matrimonial home in favour of the plaintiff, Barclays Bank. That is in familiar form and reads:

"I the undersigned Joseph William Bird of 38, Crownhill Road, Woodford Bridge, Essex, hereby declare that the title deeds and other documents have been delivered by me and deposited by me with you for securing to you the payment and discharge of all moneys and liabilities now or hereafter due from or incurred by me and/or Messrs. Jay Miller."

Messrs. Jay Miller was a firm in which the husband was interested. The charge contains an undertaking to pay on demand, and, by cl. 3, the husband, as beneficial owner, charges the property with the payment and discharge of all the moneys and liabilities due or to become due under the document. There is a covenant to execute and deliver effectually a legal and formal mortgage or registered charge on the said lands, buildings, and hereditaments in such form as the bank should elect. That is followed by cl. 8, which is an irrevocable appointment by the husband in these terms:

"I hereby irrevocably appoint such one of your local directors or managers for the time being at [blank] as you shall from time to time by writing under the hand of your chairman or deputy chairman or general manager or assistant general manager designate to be my attorney for me and in my name and on my behalf and as my act and deed or otherwise to sign, seal and deliver and otherwise perfect any such legal or formal mortgage or registered charge as aforesaid."

There is an undertaking that no one should be registered as proprietor to the detriment of the mortgagee. That charge was extended from time to time to cover further advances.

At the time when the equitable mortgage was made, the husband was living in the house as the matrimonial home with his wife, Hilda Kathleen Bird, the third defendant. It appears that in December, 1952, the husband deserted his wife, who has since continued to live in the house with two children. In January, 1953, the wife obtained a magistrates' order for her maintenance which must have been made on the footing that there had been matrimonial misconduct on the part of the husband, namely, desertion of his wife. On Mar. 11, 1953, the wife obtained an order made by the master in an action in the Queen's Bench Division under the Married Women's Property Act, 1882, by which it was ordered that the husband,

"until further order or other order varying this order be made by the court do permit his wife, Hilda Kathleen Bird and her two children, to reside in and occupy 38, Crownhill Road, Woodford Bridge, in the county of Essex, as the matrimonial home unless and until the said Joseph William Bird shall have first provided reasonably suitable alternative accommodation as a matrimonial home for his wife and children. And it is further ordered that without leave of the court [the husband] do take no steps by sale or assignment of any right title or interest which he now has in the said property or by any act whatsoever create any right title or interest in any other

person to evict his wife and children or any of them from the matrimonial home or in any way interfere with their residence therein."

On Apr. 8, 1953, a receiving order in bankruptcy was made against the husband and on Apr. 17 the bank demanded payment of the money due under its equitable charge. On May 6 the husband was adjudicated bankrupt and his trustee is the second defendant to this summons. On July 7 the bank, relying on cl. 8 of the equitable mortgage, appointed one Lavery to be the attorney of the husband to execute a legal mortgage. That document purports to be signed by the bank's assistant general manager in pursuance of the powers conferred by cl. 8 of the mortgage. On July 9 the attorney executed in the name of the husband a charge by way of legal mortgage of the property. It is signed by the husband, J. W. Bird, by his attorney, the person appointed under the document to which I have referred.

By the present summons, dated July 24, 1953, the bank demands possession of the property and no resistance to that demand is made either by the husband or his trustee; but the wife claims to be entitled in priority to the bank to possession of the property. The difference between this case and *Lloyds Bank, Ltd. v. Oliver's Trustee* (5) is merely this. At the date of desertion when the wife's rights, whatever they be, arose, the bank had no legal estate in the property, and, it is said that, that being so, as an equitable mortgagee the bank had no right to possession. Therefore, the bank's right to possession having arisen only on the execution of the legal mortgage, the wife's right to possession arose before that of the bank. It is also argued on behalf of the wife that the bank, by using the power of attorney and executing the legal mortgage on July 9 in the husband's name has, albeit unconsciously, flouted the master's order made under the Married Women's Property Act, 1882, which restrains the husband from creating any interest in priority to that of the wife. Therefore, it is said, the bank cannot have possession because of the wife's privilege or licence, or whatever it may be, which prevails over the rights of the bank.

In my judgment, there is no legal justification for that claim. The bank was, long before the wife's rights arose, in all respects an equitable mortgagee. It was entitled, therefore, as any other equitable mortgagee, to take out a summons for possession. It matters not from that point of view that it was only an equitable mortgagee. The only limitation on an equitable mortgagee in that respect is that he has no right to possession until the court gives it to him, and the equitable mortgagee could always apply to the court to foreclose and have a receiver appointed to receive the rents and profits. Indeed, the practice of the Court of Chancery, back to the time of LORD ELDON at least, was to allow the equitable mortgagee to have the rents and profits from the date of the petition and not merely from the date of the decree of foreclosure. I think that appears in *Ex p. Bignold. Re Keer* (6). I should add at this point that it is now no objection, as it was once said to be, to proceedings on originating summons by an equitable mortgagee that possession is asked for alone and not as part of the more elaborate relief of foreclosure. Therefore, the bank, having these rights as from the time when the document of Feb. 10, 1947, was executed, had an equity which, as it seems to me, must come before the equity, if one may so call it, of the wife. Qui prior est tempore, potior est jure. It is true that the bank had not the legal estate, but it had a right to create it in itself without any interference by the husband, who at the time the mortgage deed was executed had no estate, right, title, or interest in this property. If I were to hold that the wife's rights, though inchoate, existed at an earlier date, the situation might be different, but in that respect I follow the decision of UPPJOHN, J., in *Lloyds Bank, Ltd. v. Oliver's Trustee* (5).

As to the second point which was urged, viz., that the exercise of the rights under the power of attorney were, in some way, an infraction of the order under the Married Women's Property Act, 1882, I cannot take that view. The bank

had an absolute right to do what it did and an order made restraining the donor of the power of attorney from creating rights could not without notice affect the donee in any way. That is supported by *Tingley v. Müller* (7), where the point, as shortly stated in the headnote, was ([1917] 2 Ch. 144):

A "An irrevocable power of attorney to sell land and give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy."

That case is only analogous to the present, but WARRINGTON, L.J., made a general observation (*ibid.*, 165) which I find helpful:

B "Again, a recognized mode of dealing with land is through an attorney acting under a power of attorney. If such a power is made irrevocable, as is the case with that of May 20, 1915, then, in favour of a purchaser, not only can it not be revoked in the ordinary sense, but any act done by the donee within the limits of the authority conferred by the power will be as valid as if anything done by the donor of the power without the concurrence of the donee had not been done."

C The learned judge there referred to the Conveyancing Act, 1882, s. 9, which section has been repeated totidem verbis in the Law of Property Act, 1925, s. 127. He continued (*ibid.*):

D "The attorney under such a power is not like an ordinary agent. As between him and a purchaser he is, so long as he does not exceed his authority, absolutely independent of the principal. He has no occasion to consult or confer with him, and he need pay no attention to any directions he may give. The attorney in fact, when dealing with a purchaser, is exclusively clothed with all the capacities of the principal in reference to the subject-matter."

Although he is talking there of the power of an attorney quoad a purchaser, it seems to me that those capacities are equally applicable to an attorney in a case such as the present. Consequently, it seems to me that the creation of the legal charge, which was merely a piece of machinery designed, no doubt, to enable the bank conveniently to make a title for sale, is not something which I should consider adversely as being an infraction of the order of the Queen's Bench Division. In fact I rest my decision on this: the equitable mortgagee is, under a document of this sort, in precisely as good a position as under a legal mortgage to ask the court for possession, and it makes no difference—and it is no valid distinction between *Lloyds Bank, Ltd. v. Oliver's Trustee* (5) and this case—that the mortgage is equitable and not legal. It seems to me, therefore, that the mortgagee, as of right, should have an order for possession.

F It was suggested to me that, if that were so, it was a case in which a period longer than the usual interval should be given to enable the mortgagor to find other accommodation. I was referred to *Vaughan v. Vaughan* (8) on that point. That was a case where a husband was seeking possession of the matrimonial home which the wife occupied. This is a case of a mortgagee seeking possession of the mortgagor's property, and, therefore, considerations relevant in that case do not apply. If I were to depart from the usual order it would only be, in my judgment, a case of hard cases making bad law, and I do not propose in this instance to give way to my natural feelings of sympathy for the wife and children. I shall make the ordinary order which is that possession shall be given twenty-eight days after the service of the order.

Order accordingly.

Solicitors: *Forbes & Son* (for the bank); *Hunt & Hunt* (for the wife); *J. E. Baring & Co.* (for the trustee in bankruptcy).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re A DEBTOR (No. 20 of 1953). *Ex parte* THE DEBTOR *v.*
SCOTT AND ANOTHER.

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), January 25, 1954.]

Bankruptcy—Bankruptcy notice—Notice based on judgment debt—Reduction of judgment debt on appeal—Set off of costs—Validity of notice—Bankruptcy Act, 1914 (c. 59), s. 2 (ii), s. 5 (2), (3).

On Mar. 17, 1953, the creditor obtained judgment in the Queen's Bench Division against the debtor for £200 and costs. On Apr. 16, 1953, a bankruptcy notice was issued against the debtor by the creditor for £200. The costs of the action not then having been taxed, they were not the subject of the notice. On Apr. 27, 1953, the debtor gave notice of appeal against the judgment of the Queen's Bench Division. After service of the bankruptcy notice, the debtor filed an affidavit in opposition, and on June 26, 1953, the registrar dismissed the debtor's opposition. The costs of the action in the Queen's Bench Division were taxed at £226, and on July 28, 1953, the petition was filed for the judgment debt of £200 and £226 costs. On Oct. 12, 1953, the Divisional Court dismissed the debtor's appeal from the registrar's order. On Oct. 22, 1953, the debtor's appeal from the judgment of the Queen's Bench Division was heard, and the damages were reduced to £25, and, although the order for costs in the Queen's Bench Division was upheld, the debtor was awarded half the costs in the Court of Appeal with the right to set them off against the amount of the judgment debt and costs awarded against him. On the hearing of the petition, a receiving order was made. On appeal,

Held: notwithstanding the right to set off costs awarded to the debtor by the Court of Appeal, there was at the date of the hearing of the petition a debt of £25 (which was a sufficient debt to avail as an act of bankruptcy) because the costs to be set off had not been quantified by taxation; furthermore, the right of set-off did not arise until the Court of Appeal gave judgment on Oct. 22, 1953, so that, on its issue on Apr. 16, 1953, the bankruptcy notice was good, and it remained good; and, therefore, there being no injustice to the debtor by the form of the notice, there was proof of an act of bankruptcy on the basis of which it was proper to make a receiving order.

AS TO AMOUNT AND NATURE OF PETITIONING CREDITOR'S DEBT, see HALSBURY, Simonds Edn., Vol. 2, pp. 292-300, paras. 551-570; and FOR CASES, see DIGEST, Vol. 4, pp. 113-126, Nos. 1025-1148.

APPEAL by the debtor against a receiving order dated Nov. 27, 1953, made by the registrar of the Brentford County Court.

Muir Hunter for the debtor.

Eife for the creditor.

HARMAN, J.: This case raises one or two novelties. The petition in bankruptcy was filed on July 28, 1953, and is based on a judgment for £200 pronounced by LYNSEY, J., on Mar. 17, 1953, in an action in the Queen's Bench Division brought against the debtor by the petitioning creditor. In the ordinary way that judgment carried the costs of the action to be taxed. The judge was willing to grant a stay only on the terms that £200, the whole of the damages, were paid into court. The debtor was either unwilling or unable to do that. The result was that execution could be levied on the debtor, and on Apr. 16, 1953, a bankruptcy notice was issued against the debtor for £200, the costs not then having been taxed and, therefore, not being the subject of the bankruptcy notice. On Apr. 27, 1953, the debtor gave notice of appeal against the Queen's Bench decision and evaded service of the bankruptcy notice, with the result that an order for substituted service was made by the registrar

at Brentford on May 6, 1953. At the same time, the period for which the bankruptcy notice should run was extended to June 16.

A The bankruptcy notice having been served by post, the debtor filed an affidavit in opposition to it. That was eventually heard on June 8 when the registrar adjourned the hearing. Why he did so is a little obscure, but he restored the matter for hearing on June 22 and heard it on June 26 when he dismissed the debtor's opposition to the bankruptcy notice. There was an appeal against that to the Divisional Court on July 17 which was dismissed on Oct. 12, 1953. So one may take it that the matter of the validity of the bankruptcy notice at that time is now beyond cavil.

B The costs in the Queen's Bench action were taxed at £226. The allocatur for those was issued on July 16 and was in the manner customary in the Queen's Bench Division, added at the end of the order, there being no taxing master's certificate.

C On July 28 this petition was put on the file for the debt of £200 plus costs £226, making in all £426. That came on to be heard on Oct. 21, 1953, when it was adjourned pending the hearing of the appeal from the decision of the Queen's Bench Division, which in fact was heard on the next day, Oct. 22. The appeal was allowed and the order of LYNSKEY, J., was varied by reducing the judgment for damages from £200 to £25. The costs in the Queen's Bench action were left standing, but the debtor was given half the costs in the Court of Appeal and the right to set them off against what he owed on the judgment and costs below.

D As a result of that, the creditor's solicitors wrote a letter to the registrar, a practice which seems to me very much to be deprecated, saying that they wanted the petition restored and, as it were, arguing their case behind the debtor's back. That is not a practice which, I think, ought to be encouraged. However that may be, there was a re-hearing of the petition on Nov. 27, 1953, when a receiving order was made. Although the facts do not clearly appear either from the petition or from the affidavit sworn to verify it, it does not seem that there was any miscarriage of justice, either on that hearing or from the fact that this undesirable letter had been written. The registrar seems to have been in possession of the right facts. He simply took the view that, as the costs to be taxed in favour of the debtor when taxed would not reduce the total debt of the creditor below £50, there was a good petitioning creditor's debt and a receiving order ought to be made. Accordingly, he made a receiving order, and against that this appeal is brought.

F I think the main ground of appeal is this. Under the Bankruptcy Act, 1914, s. 5 (2), the court is bound to require proof of the act of bankruptcy, and it is said here that it could not be satisfied in that respect because, in the events which happened, there was no proof of an act of bankruptcy despite the fact that this court had declared the act of bankruptcy a good one and there has been no appeal against that. This bizarre result is arrived at in this way. It is said the act of bankruptcy alleged was respecting £200. The Court of Appeal reduced that to £25. £25 would be a sufficient debt to avail as an act of bankruptcy, but it is further said that the debtor has the right to set off against the debt, i.e., the £25, the right to costs which may amount to £60, and, therefore, having regard to the effect of the order of the Court of Appeal, there was no debt to support the act of bankruptcy, the condition of the statute was not complied with, and the court cannot make an order. Secondly, it is said that, if a creditor serves a bankruptcy notice on a man for a very large sum which he cannot pay and follows it up by a petition admitting that the sum is very much smaller, the debtor has suffered an injustice inasmuch as, though he could not have paid the larger amount, he might have paid the smaller one, and, therefore, the court, in the exercise of the discretion which s. 5 (3) confers on it, should come to the conclusion that there is "sufficient cause" why no order ought to be made.

In my judgment, neither of those points ought to prevail. I do not wish to canvass the larger contention of the creditor, which amounted to this, that if a sufficient act of bankruptcy was committed at the time when the notice expired it mattered not that there was no debt at all by the time the petition came on. That is a matter which can be decided when it comes necessarily into controversy.

It seems to me, however, that the true view is that there remained at the hearing of the petition in this case a debt of £25 and that was enough to support the bankruptcy notice. The right to set off the costs in the Court of Appeal is not a present right because those costs have not been quantified by taxation. Apart from that, it seems to me that the cross-claim created by the order of the Court of Appeal was not in existence before the date when the Court of Appeal made its order. It is not as if that were a matter which dated back as does in some senses the variation in the damages claimed. So that, in my judgment, the bankruptcy notice remained a good bankruptcy notice, notwithstanding that it was not for £25 for which it should have been made, but had been made for a larger sum.

Section 2 of the Act of 1914 provides:

"A bankruptcy notice . . . (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due . . .",

unless certain other conditions are satisfied which do not arise here. I do not see that any such injustice was done by the form of the bankruptcy notice as would induce us to say that in the exercise of our discretion we ought to refuse the petition. The substance of the matter is that this debtor owes the creditor the costs and £25, subject to a cross-claim which admittedly will leave a very substantial balance in favour of the creditor. In those circumstances, neither justice nor equity demands that the usual consequences should not be visited on the debtor.

DANCKWERTS, J.: I agree. When, on Nov. 27, 1953, the petition came before the registrar for further hearing, it seems to me that the view which he took was an entirely sensible one on the information which was given to him as regards the cross-claim. It appears plain that, taking the cross-claim or set-off of the debtor at his highest figure of £100, at least £150 remained owing by the debtor to the petitioning creditor. It seems to me that either the debtor was in a position to pay that sum, or, if he was not in a position to do so or was unwilling to pay that sum, justice demanded that a receiving order should be made. The answer which is given seems to me to be an entirely technical one, and, if that answer be a technical one, the debtor cannot complain if it is defeated on technical grounds.

It is true that the judgment of **LYNSKEY, J.**, for £200 damages was reduced by the Court of Appeal to £25, and, therefore, the bankruptcy notice when it was issued was demanding a sum which ultimately turned out to be larger than the proper sum. Presuming, therefore, that it is to be treated as stating too large a sum, and that the judgment of **LYNSKEY, J.**, must be treated as if it ought to have been from the beginning one for £25, it seems to me that that amount was a valid subject for a bankruptcy notice. As to the argument that it would be wiped out by the amount of costs which were recoverable by the debtor under the order of the Court of Appeal, I agree that, at the date of the bankruptcy notice, that right of the debtor could not possibly be operative. It was a claim which did not and could not arise until the Court of Appeal dealt with the matter on Oct. 22, 1953. Therefore, there was at the date of the bankruptcy notice, if not a valid debt for £200, at any rate a valid debt enforceable by bankruptcy notice for £25. In those circumstances, it seems to me that the bankruptcy notice is validated by the second proviso to s. 2 of the Bankruptcy Act, 1914. Consequently, there was a valid bankruptcy notice on which a petition could

effectively be founded, and it seems to me, therefore, that the receiving order was properly made. *Appeal dismissed.*

Solicitors: *Shelton, Cobb & Co.* (for the debtor); *Piesse & Sons* (for the creditor).
[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

PRACTICE NOTE.

BAMPTON v. COOK.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), February 1, 1954.]
Legal Aid—Costs—Security for costs—Costs of appeal—Plaintiff “assisted person” in court of first instance—“Special circumstance”—Substantial contribution then ordered—R.S.C., Ord. 58, r. 15 (2).

Cases referred to:

(1) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56; 2nd Digest Supp.

(2) *Murray v. Stewarts & Lloyds, Ltd.*, Jan. 11, 1954, unreported.

APPLICATION for security for costs of appeal.

In an action for damages for personal injuries by an infant by his next friend judgment was given for the defendant. HILBERY, J., ordered the plaintiff, who was an assisted person under the Legal Aid and Advice Act, 1949, with a disposable income of £343 and whose contribution was assessed at £93 10s., to pay £30 towards the defendant's costs. On notice of appeal being given by the plaintiff, the defendant applied to the Court of Appeal for an order that the plaintiff give security for the costs of the appeal under R.S.C., Ord. 58, r. 15 (2), which provides:

“The Court of Appeal may in special circumstances order that such security shall be given for the costs of the appeal as the court may direct.”

At the time of the hearing of the application, the plaintiff was not an assisted person for the purposes of the appeal, but it was clear from correspondence that legal aid would be granted.

R. I. S. Bax for the plaintiff.

Marven Everett, Q.C., and *M. J. Morris* for the defendant.

SOMERVELL, L.J., said that counsel for the plaintiff had asked the court to follow the decision in *Conway v. George Wimpey & Co., Ltd.* (1) and make no order for security. In that case the plaintiff was not an assisted person when the order was made. In the present case the plaintiff as an assisted person in the court below had been ordered to make a substantial contribution. That was, in his view, a “special circumstance” which took the present case out of the decision in *Conway's* case (1). Leading counsel for the defendant has drawn the court's attention to *Murray v. Stewarts & Lloyds, Ltd.* (2) in which the plaintiff had been ordered to make a maximum contribution of £95 towards the costs of the hearing in the court of first instance and had been an “assisted person” at the time of the application to the Court of Appeal for security for costs. The Court of Appeal had ordered security to the extent of £28 to be given by the plaintiff, and he (HIS LORDSHIP) and his brethren proposed to follow that decision and order in the present case that the plaintiff give security to the extent of £20. The order was intended to cover the plaintiff when she became an assisted person, whatever contribution she might be required to make towards the costs of the appeal.

BIRKETT and ROMER, L.JJ., agreed.

Solicitors: *Craigen, Hicks & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendant). P.P.

VINALL v. HOWARD.

[COURT OF APPEAL (Somervell and Birkett, L.JJ., and Upjohn, J.), January 27, 1954.]

Contract—Illegality—Motor vehicle—Sale in unroadworthy condition—Road Traffic Act, 1930 (c. 43), s. 3 (1)—Road Traffic Act, 1934 (c. 50), s. 8 (1)—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 12 (1), reg. 20, reg. 44 (1), reg. 73.

The plaintiff sold the defendant a motor car of which the speed indicator, silencer, and braking system were defective. The defendant gave the plaintiff a cheque for the purchase price of the car, but, on discovering the unsatisfactory condition of the vehicle, he stopped the cheque. In an action by the plaintiff to recover the amount of the cheque,

Held: the defects in the car were not defects in construction to which Part II of the Motor Vehicles (Construction and Use) Regulations, 1951, made under the Road Traffic Act, 1930, s. 3, applied, but arose owing to a failure to maintain the vehicle in proper working order, to which Part III of the regulations, made under s. 30 of the Act of 1930, applied; since the defects did not fall within s. 3, it followed that the contract was not rendered unlawful by the Road Traffic Act, 1934, s. 8 (1); and the plaintiff was entitled to recover.

Decision of STREATFIELD, J. ([1953] 2 All E.R. 515), reversed.

FOR THE ROAD TRAFFIC ACT, 1930, s. 3, AND THE ROAD TRAFFIC ACT, 1934, s. 8, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 574 and p. 717.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1951, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 22, p. 188.

Case referred to:

(1) *Keeble v. Miller*, [1950] 1 All E.R. 261; [1950] 1 K.B. 601; 114 J.P. 143; 2nd Digest Supp.

APPEAL by the plaintiff from an order of STREATFIELD, J., dated June 29, 1953, and reported [1953] 2 All E.R. 515.

In February, 1952, the plaintiff bought for the purpose of re-sale a 1939-40 Morris eight horse-power motor car. The plaintiff advertised the car for sale, the defendant answered the advertisement, and on Feb. 27, the plaintiff, in accordance with a previous arrangement, took the car to the defendant's house. He indicated to the defendant such defects as he knew of, and then took the defendant for a short run in the car. The defendant decided that he would buy the car, a price of £310 was agreed, and the defendant made out a cheque for that amount and gave it to the plaintiff. The defendant then drove the plaintiff in the car about ten miles to the plaintiff's house, the plaintiff knowing that the defendant would then drive it back to his own house. While the defendant was inspecting the car on the following day, he found that the chassis was fractured and, consequently, stopped the cheque. He told the plaintiff of the defect and asked him to cancel the contract, but this the plaintiff was unwilling to do. The plaintiff twice presented the cheque for payment and on both occasions it was dishonoured.

In an action by the plaintiff for recovery of the amount of the cheque the defendant contended that (i) there was an implied warranty that the car was in a fit condition for use on the road and otherwise free from mechanical defects; (ii) there was an express term that the cheque had been delivered to the plaintiff as an escrow pending the defendant's proper examination of the car in daylight; and (iii) that the contract was tainted with illegality because the sale by the plaintiff to the defendant constituted a breach of the Road Traffic Act, 1934, s. 8 (1). As to the first contention, STREATFIELD, J., found that there was no implied warranty of fitness as alleged, and, as to the second, that the cheque was delivered unconditionally. As to the third contention, the judge held that

the condition of the vehicle in question was such that its use on the road in that condition would be unlawful under the Road Traffic Act, 1930, s. 3, since it failed to comply with the requirements of the Motor Vehicles (Construction and Use) Regulations, 1951, Part II, reg. 12, reg. 20 and reg. 44, and, therefore, that the sale was unlawful under s. 8 (1) of the Act of 1934, the contract was tainted with illegality, and the plaintiff was not entitled to recover.

- A *Aldous and Elton* for the plaintiff.
Gazdar for the defendant.

SOMERVELL, L.J., stated the facts and continued: The matter arises under s. 8 (1) of the Road Traffic Act, 1934, which reads:

- B "Subject to the provisions of this section it shall not be lawful to sell . . . a motor vehicle . . . in such a condition that the use thereof on a road in that condition would be lawful by virtue of the provisions of s. 3 of the [Road Traffic Act, 1930]."

Section 8 (4) is, in effect, a proviso, and it provides:

- C "A person shall not be convicted for an offence under this section in respect of the sale . . . of a motor vehicle . . . if he proves . . . that he had reasonable cause to believe that the vehicle . . . would not be used on a road in Great Britain, or would not be so used until it had been put into a condition in which it might lawfully be so used."

The learned judge considered that there was a breach of the section and held that the plaintiff could not rely on s. 8 (4). I agree with his decision as to s. 8 (4).

- D Section 8 (1), the material section, refers to s. 3 of the Road Traffic Act, 1930, sub-s. (1) of which reads as follows:

"Subject as hereinafter provided, it shall not be lawful, to use on any road a motor vehicle . . . which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, as to the construction, weight and equipment thereof . . ."

- E The other relevant provision is s. 30 (1) of the Act of 1930 which deals generally with regulations:

"The Minister may make regulations for any purpose for which regulations may be made under this Part of this Act, and for prescribing anything which may be prescribed under this Part of this Act, and generally as to the use of motor vehicles and trailers on roads, their construction and equipment and the conditions under which they may be so used and otherwise for the purpose of carrying this Part of this Act into effect, and in particular . . .",

- F and then various matters are specified. It will be seen that the power given there goes beyond the subject-matter of s. 3 of the Act of 1930 which deals with construction, weight and equipment.

- G The real question in this case is whether the defects, to which I will refer later, come under s. 3 or whether they are outside s. 3 but are breaches of regulations made under the wider power given by s. 30. There were three defects. First, the speedometer cable was broken. The plaintiff told the defendant of that and he also told him that he had another cable, but he had not had time to fit it. It was a defect easily remedied and the new cable was available and at hand. Secondly, the foot brake was defective, and that was a defect which, on the learned judge's finding—and this was common ground—could be remedied.
H Indeed, a sum was deducted from the original price in respect of those two matters. Thirdly, it was found, although the plaintiff did not realise this, that the silencer was not in proper working order. The learned judge dealt with those matters and set them out as breaches of the Motor Vehicles (Construction and Use) Regulations, 1951, which purport to deal with the subject-matter of s. 3, namely, construction and equipment. If that were right, and if they were defects which fell properly within s. 3, the conclusion would be that the sale was

illegal, as, indeed, the learned judge held. It was argued before us that these defects were not within the subject-matter of s. 3. Very broadly, it was said that the car was properly constructed, the equipment was there, but that it was not in good working order and that is a matter which is outside s. 3. The fact that it is a matter which falls within the wider section (s. 30 (1)) does not, of course, affect the argument, but that is the background against which we have to deal with the matter.

The Motor Vehicles (Construction and Use) Regulations, 1951, Part II, is headed:

“Regulations governing the construction, weight and equipment of motor vehicles and trailers”,

a heading which reproduces the wording of s. 3. Part III is headed:

“Regulations governing the use of motor vehicles and trailers”,

a heading which indicates an obvious intention to use the wider power conferred by s. 30 of the Act of 1930. Although there may be difficult border-line cases, it is quite plain that the construction of a machine is one subject-matter and the maintenance of that construction in good working order is another subject-matter. Having read the judgment and the findings and having heard counsel's submissions, in my view, all these defects indicated a failure to keep and maintain in good working order. There is no suggestion in the judgment or in any argument put before us that the vehicle or the relevant parts had not been properly constructed. It was sought to say that there was a breach of what I will call the construction regulations because the silencer, speed indicator and foot brake did not work. As to the speed indicator, reg. 12 (1) [which is within Part II of the regulations] provides:

“To every motor vehicle registered on or after Oct. 1, 1937, and to every public service vehicle which is for the time being used as an express carriage there shall be fitted an instrument so constructed and in such a position as at all times readily to indicate to the driver of the vehicle within a margin of accuracy of plus or minus ten per cent. if and when he is driving at a speed

In my opinion, that deals with the fitting of the instrument. That is reinforced in considering this code as a whole by reg. 73 [which is within Part III of the regulations] which provides:

“Every instrument for indicating speed provided in compliance with the requirements of reg. 12 of these regulations shall (a) at all material times be maintained in good working order . . .”

I think it is plain that the offence here was under reg. 73 and not under reg. 12. Counsel for the defendant put to us various other regulations and posed problems which it is unnecessary to decide. He took the example of a driving mirror, and said that if the mirror were not in the car, there being no special maintenance provision with regard to mirrors, we must hold that there was a breach of the construction regulations. I do not propose to consider that. It seems to me quite sufficient that we should decide this case on the basis that these defects are outside s. 3. I would, however, add this. Counsel for the plaintiff, in opening the appeal, used words, which he does not seek to uphold now, which indicated that he was putting forward the view that s. 3 applied only to the original manufacture. I think that must be wrong. If there has been anything in the nature of a reconstruction, or anything which could be properly described as an alteration in construction, so far as I can see, s. 3 would apply. I only say that to indicate that in coming to my decision I have not based myself on any rigid principle that s. 3 applies only at the time of the original construction. I do not think it does. I think it has a wider application. That conclusion is, I think, borne out by *Keeble v. Miller* (1), although that case was dealing with a different section. For those reasons, holding that these defects are outside s. 3, it follows

that the contract was not made illegal under s. 8 (1) and that the plaintiff is entitled to succeed.

BIRKETT, L.J.: I am entirely of the same opinion. The important point with which we are concerned was put in this way. It was said this was an unlawful sale under s. 8 (1) of the Act of 1934 which my Lord has read. That sub-section prohibited the sale of a motor car which offended against the Road Traffic Act, 1930, s. 3 (1). The latter sub-section refers to the construction, weight and equipment. The regulations to which reference has been made, in Part II of the Motor Vehicles (Construction and Use) Regulations, 1951, refer to the construction, weight and equipment of motor vehicles and trailers, whereas Part III contains the regulations governing use. I observe that in his judgment, when dealing with the matters which were alleged in relation to the speedometer, the silencer and the braking system, the learned judge says ([1953] 2 All E.R. 517):

“The particulars pleaded, in which it is alleged that this motor car was illegally sold because it was unroadworthy, first of all refer to the speed indicator, and it is admitted by the plaintiff that in fact the speedometer was in breach of reg. 12 (1) . . . which is applicable to the speedometer.”

Similarly, with regard to the silencer, he said that it was admitted that that was in fact a breach of reg. 20. Thirdly, he said that it was admitted that the motor car was not equipped with an efficient braking system and that it was in breach of reg. 44 (1). Had there been breaches of those three regulations, one could understand why the provisions of s. 8 (1) of the Act of 1934 and s. 3 (1) of the Act of 1930 were invoked. It does, however, seem a somewhat startling proposition that, if one sells a motor car in which the speedometer happens to be faulty or the silencer is not quite efficient or the braking system is not quite up to the mark, one has made an illegal sale. I think all three matters which were the subject of contest in the court below were not breaches of Part II of the regulations as the learned judge considered, but were breaches of the regulations in Part III dealing with use and maintenance.

UPJOHN, J.: I agree.

Appeal allowed.

Solicitors: *Curwen, Carter & Evans* (for the plaintiff); *Vanderpump & Sykes* (for the defendant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

STUDHOLME v. SOUTH WESTERN GAS BOARD.

[QUEEN'S BENCH DIVISION (Lynskey, J.), January 11, 12, 13, 14, 15, 20, 1954.]

Gas—Nationalisation—Vesting of liability—Service agreement with gas company—Remuneration calculated on capital of company—Frustration of agreement as from vesting date—Gas Act, 1948 (c. 67), s. 17 (3) (b).

Gas—Nationalisation—Financial provisions—Provision for compensation—Loan capital—Gas stock issued to area board—Money borrowed by Gas Council and lent to area board—Gas Act, 1948 (c. 67), s. 43 (1) (a), s. 44 (2) (a).

By an agreement dated June 7, 1938, the plaintiff was appointed solicitor to the Severn Valley Gas Corporation, Ltd., and its subsidiaries, and for his work was to be paid a retaining fee at the rate of £400 (in 1947 increased to £600) per annum per £1,000,000 of issued share and loan capital of the corporation to the nearest £100,000, payable half-yearly or as otherwise arranged. On May 1, 1949, the vesting date under the Gas Act, 1948, the Severn Valley Gas Corporation, Ltd., was vested in the defendants, together with six of the corporation's subsidiaries, the other subsidiaries being vested in three other area boards. The defendants did not avail themselves of the plaintiff's services, and, on Mar. 20, 1950, he was given written notice in accordance with the agreement of June 7, 1938, to expire on Mar. 31, 1951. He claimed from the defendants a balance which he alleged to be due under the agreement for his remuneration for the period Apr. 1, 1949, to Mar. 31, 1951.

HELD: although s. 17 (3) (a) of the Gas Act, 1948, enabled the defendants to be treated as a party to the agreement of June 7, 1938, under s. 17 (3) (b) of the Act the defendants were liable only "as respects anything falling to be done on or after the vesting date"; the thing falling to be done after the vesting date in the present case was the payment of the retaining fee as fixed by the agreement; that fee, however, was fixed in relation to the issued share and loan capital of the Severn Valley Gas Corporation, Ltd., and, as this basis of calculation had ceased to exist after the vesting date, the agreement was not possible of performance, even as modified under s. 17 (3); and, therefore, it became frustrated from and after the vesting date.

The defendants having admitted that the plaintiff was entitled to reasonable remuneration for the period May 1, 1949, to Mar. 31, 1951, there would be judgment for the plaintiff for an agreed amount.

Per curiam: the allocation (even if only provisional) under s. 44 (2) (a) of the Act of 1948 to the defendants by the Gas Council of ultimate responsibility for a proportion of the gas stock issued as compensation under the said Act constituted a debt due from the defendants to the Gas Council which was a funded debt with the character (having regard to s. 44 (2) (a)) of borrowed money, and which could, therefore, properly be described as loan capital; and, a fortiori, money borrowed by the issue of stock by the Gas Council under s. 43 (1) (a) of the Act for the purpose of exercising its powers under s. 42 and lent to the defendants constituted loan capital of the defendants.

FOR THE GAS ACT, 1948, s. 17 (3) (b), s. 43 and s. 44, see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 880, 919, 920.

Case referred to:

(1) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.

ACTION for balance of annual remuneration alleged to be due under an agreement in writing, and for damages for breach of agreement.

In 1934 the Severn Valley Gas Corporation, Ltd., was formed as a holding company the object of which was to obtain control of gas undertakings by acquiring the majority holding of their shares or stock. The plaintiff, Richard

Home Studholme, a solicitor, was employed by this company, and also by a second company, Gas Consolidation, Ltd., formed with the same objects shortly after his appointment to the first company, at a joint salary of £1,000 a year. He did legal work for both companies, and also a good deal of work on the administrative, technical and financial side. By an agreement in writing dated June 7, 1938, between the plaintiff and the Severn Valley Gas Corporation, Ltd., the plaintiff was appointed solicitor to the corporation and its subsidiaries. He was to perform the general parliamentary, legal and administrative work for the corporation, and was to be given the refusal of the parliamentary and legal work of the subsidiaries, charging his fees for the work done to the subsidiary concerned. He was to be paid a general retaining fee calculated at £400 per annum per £1,000,000 on the issued share and loan capital of the corporation to the nearest £100,000 at the end of each financial year, plus travelling expenses, payable half-yearly or as otherwise arranged, and for other work not covered by the retaining fee he was to be paid at rates not exceeding normal professional rates. These arrangements came into force on Apr. 1, 1938, and, unless otherwise agreed, were to be subject to twelve months' notice by either side, expiring on any Mar. 31. An agreement on similar lines was also come to between the plaintiff and Gas Consolidation, Ltd. In 1939 the plaintiff, who was a member of the Territorial Army, was called up for service in the forces where he remained until 1945, when he was invalided out with a spinal injury. He returned to the employment of both companies, and, on Mar. 5, 1946, became a director of the Severn Valley Gas Corporation, Ltd. On July 1, 1947, his retaining fee for the Severn Valley Gas Corporation, Ltd., was increased to £600 per annum per £1,000,000 of issued share capital and loan capital. On July 31, 1948, the Gas Act, 1948, was passed, and the vesting date under that Act was May 1, 1949. For the three years prior to the vesting date, the plaintiff's remuneration averaged £2,065 3s. 6d. a year, paid in part by the Severn Valley Gas Corporation, Ltd., and in part by its twenty-six subsidiaries. On the vesting date, by virtue of the Act of 1948, the Gas (Vesting Date) Order, 1949 (S.I., 1949, No. 392), and the Gas (Allocation of Undertakings to Area Boards and Gas Council) Order, 1949 (S.I., 1949, No. 742), the Severn Valley Gas Corporation, Ltd. was dissolved and was vested in the defendant gas board, as were six of the subsidiary companies, the other twenty subsidiaries being vested in three other area boards. The defendants did not avail themselves of the plaintiff's services after the vesting date, and sought to give him notice. He insisted on notice in accordance with the agreement of June 7, 1938, and the defendants then gave notice on Mar. 20, 1950, to expire on Mar. 31, 1951. The plaintiff claimed the balance of his annual remuneration from Apr. 1, 1949, to Mar. 31, 1951, due under the agreement of June 7, 1938.

Paull, Q.C., and Maurice Lyell for the plaintiff.

Megaw, Q.C., and M. R. E. Kerr for the defendants.

Cur. adv. vult.

Jan. 20. **LYNSKEY, J.**, read the following judgment. This is a claim for the balance alleged to be due to the plaintiff for his remuneration for the period from Apr. 1, 1949, to Mar. 31, 1951. The agreement for service under which the claim is made was one between the plaintiff and the Severn Valley Gas Corporation, Ltd. As a result of the provisions of the Gas Act, 1948, the plaintiff says that his agreement with the Severn Valley Gas Corporation, Ltd., became vested in the defendants, the South Western Gas Board, on May 1, 1949, and thereafter this agreement must be construed as if made with the South Western Gas Board and not with the Severn Valley Gas Corporation, Ltd., and any reference, however worded and whether express or implied, to the Severn Valley Gas Corporation, Ltd., in the agreement must be read as if the name of the South Western Gas Board were substituted in that agreement for the Severn Valley Gas Corporation, Ltd. As a result, the plaintiff says he is entitled to remuneration

by way of retaining fee from the South Western Gas Board as from May 1, 1949, of approximately £10,000 a year as against the remuneration by way of retainer to which he was entitled from the Severn Valley Gas Corporation, Ltd. of £754 8s. 11d. per year.

The first question I have to consider is what is the true construction of the Gas Act, 1948, and, in particular, of s. 17 of that Act, and whether it produces the somewhat remarkable result which the plaintiff contends that it has. [His LORDSHIP stated the facts and continued:] Section 17 of the Gas Act, 1948, is the section on which the plaintiff relies as the basis of his claim. Sub-section (1) reads:

“Subject to the provisions of this Part of this Act, all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister (in this Act referred to as ‘the vesting date’), were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister.”

That sub-section on the vesting date vested in the defendants “all property, rights, liabilities and obligations” of the Severn Valley Gas Corporation, Ltd. as they existed immediately prior to the vesting date. Sub-section (3) provides:

“Subject to the provisions of this Part of this Act, every agreement to which any undertaker to whom this Part of this Act applies was a party immediately before the vesting date, whether in writing or not, and whether or not of such a nature that rights, liabilities and obligations thereunder could be assigned by the undertaker, shall, unless its terms or subject-matter make it impossible that it should have effect as modified in manner provided by this sub-section, have effect as from the vesting date as if— (a) the appropriate board had been a party to the agreement; (b) for any reference (however worded and whether express or implied) to the undertaker there were substituted, as respects anything falling to be done on or after the vesting date, a reference to the appropriate board . . . (e) in the case of an agreement for the rendering of personal services to the undertaker, the services to which the agreement relates were, on and after the vesting date, any services under the appropriate board, to be selected by that board, which are reasonably equivalent services; and (f) save as provided by the three last preceding paragraphs, for any reference (however worded and whether express or implied) to the undertaking of the undertaker or any part of that undertaking or to the limits of supply of the undertaker or any part thereof there were substituted, as respects anything falling to be done on or after the vesting date, a reference to so much of the business carried on by the appropriate board as corresponds to the undertaking or part of the undertaking of the undertaker or, as the case may be, a reference to the area comprised in the said limits immediately before the vesting date or part thereof.”

Sub-section (4):

“Every agreement, whether in writing or not, and every document (not being an agreement or a document to which the last preceding sub-section applies or an enactment) which refers whether specifically or generally to any such undertaker shall be construed in accordance with the provisions of the last preceding sub-section, so far as applicable.”

There are certain exceptions which are dealt with in sub-s. (6). Sub-section (9):

“Subject to the next following section, every undertaker to whom this Part of this Act applies, being a body corporate, shall be dissolved on the vesting date.”

The agreement which I am considering is an agreement for rendering personal services. If it had not been for the provisions of s. 17 (3), it would be impossible of performance (*Nokes v. Doncaster Amalgamated Collieries, Ltd.* (1) ([1940] 3 All E.R. 554)), as the contract was only to render personal services to the Severn Valley Gas Corporation, Ltd. By the provisions of s. 17 (9), that corporation, being a body corporate, was dissolved on the vesting date. The question I have to consider is whether, assuming the contract is modified as provided by sub-s. (3), it would still be possible of performance. So far as the plaintiff's services are concerned, sub-s. (3) (e) enables the board to substitute for the contractual services reasonably equivalent services selected by the board, and, although the services may be varied under para. (e) of sub-s. (3), there is no express power given by the section (or, indeed, any part of the Act) to vary the remuneration for those services. The scheme of the whole section appears to be that persons contracting with the undertakers shall retain the rights they had as against the undertakers with the substitution of the board as the party liable. It is said, however, on behalf of the plaintiff that, as his retaining fee was to be calculated at £600 per annum per million on issued share and loan capital at the end of each financial year, the section requires that "the issued share and loan capital of the Severn Valley Gas Corporation, Ltd." must be read as "the issued share and loan capital of the South Western Gas Board" which, according to the statement of claim, means substituting £16,713,032 for £1,382,971 as the figure on which the £600 per million per annum has to be calculated. I feel sure that this result was never envisaged by those who drafted or passed the Act.

The defendants did not avail themselves of the plaintiff's services. They sought to give him notice shortly after the vesting date, but he insisted on notice in accordance with the terms of his agreement to expire on Mar. 31, 1951. The notice was given on Mar. 20, 1950, to expire on Mar. 31, 1951. The defendants, or those representing them, appear to have thought the agreement was binding on them, but there is no plea of estoppel and no point was made as to this before me.

It seems to me that the real issue in this case is: What is the proper construction of s. 17 (3) (b)? Section 17 (3) (a) enables the board to be treated as a party to the agreement, but para. (b) sets out the extent to which the board, as from the vesting date, is to become liable under the agreement. Paragraph (b) does not provide that for any reference in the agreement to the undertaker there shall be substituted a reference to the appropriate board. The words are limited. The substitution is only to be made

"as respects anything falling to be done on or after the vesting date."

The words "falling to be done" mean falling to be done under the agreement, but by the board, in substitution for the undertaker. What falls to be done by the board here is to pay the plaintiff the retaining fee fixed by the agreement. That fee was fixed in relation to the issued share and loan capital of the Severn Valley Gas Corporation, Ltd. The issued share and loan capital was the yardstick by which the basis of the retaining fee was fixed. There is nothing in the agreement which called on the undertaker to issue shares or acquire loan capital. The agreement was made on the basis that shares had been issued and might vary from time to time, but there was no obligation on the undertaker to issue such shares in the future or acquire such loan capital. In fact, the Severn Valley Gas Corporation, Ltd. had no loan capital. The issue of shares or the creation of loan capital was not something falling to be done under the agreement with the undertakers, and para. (b), therefore, in my view, does not operate to substitute a reference to the board's issued share and loan capital at the end of each financial year for that of the Severn Valley Gas Corporation, Ltd.

As, by the Gas Act, 1948, the Severn Valley Gas Corporation, Ltd. was dissolved on May 1, 1949, there was thereafter no issued share or loan capital existing at the end of each of the succeeding financial years and nothing, therefore,

on which the plaintiff's retaining fees could be calculated. The obligation of the area gas board to pay the retaining fee assessed in accordance with cl. 2 of the plaintiff's agreement became impossible of performance. Under para. 3 of his agreement, the plaintiff was to be given the refusal of the legal and parliamentary work of the subsidiary companies and was to charge his professional fees for such work to the party concerned, that is, in the proper case, to the subsidiary company. At the date of the vesting order there were some twenty-six of these subsidiaries and twenty of these had been allocated to other area boards. It might have been possible for the area board under s. 17 (3) (e) to direct the performance by the plaintiff of reasonably equivalent services, but they had no power to remunerate him under the terms of his agreement for such services in place of the services he would previously have rendered the subsidiary companies. The result was that this part of the plaintiff's agreement also became impossible of performance by the board. A basic part of any agreement for the rendering of personal service is the remuneration the employer is to pay under the agreement for such service. Applying the modifications provided for in s. 17 (3) as I understand them, the board would not be able to pay the retaining fee called for under cl. 2 of the plaintiff's agreement as the basis on which it was calculated had ceased to exist after the vesting date. They would not have been able to procure the giving of the offer to the plaintiff of the work of some twenty of the subsidiary companies or procure payment by such companies for such work, as those companies had ceased to exist on the vesting date and their property, rights and obligations vested in other area boards.

In my view, therefore, the agreement between the plaintiff and the Severn Valley Gas Corporation, Ltd. by its terms and subject-matter, even when modified as set out in s. 17 (3), made it impossible that it should have effect. Although the agreement between the plaintiff and the Severn Valley Gas Corporation, Ltd., may have vested in the defendants, as it was not possible of performance even as modified under s. 17 (3) the agreement became frustrated as from the vesting date.

By their defence, the defendants, whilst denying that the plaintiff is entitled to any remuneration under or by virtue of his agreement with the Severn Valley Gas Corporation, Ltd., admit that he is entitled to reasonable remuneration for the period from May 1, 1949, to Mar. 31, 1951, and they admit that the reasonable remuneration for such period would be £3,958 5s. 1d., and, after taking credit for £635 19s. 9d. already paid to the plaintiff, admit that there is due and owing to the plaintiff the sum of £3,322 5s. 4d. In view of this admission, the plaintiff is entitled to judgment for this sum against the defendants.

This is enough to dispose of this case, but, in view of the arguments addressed to me by counsel for both parties, I propose to deal with the further question debated, although, of course, it can have no effect on the result which I have already indicated. If I am wrong in the view I have taken of the construction of s. 17 and the plaintiff is entitled to have his retaining fee calculated on the basis of the issued share and loan capital of the board, the question then arises what was the issued share and loan capital of the board on Mar. 31, 1950, and Mar. 31, 1951—if, indeed, there was any such capital. It is common ground that there was no issue of share capital by the area board. The plaintiff, however, contends that the amount of gas stock for which the ultimate responsibility for meeting the obligations in respect of such stock is allocated to the area board under a scheme under s. 44 of the Gas Act, 1948, is capital loan of this area board. I was referred to the Finance Act, 1899, s. 8, as to what is a capital loan for the purposes of the Finance Acts, and "loan capital" there means, *inter alia*, any funded debt, by whatever name known, and any capital raised by any corporation, company or body of persons which is borrowed, or has the character of borrowed money. The Finance Act, 1946, s. 52, exempts from the stamp duty imposed by the Finance Act, 1899, s. 8, documents connected with nationalisation

schemes and loan capital issued to raise money required to be paid as consideration for the transfer to the nationalised body of an undertaking. But for this exemption it would seem that money so raised would have attracted this duty as loan capital.

A The scheme of the Gas Act, 1948, is to create a Gas Council as a body corporate and twelve area gas boards, each again being a body corporate. The Gas Council, by s. 43, is to issue stock to be known as British gas stock. It is empowered to issue such stock for the purpose of exercising its powers under s. 42, and required to create and issue such stock for the purpose of satisfying any right to compensation which, under the Act, is expressly required to be satisfied by the issue of stock. By s. 25 of the Act every holder of securities of any undertaker, not being an undertaker to which s. 18 of the Act applies, shall be entitled to be compensated by the issue to him by the gas council of British gas stock. The British Gas Council become responsible to the stockholder for the redemption of the stock and payment of the interest on it, and the stockholders are given no rights directly against the area gas boards. On the other hand, by s. 17 (1) all property, rights, liabilities and obligations of the undertakers vest in such area board as the Minister may determine. Under s. 44 (2) (a), however, a scheme is to be settled by the Gas Council and the Minister to determine the shares in which the ultimate responsibility for meeting the obligations in respect of the issue of stock is to be borne, and the scheme must provide (a) for allocating to the area boards ultimate responsibility for any stock issued for the purpose of satisfying rights to compensation, having regard to the extent to which the assets in respect of which the compensation is payable vest by virtue of the Act, or are subsequently transferred to the respective boards. By s. 44 (3):

E "Each area board shall, at such times as may be directed by the Gas Council, pay to the council—(a) such sums as may be necessary to enable the council to make any payments, or to refund to themselves any payments made, in respect of interest on or the redemption of British gas stock, including payments into a sinking fund, so far as the payments are attributable to stock for which the area board are ultimately responsible under this section; and (b) such contributions towards the expenses incurred by the Gas Council in issuing any British gas stock and in managing that stock as bear to the total expenses so incurred the same proportion as the amount of the stock in respect of which the area board are ultimately responsible under this section bears to the total amount of the stock. Any sums paid by an area board under this sub-section to enable the Gas Council to make payments in respect of interest on British gas stock shall be deemed to be annual payments, and any sums so paid to enable the council to make payments in respect of the redemption of such stock shall be deemed to be capital payments."

G Section 45 provides for a Treasury guarantee and the Gas Council are the body responsible for meeting any liability incurred by the Treasury in implementing the guarantee. By s. 46 a central guarantee fund is to be created, and by sub-s. (1) of that section the Gas Council's solicitors shall maintain

H "... a fund, which shall be known as the central guarantee fund, for the following purposes—(a) in the event of any area board or the Gas Council being unable temporarily to discharge their obligations in respect of the payment of interest on, or the redemption or repayment of, any British gas stock or any temporary loan, or in respect of any payment by way of compensation to a local authority, for enabling those payments to be made out of the fund; (b) for repaying to the Treasury any payments made by them for the purposes of fulfilling any guarantee given by them under the last preceding section; and the moneys in the central guarantee fund shall be applied by the Gas Council for those purposes only."

No scheme was settled by the council and the Minister under s. 44 until July 31, 1952, but the council had made provisional allocations of stock for such purposes to the South Western Gas Board on Mar. 31, 1950, of £11,376,595, and on Mar. 31, 1951, of £12,714,188 in respect of compensation stock. There was no direct obligation of the area boards to the stockholders. The obligation imposed by the statute on the area boards is to be the ultimate responsibility of the Gas Council for the payment of interest on and the redemption of that gas stock. The payments are to be made under that obligation at such times as may be directed by the Gas Council, who are given complete control as to rate of interest and amounts of repayments made under the Act, namely, the Gas (Stock) Regulations, 1949 (S.I., 1949, No. 751). The British gas stock issued by the Gas Council consisted of British gas three per cent. guaranteed 1990-95 and British gas three and a half per cent. guaranteed stock 1969-71. This stock, as far as the Gas Council is concerned, was clearly a funded loan. The question I have to decide is whether the area board's ultimate responsibility to the Gas Council for meeting obligations of the stock, the responsibility for which was allocated to the area board, can properly be described as loan capital as being a funded debt or capital raised which is borrowed or has the character of borrowed money.

I have come to the conclusion, although I must say with considerable reluctance, on the facts of this case, that the statutory debt owed by the area board to the Gas Council is a funded debt, and, having regard to the provisions of s. 44 (2) (a), the credit obtained has the character of borrowed money. Payments required to be made by the area board to the Gas Council to enable the council to make payments for the redemption of the gas stock are, by s. 44 (3), deemed to be capital payments. If the ultimate responsibility had been allocated by the Gas Council and the Minister under the scheme on Mar. 31, 1950-51, that responsibility would be a funded debt and loan capital of the area board. The fact that only a provisional allocation had been made at those dates would not, in my view, prevent the credit thereby obtained being loan capital. Those entitled to such compensation by way of gas stock were entitled to such compensation at the vesting date or at the conversion date and the area board's obligation when the final allocation is made dates back to the vesting date.

In addition to issuing the gas stock required for compensation, the Gas Council, under s. 43 (1) (a), may create and issue any stock required for the purpose of exercising their powers under s. 42. Section 42 reads:

"(1) Each area board and the Gas Council may, with the consent of the Minister and with the approval of the Treasury or in accordance with the terms of any general authority issued by the Minister with the approval of the Treasury, borrow temporarily, by way of overdraft or otherwise, such sums as the board or council, as the case may be, may require for meeting their obligations or discharging their functions under this Act. (2) The Gas Council may, with the consent of the Minister and the approval of the Treasury, borrow money by the issue of British gas stock, for all or any of the following purposes, that is to say—(a) the redemption of any British gas stock; (b) the provision of money for meeting any expenditure incurred by any area board or by the Gas Council in connection with any works the cost of which is properly chargeable to capital account; (c) the provision of any working capital required by any area board or by the Gas Council; (d) the provision of money required for the payment of compensation by area boards under this Act, except payments to local authorities in respect of loans and advances; (e) any other purpose for which capital moneys are properly applicable by any area board or the Gas Council, including the repayment of any money temporarily borrowed under the last preceding sub-section for any of the purposes mentioned in this sub-section; and (f) any other payment which any area board or the Gas Council are authorised to make and which ought in the opinion of the Gas Council to be spread over

a term of years. (3) The aggregate of the amounts outstanding in respect of the principal of any stock issued by the Gas Council, otherwise than for the purpose of paying compensation under Part II of this Act whether in stock or in cash, and in respect of any temporary loans raised by the Gas Council or any area board, shall not at any time exceed the sum of £250,000,000: Provided that nothing in this sub-section shall prevent the Gas Council from borrowing in excess of the said sum for the purpose of redeeming any British gas stock which they are required or entitled to redeem, or of repaying any money temporarily borrowed under sub-s. (1) of this section. (4) Save as aforesaid, neither an area board nor the Gas Council shall borrow any money."

A

It is quite clear that the powers given by s. 43 for the issue of gas stock for exercising the Gas Council's powers under s. 42 constitute powers to borrow money. It is not stock raised for the purpose of compensation, but stock issued for the purpose of borrowing money from stockholders, to be applied for the purposes set out in s. 42. In this case the Gas Council borrowed money on issued gas stock, and the money was actually lent to the defendant gas board, and, whatever view may be taken of the allocation of responsibility for compensation gas stock, it seems to me reasonably clear that stock issued for borrowing money and the loan of that money to the area board for what obviously are mostly capital purposes, in any event which called for a funded debt, must be treated as loan capital. According to the reports, the defendant board received £3,500,000 from the gas council under s. 42 of the Act, and that, in my view, whatever may be said about the rights or wrongs of my decision with regard to the compensation stock, must clearly be loan capital.

C

D

The ultimate result is that there will be judgment for the plaintiff for the admitted amount set out in the earlier part of my judgment.

Judgment for the plaintiff.

Solicitors: *Beaumont & Son* (for the plaintiff); *Slaughter & May* (for the defendants).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

ISAACS v. TITUS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), January 26, 1954.]

Rent Restriction—Shared accommodation—Kitchen shared by two tenants—Premises vacated by one tenant—Right of landlord to possession as against remaining tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 8 (1) (b).

The tenant rented one room together with a kitchen the use whereof she shared with another person who had later vacated his premises. The landlord did not resume occupation of the premises thus vacated, but he claimed possession of the room and kitchen, contending that the right to share the kitchen had reverted to him, that s. 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949, no longer applied, and that he was thus entitled to possession.

HELD: where a tenant shared accommodation with a person other than the landlord and that person vacated the premises, the landlord did not automatically step into the shoes of that person so that the tenant now shared the accommodation with the landlord, and, therefore, the landlord was not entitled to possession.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1103.

Case referred to:

(1) *Lockwood v. Lowe*, post, p. 472.

APPEAL by the tenant from a decision of His Honour JUDGE ARCHER, Q.C., at Brighton County Court, dated Oct. 29, 1953.

By his particulars of claim, dated Sept. 30, 1953, the landlord claimed against the tenant possession of the front room and kitchen on the first floor of the landlord's property known as No. 12, Norfolk Square, Brighton, and stated, *inter alia*:

"2. By the terms of the said tenancy the [tenant] shares the said kitchen with the tenant or occupier of the other room or rooms situate on the said first floor."

By amended particulars of claim, dated Oct. 26, 1953, the landlord added:

"3. The tenant with whom the [tenant] has heretofore shared the said kitchen has vacated the premises and the right of sharing the said kitchen has accordingly reverted to the [landlord]."

By his defence the tenant relied on the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, as amended by the Landlord and Tenant (Rent Control) Act, 1949, s. 8 (1). The facts were not in dispute and in the note of his judgment, the county court judge said:

"This is a very doubtful point, but in the events which have happened the landlord and no one else at present has any right to share the kitchen with the [tenant], and so I feel constrained to hold that s. 8 of the Act of 1949 does not protect the defendant."

Accordingly, the judge made an order for possession in one month and the tenant appealed.

P. P. Elman for the tenant.

The landlord did not appear.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: Section 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949, is as follows:

"Where—(a) a tenant has the exclusive occupation of any accommodation (in this section referred to as 'the separate accommodation'), (b) the terms

as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as 'the shared accommodation') in common with another person or other persons, not being or including the landlord, and (c) by reason only of the circumstances mentioned in para. (b) of this sub-section, the separate accommodation would not apart from this section be a dwelling-house to which the [Rent Restrictions] Acts apply, the separate accommodation shall be deemed to be a dwelling-house to which those Acts apply, and the following provisions of this section shall have effect."

That provision altered the law as it had previously been laid down, namely, that where there was sharing, whether with the landlord or anyone else, of accommodation of the kind indicated, there was no letting as a separate dwelling, and so no protection for the tenant. Section 8 (6) provides:

"While the tenant is in possession of the separate accommodation by virtue either of the contract of tenancy or of the provisions of the [Rent Restrictions] Acts, any term or condition of the contract of tenancy terminating or modifying, or providing for the termination or modification of, his right to the use of any of the shared accommodation which is living accommodation shall be of no effect . . ."

Sub-s. (8) gives to the court a right, on the application of the landlord, to modify the sharing provision.

Had the learned county court judge had the advantage of having cited to him *Lockwood v. Lowe* (1), he would not have felt constrained to hold, as he did,

that the tenant has lost the protection of the Act. In that, as in the present, case, there had originally been a letting to two persons of separate accommodation, each having the right to share with the other an essential part of the habitation of each, namely, the kitchen and scullery and the bathroom, and one of the two had gone and left his part of the premises vacant. The majority of the court (DENNING and MORRIS, L.JJ.), in deciding the case in favour of the remaining

tenant, came to the conclusion that, on the facts as found by the county court judge, the terms of the original letting remained as they had previously been, notwithstanding the departure of one of the two original tenants, that is to say, they were of opinion that the right of the remaining tenant was, as it always had been, a right to the exclusive occupation of certain of the accommodation, plus a right to share with the other tenant and with no one else. ROMER, L.J.,

who was the third member of the court, based his conclusion rather on this, that, as Bartholomew had gone, the practical effect was that Lowe had an exclusive right, on the facts as found, not only to the original accommodation, but also to that which he had formerly had to share with Bartholomew. But all three judges indicated that, unless there was by mutual consent some modification or alteration of the contract, or the making of a new contract, it could not be

said that because one of the two tenants had gone, the landlord had, so to speak, automatically stepped into the shoes of the old tenant so as to produce the result, as a matter of law, that the tenant who formerly had the right to share with another tenant was now in the position of having a right to share with the landlord. ROMER, L.J., drew attention to the point that, according to the amended and added para. 3 in the particulars of claim in the present case, it was alleged by

the landlord that, because of the departure of the other tenant, the right of sharing the kitchen "has accordingly reverted to the [landlord]". By the particulars of defence the tenant relied on the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, as amended by the Landlord and Tenant (Rent Control) Act, 1949, generally as a defence, but did not in terms challenge that statement. I construe the statement in para. 3 merely as an allegation that because the former tenant has gone, therefore, that tenant's former estate in the premises has, no doubt, come to an end, and in that sense the landlord is

entitled to possession of the room which the previous tenant formerly occupied. But it does not follow, as I think, that the remaining tenant's terms of tenancy have automatically undergone some change. We are told by counsel for the tenant, no doubt accurately, that it is not in any case the fact that the landlord is himself in occupation, and is himself sharing with the tenant the accommodation which the tenant formerly shared with the other tenant. In those circumstances, I cannot conclude that para. 3 in the particulars of claim, which is not challenged, serves to distinguish the present case on these facts from *Lockwood v. Lowe* (1). On the contrary, as I have already indicated, the present case is, in my judgment, necessarily on its facts governed by the decision of this court in *Lockwood v. Lowe* (1), and that, had *Lockwood v. Lowe* (1) been cited to the learned judge, I have little doubt that his opinion would also have been to that effect. I, therefore, think that the appeal must be allowed and the order for possession set aside.

DENNING, L.J.: I agree that the appeal should be allowed.

ROMER, L.J.: I also agree.

Appeal allowed.

Solicitors: *A. & G. Tooth*, agents for *Leslie Wilner*, Brighton (for the tenant).
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LOCKWOOD v. LOWE.

[COURT OF APPEAL (Denning, Morris and Romer, L.JJ.), March 17, 31, 1953.]

Rent Restriction—Shared accommodation—Kitchen shared by two tenants—Premises vacated by one tenant—Right of landlord to possession as against remaining tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 8 (1) (b).

In 1941 the landlord let her house to the tenant and one B., each occupying a separate part of the house with the shared right of user of the kitchen and bathroom. The tenant and B. each had a separate tenancy, to which the Rent Restrictions Acts applied, and a separate rent book. In June, 1950, B. left the premises and the landlord sought possession of the premises from the tenant on the ground that, since he no longer shared the kitchen with another tenant, he was not protected by the Landlord and Tenant (Rent Control) Act, 1949, s. 8 (1) (b).

HELD: although the tenant no longer shared the kitchen because there was no other tenant with whom to share it, until the court made an order under s. 8 (8) of the Act of 1949 permitting the landlord herself to enter into occupation and share the kitchen, the terms of the contract of tenancy remained the same and the tenant was still protected by s. 8 (1) (b).

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1103.

APPEAL by the landlord from an order of His Honour JUDGE REGINALD CLARK, Q.C., at Ilford County Court dated Dec. 16, 1952, dismissing the landlord's action for possession of the premises known as 170, Pembroke Road, Ilford.

R. H. W. Dunn for the landlord.

The tenant appeared in person.

Cur. adv. vult.

Mar. 31. The following judgments were read.

DENNING, L.J.: In 1941 the landlord let her house, 170, Pembroke Road, to the tenant, Lowe, and one Bartholomew, who were brothers-in-law. Each family had a part of the house separately, but they shared the scullery (which was used as a kitchen) and the bathroom. Each had a separate tenancy and a separate rent book. In June, 1950, Bartholomew moved out, and the landlord now seeks an order to evict the tenant because she (the landlord) wants to sell the house with vacant possession. The judge has found that the tenancy of the tenant is one for exclusive occupation of the upstairs rooms with the shared right of user with Bartholomew of the scullery-kitchen and bathroom.

It is clear that before Bartholomew left the house both he and the tenant were protected by the Rent Acts. The terms on which each of them held included the use of the kitchen in common with the other. Each, therefore, came within s. 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949. When Bartholomew went out the

tenant, of course, no longer used the kitchen in common with him. He used it alone because there was no one else with whom to share it. But does that mean that the tenant was no longer protected by the Act? I think he was still protected. His contract of tenancy remained unaltered and the terms on which he held remained the same. The only difference was that there was no occasion for him to share the kitchen.

A It was argued that it was open to the landlord to go into that part of the house Bartholomew had occupied, to share the kitchen with the tenant, and then to say that he (the tenant) was not protected save to the limited extent given by s. 7 of the Act of 1949, in short, that he could be evicted. Why, it was asked, should the landlord be put to the trouble of going into occupation to achieve this result? Why should she not reap the advantage of s. 7 at once? The answer to this argument is, I think, that the landlord was not at liberty to go into the house herself and share it with the tenant unless she first obtained an order of the court enabling her to do so. The tenant agreed to take his part of the house on the terms that he shared the kitchen with Bartholomew, and not with anyone else. On the wording of the contract, the landlord could not go in herself, nor could she put anyone else in to share it with the tenant. But the Act of 1949 has provided for some modification of the contract. Section 8 (8) gives the court power to modify the terms so as to enable the landlord to put someone else into the house in place of Bartholomew with the right to share the kitchen just as Bartholomew had done. Incidentally, I find it difficult to understand the proviso to that sub-section, but I am inclined to think that its principal object is to see that, on any change of occupants, the hours during which the tenant can use the shared accommodation are not diminished or altered to his disadvantage. At any rate, the proviso should not be so construed as to nullify the operative part of the sub-section. If the court, under s. 8 (8), can make an order to vary the persons in occupation of the house, as I think it can, it means that the landlord, by applying to the court, can put someone into the house to share with the tenant. The new tenant will presumably be someone other than the landlord. It is possible that the court might modify the terms so as to permit the landlord himself to go in and share the house, but it would hesitate to do so when the result would be to deprive the tenant of the protection of s. 8 (1). At any rate, the court has as yet made no such order, and until it does so the terms on which the tenant holds are that he shares the kitchen with someone other than his landlord. He is, therefore, protected by s. 8 (1) of the Act of 1949. The appeal should be dismissed.

D MORRIS, L.J. (read by DENNING, L.J.): The learned judge has held as a determination of fact that the tenancy was one for the exclusive occupation by the tenant of the upstairs rooms with the shared right of user with Bartholomew of the scullery and bathroom. It is conceded that until Bartholomew left in 1950 the tenant's tenancy could have been protected as a result of s. 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949. No event has since taken place in reference to the house save that a notice to quit was served on the tenant in October, 1952. But I cannot see that any change has taken place in the terms on which the tenant held. There has been no new agreement or modification of the prior agreement, and, save by mutual consent, there could be no alteration of the provisions of the tenant's contract of tenancy which form the terms and conditions of his statutory tenancy. As, however, the agreement between the tenant and the landlord was marked by a singular economy of express provisions there is, undoubtedly, room for certain implied provisions. The contingency of the departure of Bartholomew, for any one of a variety of possible reasons, was not provided for. Terms are not lightly to be implied in a contract, and certainly will not be implied merely because they might be considered by a court to be reasonable. Terms will only be implied which the court can say *must* have been of ready mutual acceptance by the parties. It is unnecessary on this appeal to decide what, if any, terms can be implied for, in my view, it is at least clear that the tenant would not have agreed to a term which gave to the landlord a right, in the event of Bartholomew's departure, to enter the vacated part in such a way as to deprive the tenant of the security of tenure which otherwise he would enjoy. No term to that effect ought to be imported into the terms on which the tenant holds. In my judgment, this appeal fails.

G ROMER, L.J.: The issue which was argued in this case before the learned judge and before us was whether the tenant is entitled to the protection afforded by s. 8 (1) of the Act of 1949. I have come to the conclusion that on the whole he does not qualify for protection under that particular statutory provision, but that he can claim security of tenure, at all events for the present, for another reason.

H So far as s. 8 (1) is concerned, the tenant would have to establish that at the date of the commencement of the proceedings (i) he had the exclusive occupation of separate accommodation at the premises in question, and (ii) that the terms as between himself and the landlord on which he held the separate accommodation included the use of other accommodation in the house in common with another person or other persons, not being or including, the landlord. No difficulty arises as to the separate accommodation, for the tenant had such accommodation from the time when he first went to live in the house in 1940, and he still had it on Oct. 31, 1952, when these proceedings were

started. As to the shared accommodation, the first step must be to ascertain what, in this regard, were the original terms of tenancy. The judge held

"that what the landlord let to the tenant was a part of the house to be agreed on between the tenant and Bartholomew, together with a right to use the scullery for cooking purposes in common with Bartholomew. I accept the tenant's evidence that he occupied the upstairs rooms, and I, therefore, hold that his tenancy was one for the exclusive occupation of those rooms with the shared right of user with Bartholomew of the scullery and bathroom."

Bartholomew left the house in June, 1950, and has not since returned. What, then, was the position which arose on his departure, and what was it at the date of the commencement of these proceedings?

The original arrangements between the landlord, the tenant, and Bartholomew, as disclosed by the evidence, seem to have been of a loose and somewhat indefinite character, and I should imagine that no thought was given, and certainly no intention was proved, as to what was to happen if and when either the tenant or Bartholomew, with their respective wives, were to leave the house for the purpose of living somewhere else. That contingency was left in nubibus. I cannot think, nor, in my judgment, did the learned judge intend to hold, that the common intention of landlord and tenant was that the tenant's right to share with Bartholomew was to continue during the lifetime of the latter regardless of where he might have been living. The corollary of the tenant's right to share the scullery with Bartholomew was necessarily, as I think, that Bartholomew had a right to share it with the tenant. And if Bartholomew left the house, as he did, in order to live elsewhere, his right to use the scullery in common with the tenant would cease, if only for the reason that he would have no right to enter the house at all. Accordingly, it is implicit in the contract as found by the judge, I think, that the tenant's right to share the scullery with Bartholomew was to last only for so long as Bartholomew was there himself. If it were possible to say that after Bartholomew's departure, or on Oct. 31, 1952, or now, it was or is a term of the tenant's tenancy that he had or has a right to use the scullery in common with Bartholomew, it would be equally possible to say so, I suppose, in ten or twenty years' time (provided that the tenant is still living in the house), even though by then Bartholomew may have gone to live in America or may, indeed, be no longer alive. Accordingly, I come to the conclusion that whoever else (if anyone) may be regarded as "another person or other persons" for the purposes of s. 8 (1) of the Act of 1949, when these proceedings were started, Bartholomew is not one of them.

It is, however, clear, I think, that the tenant's contractual right to use the kitchen did not automatically cease altogether when Bartholomew left the premises. The contrary view would impute to the parties an intention so capricious and improbable that I should only accept it if there were clear evidence to support it, which there is not. Further, if, in fact, there was a term to that effect in the tenant's contract, it would appear to be of no effect by reason of s. 8 (6). Accordingly, it follows, in my opinion, that, as at the date of these proceedings the tenant still possessed the right to use the scullery, such right was either an exclusive right or one which he shared with someone else. The only other person, I think, who could be said at the relevant date to have a right of user in common with the tenant was the landlord herself. There was no reason that I can see why the landlord should not have re-occupied Bartholomew's accommodation when Bartholomew went out. She did not, however, do so, nor has she done so since, and, in my opinion, the mere fact that the landlord had the ordinary rights as such to take possession of property which belongs to her does not justify the view that she should be regarded as being entitled to use the kitchen in common with the tenant. Moreover, it certainly was not, nor has it ever been, a term of the tenant's tenancy of his separate accommodation that he should share the right of using the kitchen in common with the landlord. Such a term, as I have previously indicated, would involve the existence of a correlative right in the landlord as the other sharing party, and this right was not one to which the tenant ever agreed. It is not possible to suggest anyone other than Bartholomew or the landlord herself as a person with whom the tenant had the right to use the kitchen when these proceedings commenced, and as, in my opinion, neither of these persons can fairly be regarded as being such a person it must follow that no such person existed at all.

The result would seem to be that on Oct. 31, 1952, the tenant's right to use the kitchen was, in effect, and still is, an exclusive right. If, however, the landlord were herself to re-occupy the separate accommodation in which the Bartholomews lived, a different position would, or might, arise, as to which I would prefer not to express any concluded opinion. It may be also that the county court judge could entertain an application by the landlord under s. 8 (8) of the Act of 1949, but I do not desire to indicate any view, either on this point or on what the position would be if the court, on any such application, made an order modifying the tenant's right to use the scullery in the manner authorised by the sub-section. It is sufficient for the purposes of this appeal to say that, in my opinion, the tenant's separate accommodation, the bathroom and the scullery

together, constituted a dwelling-house to which the Rent Restrictions Acts apply; that the landlord made out no case entitling her to possession of the premises so constituted; and that this appeal must, accordingly, be dismissed.

Appeal dismissed.

Solicitors: *Woodman, Matthews & Co.* (for the landlord).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

A MARSDEN v. REGAN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), January 27, 28, 29, 1954.]

Executor and Administrator—Liability—Personal liability—Relief—Legal advice followed—Insolvent estate—Business continued to be carried on by executor—Ejectment proceedings resisted—Unsuccessful claim for new lease—Trustee Act, 1925 (c. 19), s. 61—Judgment for rent obtained by landlord in county court—Presumption of devastavit—County Court Rules, 1936, Ord. 32, r. 2 (1).

The testatrix was the tenant of premises where she lived on the first floor and carried on the business of an old clothes dealer on the ground floor. By her will she appointed the defendant to be her executrix and trustee and bequeathed to her "the business at" the premises. On June 15, 1951, she died. Her estate was virtually insolvent, and the defendant, as executrix, carried on the business in order to raise funds. Shortly after the death of the testatrix the plaintiff purchased the reversion of the premises, and commenced proceedings for possession and mesne profits against the defendant as personal representative. The defendant, who acted throughout on the advice of a reputable firm of solicitors, resisted the claim for possession, but she did not plead *plene administravit* or insufficient assets. On Feb. 13, 1952, the plaintiff obtained judgment for possession and mesne profits amounting to £29 15s. and costs which were later taxed at £21 18s. In November, 1952, a claim by the defendant for a new lease under s. 5, or compensation under s. 4, of the Landlord and Tenant Act, 1927, was dismissed. In March, 1953, the plaintiff levied execution on the judgment he had obtained, but there was a return of *nulla bona testatoris* on execution. The defendant delivered up possession on May 9, 1953. The plaintiff now claimed from the defendant personally the judgment debt of £29 15s. with £21 18s. costs and a further £55 5s. mesne profits for the period from the first judgment till possession was given, on the ground that the defendant had received assets amounting to at least £200 which she had wasted in legal proceedings and in carrying on the business when it was not profitable. The defendant pleaded, *inter alia*, *plene administravit*, and at the hearing she produced trading accounts showing that for the year ending June 21, 1952, the business made a net profit of £175 8s. 1d., but that from that date to Feb. 9, 1953, it made a net loss of £11 7s. 8d. She also produced her account as executrix showing that she had paid all the creditors of the estate except the plaintiff. The plaintiff relied on the presumption of *devastavit* which arose from the facts that in the proceedings resulting in the judgment of Feb. 13, 1952, the defendant must be taken to have conclusively admitted assets in her hands sufficient to pay all debts then known to her and that the sheriff returned *nulla bona* to the warrant of execution. The defendant submitted that that presumption was not available having regard to Ord. 32, r. 2 (1), of the County Court Rules, 1936, and contended that there was no waste, but that, if there was waste committed by her, relief should be granted under s. 61 of the Trustee Act, 1925.

HELD: (i) a rebuttable presumption that the defendant had wasted assets flowed from the judgment of Feb. 13, 1952, but this presumption covered only the debt of £29 15s. and not the costs which had not at that date been taxed or, therefore, ascertained.

Observations of FARWELL, J., in *Batchelar v. Evans* ([1939] 3 All E.R. 609), applied.

(ii) Order 32, r. 2 (1), of the County Court Rules, 1936, was not intended to, and did not, abrogate the presumption of devastavit, and was only directed as a matter of procedure to a case where the plaintiff had to prove that the personal representative had assets at the relevant date and had wasted the same, whereas in the present case the plaintiff relied on the fact that the defendant was estopped from denying that she had assets.

(iii) as to the claim for £55 5s. for mesne profits arising after the judgment of Feb. 13, 1952, there was no presumption and the plaintiff must allege and prove both that the defendant had had assets and had wasted them.

(iv) assuming that the defendant had committed a devastavit with regard to the £29 15s. and the £55 5s., the question whether or not she should be granted relief under s. 61 of the Trustee Act, 1925, was essentially a matter within the discretion of the county court judge, and, as there was no misdirection, his judgment would not be disturbed.

Per SIR RAYMOND EVERSHERD, M.R.: A trustee seeking relief under s. 61 must show that he has acted honestly and reasonably and that he ought fairly (i.e., in fairness to himself and the other persons affected) to be excused. The mere fact that he has acted throughout on a solicitor's advice will not automatically result in relief being given.

FOR THE TRUSTEE ACT, 1925, s. 61, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 141.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 4 and s. 5, see *ibid.*, Vol. 13, p. 889 and p. 892.

Cases referred to:

- (1) *Batchelar v. Evans*, [1939] 3 All E.R. 606; [1939] Ch. 1007; 161 L.T. 160; Digest Supp.
- (2) *Leonard v. Simpson*, (1835), 2 Bing. N.C. 176; 4 L.J.C.P. 302; 132 E.R. 69; 24 Digest 744, 7734.
- (3) *Re Marvin*, [1905] 2 Ch. 490; 74 L.J.Ch. 699; 93 L.T. 599; 24 Digest 745, 7740.

APPEAL by the plaintiff from an order of His Honour JUDGE ARCHIBALD, at Huddersfield County Court, made on Nov. 17, 1953, whereby he dismissed the plaintiff's action for devastavit.

The testatrix, Jane Marsden, lived on the first floor and carried on a second-hand clothes business on the ground floor at 13 Northgate, Huddersfield, and her daughter, Mrs. Martha Annie Regan, the defendant, lived next door. By her will, dated Oct. 7, 1947, the testatrix appointed the defendant to be her executrix and stated:

"I give and bequeath unto [the defendant] the business at 13 Northgate."

The testatrix died on June 15, 1951, and the defendant, as executrix, took possession of those premises and carried on the business. Shortly afterwards the plaintiff, Joe Marsden, the son of the testatrix and brother of the defendant, acquired the reversion to the premises and instituted proceedings against the defendant as executrix for possession thereof and mesne profits. In July, 1951, the defendant applied under the Landlord and Tenant Act, 1927, s. 5, for a new lease of the premises on the ground that the business which the testatrix had carried on had caused goodwill to adhere to the premises, and, alternatively, for compensation under s. 4 of the Act. In December, 1951, the defendant obtained a grant of probate, valuing the estate at £150 for goodwill, £50 for stock in trade, and £50 for miscellaneous items including £20 for furniture. The debts, consisting of funeral and testamentary expenses, amounted to not less than £78 at the date of the death of the testatrix.

The defendant resisted the claim for possession. She admitted her representative capacity, but she raised no plea of a total or partial administration of

assets or insufficient assets, and on Feb. 13, 1952, at the Huddersfield County Court judgment was obtained against her for (i) possession, (ii) £29 15s. mesne profits from June 11, 1951, to the date of judgment, and (iii) costs. The order thereupon drawn up was for judgment against the defendant personally and not as executrix. The defendant was granted a stay of execution and entered an appeal, which was, however, later abandoned. In November, 1952, the referee made his report as a result of which the defendant's application under the A Landlord and Tenant Act, 1927, was dismissed. On Feb. 11, 1953, the plaintiff was granted leave to issue execution. On Mar. 11, 1953, the plaintiff's costs were taxed and allowed at £21 18s. On Mar. 20, 1953, the plaintiff issued a warrant of execution in respect of the sums of £29 15s. and £21 18s., and on Mar. 27, 1953, the sheriff made a return of nulla bona testatoris. On May 9, 1953, the defendant vacated the premises.

B In the present proceedings, by particulars of claim dated Aug. 4, 1953, and amended on Sept. 25, 1953, the plaintiff pleaded, inter alia:

"7. The defendant has received assets upwards of £200 and has wasted the same, (a) By serving notice of appeal against the judgment [dated Feb. 13, 1952], which appeal was subsequently abandoned by the defendant. The appeal, if successful, would have benefited the defendant personally and not the estate of [the testatrix]. (b) By making application under the C Landlord and Tenant Act, 1927, for a new lease of the . . . premises. (c) By converting the same to her own use, and thereby the plaintiff has been unable to obtain satisfaction of his . . . judgment. 8. The plaintiff did not obtain possession of the . . . premises until May 9, 1953. During such period the D defendant carried on the business formerly carried on at the . . . premises by the . . . testatrix, and made a profit therefrom of at least £175 which the defendant has retained for her own use. The mesne profits for the period from Feb. 13, 1952, to May 9, 1953, amount to £55 5s. And the plaintiff E claims: (i) payment of the sum of £29 15s. [being the mesne profits from June 11, 1951 to Feb. 13, 1952] by the . . . defendant personally, (ii) payment of the taxed costs amounting to £21 18s. by the . . . defendant personally, (iii) an order for the payment of mesne profits for the period from Feb. 13, 1952, to May 9, 1953, amounting to £55 5s. by the . . . defendant personally, (iv) costs against the defendant personally."

By her defence the defendant denied the allegations in the particulars of claim and pleaded, inter alia:

F "7. The defendant will plead plene administravit with regard to the estate of the . . . [testatrix]."

At the hearing in the county court the defendant produced (i) her trading accounts which showed that the business as carried on by her had made a net profit of £175 8s. 1d. for the year ending June 21, 1952, but a net loss of £11 7s. 8d. for the period June 21, 1952, to Feb. 9, 1953, and (ii) accounts which showed G that, taking into account the business profit, there was a deficiency, after payment of the funeral and testamentary expenses and of the legal expenses in connection with the action for possession and the application under the Landlord and Tenant Act, 1927. The county court judge found that the defendant had at all times been legally advised and that she should be protected and should not have to make up the deficiency out of her own pocket. He, accordingly, H entered judgment for her with costs, and the plaintiff appealed.

A. C. Sparrow for the plaintiff.

Goff, Q.C., and *C. R. Dean* for the defendant.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: The present proceedings are brought, not against the defendant personally, but against her in her capacity as executrix of the testatrix, the mother of the plaintiff and of the defendant. The plaintiff claims an order against the defendant personally for three sums, namely, £29 15s. mesne profits, £21 18s

costs, and £55 5s. mesne profits. In my judgment, different considerations apply to each.

As regards the subject-matter of the previous judgment, the law is, in my judgment, clearly stated by FARWELL, J., in *Batchelar v. Evans* (1). There is no question (and counsel has not argued to the contrary) that the effect of the judgment of Feb. 13, 1952, which was obtained by the plaintiff in the absence of a plea of no assets or plene administravit, together with the return on Mar. 27, 1953, by the sheriff to the warrant of execution of nulla bona testatoris, is, first, that the defendant must be taken to have conclusively admitted assets in her hands at the date of the judgment sufficient to pay all debts then known to her, and, secondly, that there is against the defendant in respect of the sums in question a rebuttable presumption that, not now having (as she pleads) any assets, she has committed devastavit. After referring to older authorities, including *Leonard v. Simpson* (2), in which the matter was fully dealt with (2 Bing. N.C. 179) by TINDAL, C.J., FARWELL, J., says ([1939] 3 All E.R. 609):

"In my judgment, it is clear from that case that, in the view of TINDAL, C.J., the sheriff's return of nulla bona is not conclusive against the defendants, but it is open to the defendants, if they can, to show why, at the date of the return of nulla bona, the assets, admittedly in their hands at the date of judgment, are no longer in their hands and to show that that is not due to any devastavit committed by them."

It is clear, however, in my view, that the admission and the presumption which inevitably flow from the judgment obtained on Feb. 13, 1952, does not cover the sum of £21 18s. in respect of costs. Counsel for the plaintiff drew our attention to *Re Marvin* (3) in which a judgment had been obtained under R.S.C., Ord. 14, for a sum of £5,000 and £7 for costs. In that case, as counsel for the plaintiff observed, the discussion went on the basis that there was a single judgment for both the sum claimed and costs, which, by some means that is not at all clear, had arrived at the net figure of £4,519. But, having drawn our attention to the case, counsel, I think, was not disposed to contend that it was authority for the view that the admission and the presumption could relate to the costs of the proceedings which had not been taxed, and, therefore, had not become due or even ascertained at the date when the judgment was obtained. I, therefore, take the view that the sum of £21 18s. for costs is for present purposes out of the picture. In saying that, I am not indicating that the plaintiff is unable to recover it. So far as I can see, if he claims against the defendant personally for those costs which the defendant has personally been ordered to pay, there would be no answer to the claim, and counsel for the defendant conceded as much.

A point was taken by counsel for the defendant to the effect that having regard to the County Court Rules, 1936, Ord. 32, r. 2 (1), it is not competent in a county court proceeding (for to such length I understand this point goes) for a plaintiff to rely on the general law, and, in particular, on the presumption which results from a judgment such as was obtained on Feb. 13, 1952. The terms of Ord. 32, r. 2 (1), are:

"Where a plaintiff alleges that an executor or administrator has had assets and has wasted them, he shall make the allegation in his particulars [of claim] and state the amount of assets alleged to have been left by the deceased and the manner in which they have been wasted."

So far as the plaintiff's particulars of claim in the present action are concerned, they do make particular allegations which, as counsel for the defendant concedes, would meet the requirements of that sub-rule. For para. 7 alleges: "The defendant has received assets upwards of £200 and has wasted the same" in three particular ways which are thereafter stated. Accepting the correctness of the pleading, counsel says that the plaintiff can only rely on such a plea

A and cannot set up the admission and presumption that I have mentioned, although the preceding six paragraphs of the particulars of claim clearly plead the facts necessary to found an argument based on the admission and presumption. I must say that I am unable to accept the argument of counsel for the defendant on this point, or to accept the view that the rule-making body under the County Courts Act, 1934, either intended or had power by rules, which were directed to forms of procedure, to alter and, indeed, to abrogate in the county court part of the general law. To my mind, the sub-rule is directed, not to a case like the present, but only to a case where the plaintiff has to, and does, allege that an executor has had assets at the relevant date. In the present case, as regards the sum of £29 15s., the plaintiff has not so sought to allege or prove, for as I have already indicated the defendant is estopped from denying that she had assets, and the plaintiff relies on that.

B So far, however, as the claim for £55 5s. is concerned, it is plain that the plaintiff must not only allege and prove assets—they having been denied by the defendant—but also must allege and prove devastavit. Paragraph 7 of the particulars of claim which I have mentioned is particularly directed to that aspect of the case. Therefore, a separate question arises involving our determination whether the plaintiff can establish, as I think he can, not only the existence of assets but also the devastavit. Assuming that those facts are established, the position will then be that the defendant is presumed to have wasted to the extent of the £29 15s., and is found to have wasted to the extent of the £55 5s. There would still, however, remain the plea under the Trustee Act, 1925, s. 61, namely, that in all the circumstances the defendant ought to be excused. It is convenient at this stage to say that the learned judge came to the conclusion (and I will return in due course to his judgment) that the defendant ought in the circumstances to be excused, and so he dismissed the present action.

C Let me now return to the first part of the claim, which relates to the £29 15s. For the first question is: Has the presumption to which the form of the first judgment (of Feb. 13 1952) has given rise been rebutted? Counsel for the defendant says that it has, because the defendant has shown that the most substantial asset of all, namely, the goodwill valued at £150, was lost, not through any waste or neglect on the part of the defendant, but because the plaintiff successfully claimed an order for possession of the premises and that automatically destroyed the goodwill. Although, it is argued, the asset has been lost, it has not been lost through any neglect on the part of the defendant, who, indeed, over a period of time, by defending proceedings, appealing against the order, and applying under the Landlord and Tenant Act, 1927, did all that lay in her power to preserve the asset. Counsel for the defendant says that, if that premise is right, the conclusion follows that it is not open to the defendant to give evidence inconsistent with the admission which is conclusively made, but she can give evidence consistent with it, and she can, therefore, plead that one of the assets which she had was the goodwill, and, if she can show that that asset, valued at £150, has not been wasted, then, whatever may be the facts about other assets (as to which there is no evidence), she has discharged the onus on her and rebutted the presumption. I am not satisfied that counsel for the defendant makes good that point. I am not satisfied that the whole goodwill was so closely and intimately bound up with the premises that the mere loss of the premises alone destroyed the goodwill. In other words, I think that to discharge this burden on her, the defendant would have to show that some attempt was made by her to preserve this goodwill other than by trying to retain the premises. As she herself lived next door, it would appear obvious that she might have tried to translate, and thereby preserve, the business and the goodwill to those premises. I am not, therefore, prepared to hold that the presumption to which the order has given rise is in this respect rebutted.

Prima facie, therefore, in the result the defendant is liable for the sum of £29 15s., but, as I have already said, not for £21 18s. costs.

It is now convenient to deal with the claim for £55 5s. The evidence before the court includes certain accounts. They were subjected to some criticism in that they were not properly vouched, but they appear to show that up to June 21, 1952, the defendant's conduct of this business was not unsuccessful since she made in actual fact a net profit of some £175. But I draw attention to the fact that June 21, 1952, though a convenient date for the purpose of accounting, has no other particular significance. The defendant went on conducting the business until February, 1953, and during the second period (i.e., from June 22, 1952, to Feb. 9, 1953), according to the accounts, the business was less successful and she made a small net loss. The third sheet before us shows that the sum made out of this business went, by and large, in paying the costs of the solicitor who advised the defendant. The costs of the earlier proceedings, including the costs in respect of acting for obtaining probate, amounted to £163 15s. 9d. The defendant also paid various items in connection with the business—remuneration to employees, and telephone and advertising accounts—and counsel for the plaintiff alluded to the item of travelling expenses which over the period amounted to £28 1s. 6d. In truth—though, as counsel for the plaintiff said, this is a matter for consideration under the Trustee Act, 1925, s. 61—the conduct of the business enabled the defendant to pay everyone, and she did pay everyone, with the notable exception of the plaintiff. He alone was left unpaid for.

The first question is: Is the defendant, having throughout acted on advice and carried on the business for most of the time successfully, to be found to have committed a *devastavit*? That, I think, is by no means clearly established. I have already indicated that this matter must be judged, not as at January, 1954, and on the material before us in the Court of Appeal, but by the situation in which the defendant found herself as executrix of the testatrix, her own mother, whose estate, when she first took over its administration, was insolvent. Counsel for the plaintiff has said that, although, no doubt, she would, or, at any rate, might, be justified in carrying on the business for some time, she ought to have paused to consider whether or not the game, if I may use the phrase, was really worth the candle, and, had she so paused, she would, or might, have concluded, before a decision was forced on her by possession being given, that the business could not and should not be further carried on, and that, in so far, therefore, as she went on conducting the business beyond the time when it was profitable and fruitful to do so, she committed a *devastavit*. As ROMER, L.J., has observed, I think that is, in all the circumstances, a harsh view to take of the defendant's conduct. For myself, therefore, I am not satisfied on this question, though it is not necessary for me to express a final conclusion, for, even if the defendant did commit a *devastavit*, the question still remains: Ought she to be relieved under the Trustee Act, 1925, s. 61? I say at once that, on the whole and bearing in mind that, if I had been trying this case, I am not saying that I should have wholly relieved the defendant, still I am not satisfied that, in a matter which is essentially within the learned judge's discretion, it would be right that we should interfere with his conclusion.

Let me assume that the plaintiff has established a *devastavit* sufficient to entitle him to judgment for £55 5s. He would then be entitled, on the presumption which the defendant has failed to rebut, to £29 15s., and on the facts which he has proved to £55 5s. But s. 61 is available in both cases, and I think that it is impossible to distinguish between the two, for, if the defendant ought to be relieved at all, she ought to be relieved in respect of the whole period. I can see no basis on which we could relieve her in respect of the £29 15s., and not the £55 5s. or vice versa, though I can see, as I have said, that if I had been trying the case I might have held that she ought to be not wholly, but partly, relieved in respect of both items. But before I discuss, briefly, why I think

we ought not to disturb the learned judge's conclusion, I must first point out that as to £22 it seems to me there is no answer to the plaintiff's claim. It is clear that the defendant proceeded to give away furniture which was comprehended in the miscellaneous items valued for probate, and, further, that before she gave it away she improved or embellished some bedding by spending £2 of the estate money on it for that purpose. So far as the value is concerned, there is no evidence except that the defendant herself stated the sum of £20 for the purpose of obtaining probate, and since there can be no possible defence against a charge of devastavit by an executor who admits having given the furniture away, I do not think she can be heard to say that it was of less value than that which she herself swore it had for the purpose of probate. The result is that as to £22, the plaintiff must be entitled to recover. Counsel for the plaintiff has not suggested that in the circumstances he could claim the £29 15s. on the basis of the presumption that has not been rebutted, and the £22 in addition—in other words, that the defendant would be entitled to say that the £22 went towards the £29 15s. which would leave a sum of £7 15s. to be considered in reference to s. 61 on the first part of the case. But I do not think those arithmetical calculations much matter. The broad and single question is: Ought the defendant to be relieved, or ought this court to interfere with the judge's order relieving her as regards the balance of the sums of £29 15s. and £55 5s. after allowing for the £22 for which the defendant is, undoubtedly, liable?

In approaching this matter, counsel for the plaintiff rightly drew attention to the threefold obligation on an executor or trustee seeking relief, namely, that he must show that he himself acted honestly and reasonably, and he must further satisfy the court that he ought "fairly" to be excused, which I take to mean, in fairness to the executor and to other people who may be affected. Counsel for the plaintiff made some suggestion (and I hope he will forgive me if I say that I regret it) that the defendant had not acted honestly. There was no such suggestion or finding in the court below which could possibly justify such an inference, and no question, therefore, can possibly be raised in this court that the defendant acted otherwise than perfectly honestly. But it is said that she did not act reasonably, and in any case ought not fairly to be excused. It was to the last requirement that the most formidable part of counsel for the plaintiff's argument, I think, was directed. For he showed that, in effect, the defendant used the business for the purpose of paying everybody except the plaintiff, whose premises she had occupied throughout for the very purpose of carrying on the business. But, first, counsel contended that it was not sufficient to say, as the defendant said: "I acted throughout on a solicitor's advice". That, he says, was a mere abdication of her duty as executrix; and however wise the solicitor, and however natural it is to seek a solicitor's advice, nevertheless that of itself cannot suffice. The mere fact that you take a solicitor's advice, natural and prudent though such a course be, will not automatically result in relief being given. With that last contention I do not disagree. But the learned judge, as I gather from the short note of his judgment which we have before us, did not proceed on any such general view. As I apprehend, he had his attention drawn to the circumstances that there was, to start with at least, the serious problem of who was entitled to what property, and, in particular, what was the beneficial interest in the premises apart from the business, and that, having regard to the financial state of affairs, it was obviously desirable in everyone's interest, if the business could produce some sort of return, that the defendant should try to preserve it. And she is not in any worse position because, when the will eventually was proved, it turns out that she herself was beneficially entitled.

Sitting in this court, it is our unhappy lot sometimes to come across cases in which nothing is more deplorable than the fact that a person inexperienced in matters in which they are involved fail to take advice from solicitors, who

could clearly have given advice and have protected them from the consequences of their rash conduct. I think that one must pay some regard to the kind of station in life of the people here concerned, the character of the business, and the difficulties with which they were confronted, including the unfortunate fratricidal strife. If this court were to say that the defendant ought to have taken some further advice by way of going to counsel or applying to the judge, I think it would shock the common sense of many people and certainly be a most disturbing factor when other persons in like situation found themselves in the position of being personal representatives of their deceased relatives. I, therefore, acquit the learned judge entirely of forming the view that merely taking advice, without more, is necessarily a passport to relief, but I think with him that, in all the circumstances of the present case and bearing in mind the grave difficulties with which the defendant was confronted, it was reasonable for her, having taken the advice and paying regard to the advice which was given, to act on it as she did.

There still remains the question: Ought she fairly to be excused? That is the most difficult point of all, and I have said that, if I had been trying this case, I am not convinced that I should have wholly excused her. But this is essentially a matter within the discretion of the judge, and although the judgment is short I am not prepared to say that the learned judge failed to consider any of the points before him, though he may well not have had the advantage of having them so forcibly put to him as counsel for the plaintiff put them to us. But having had all the material facts before him, I think it would be wrong for this court to assume that in some way he had misdirected himself or left out something which he should have taken into account. Therefore, I think that we ought not to disturb his conclusion. So, assuming against the defendant that she committed devastavit as to the £55 5s. and holding that she must be presumed to have committed it as to the £29 15s., still, I think she is entitled to retain her judgment save, as I have already indicated, to the extent that she must be accountable for the £22. That matter seems to have been omitted from consideration in the court below. It is not referred to in the judgment, and I think must have eluded the memory or observation of the learned judge when he came to deliver his judgment. I conclude, therefore, that the plaintiff should have recovered judgment for £22, but no more, and that, accordingly, the appeal must be allowed, but so only as to enable judgment for that sum to be substituted.

DENNING, L.J.: This case ought to have been simple, but the lawyers have made it complicated. The plaintiff seeks to recover the rent or the mesne profits from the defendant. I think that in the circumstances he could have sued her personally and said: "You have carried on this business, and, even though you did carry it on as executrix, you ought to pay rent". But he did not bring proceedings against her personally. Instead, he sued her as the executrix and obtained judgment against her for a portion of the rent, £29 15s. and for costs taxed and allowed at £21 18s. As executrix, the defendant, if she had had proper grounds, could have pleaded that she had used up all the assets, or that she had no assets with which to pay the debt. She did not plead either, and judgment went against her. The effect of that judgment is not in doubt, namely, that it is an admission in law that she had assets with which to pay this debt of £29 15s. for rent.

The first question that arises for determination in the present case is whether or not the defendant can rebut the presumption which the law raises against her. As to £22 she clearly has not rebutted the presumption, because she gave away furniture and some bedding of the testatrix, and in respect of that sum she clearly has no answer to this claim. As to the remainder, she says that she has not wasted the assets because she spent the money on the litigation. She appealed to the Court of Appeal from the judgment against her for possession. The appeal was abandoned, but a bill of costs was run up with the solicitor on

that account which she paid. It is said by the plaintiff that that was a devastavit, in other words, that she had wasted the assets.

I am by no means sure that it was a devastavit because she was carrying on that litigation for the benefit of the estate generally, but, in any event, I agree with SIR RAYMOND EVERSHED, M.R., that it is a matter in which, having taken and acted on legal advice, she ought fairly to be excused under the Trustee Act, 1925, s. 61. I was much impressed by counsel's argument on behalf of the plaintiff.

A He asked pertinently why should she pay every other creditor and not the landlord? Why should she pay her solicitor in full? Why should she leave only the landlord unpaid? I think there is a lot to be said for that view. But, on the other hand, this matter of relief is essentially one for the judge in his discretion. He hears the matter, and, he having come to his decision on it, I do not think that this court should interfere. For these reasons, although the defendant

B has no defence as to the £22 in respect of which she has wasted the assets, I feel that we cannot refuse to give relief against her in respect of the remainder, and I, therefore, agree with the order that my Lord proposes.

ROMER, L.J.: I also agree. I am not satisfied that there was a devastavit in respect of the £55 5s., and I share the doubt on that matter which my brethren

C have expressed. It seems to me that the plaintiff, seeking as he has done to sue the defendant, not in her personal capacity, but in her capacity as executrix, has to prove that she wasted assets of the estate which would otherwise have been available for payment of debts, and that the plaintiff has in respect of that sum no such presumption to support him as he had in relation to the £29 15s. The suggestion made on behalf of the plaintiff was that the defendant really

D looked more to the beneficiaries in continuing this business than to the creditors, and that that was wrong. But, as has already been pointed out, this estate was not solvent. The defendant had to obtain money for the probate and the testamentary expenses which would be incurred in winding-up the estate, and she had not sufficient money for those purposes, so, for my part, I think that she was well justified in continuing to carry on this business for the purposes of

E raising some money—which, indeed, she did successfully, because the first year's accounts showed a profit of £175, from which it follows that she increased the assets of the estate to that extent, and thus raised funds which could be applied for the purpose of paying off the debts. Apart from that, she was placed in further difficulties. She was advised that her brother (the plaintiff) and sisters would have an interest in the lease of the premises on which the business was

F carried on, and she had to look after them. That, of course, is no answer to the suggestion that I have mentioned, that she ought to have first met the claims of the creditors. But she acted in accordance with the advice given to her by her solicitor, and I cannot see that she did anything wrong, except, perhaps, in carrying on the business for a longer period than she should have done. It was suggested by counsel for the plaintiff, with some force, that at all events

G she ought to have discontinued the business when she found in November, 1952, that she was not going to make a profit, but we do not know that in fact she did know this or what further loss was in fact incurred between November, 1952, and the time when she actually closed down the business.

Speaking for myself, taking all the circumstances into account, I do not think that the defendant can be held guilty of a devastavit in the administration

H of the estate. Even if I am wholly or partially wrong on that, nevertheless, I agree with what my brethren have said as to the application of the Trustee Act, 1925, s. 61, and I do not desire to add anything to their observations on that part of the case.

Appeal allowed in part.

Solicitors: *Torr & Co.*, agents for *Chambers, Tregoning & Robertshaw*, Brighouse (for the plaintiff); *Winter, Plowman, Harwood & Hill*, agents for *G. E. Hutchinson*, Huddersfield (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

POWELL v. BRAUN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), January 26, 1954.]

Master and Servant—Remuneration—Quantum meruit—Remuneration additional to salary—Bonus on net profits.

On Mar. 18, 1946, the defendant wrote to his secretary, the plaintiff, that instead of a rise in salary he proposed to pay her each year a bonus on the net trading profits of the previous financial year. On the same day the plaintiff replied that the "idea of a yearly bonus is very considerate, and one which I much appreciate". Bonuses were paid until 1951, but the defendant refused to pay a bonus for the years 1952 and 1953 on the ground that no firm promise had been made, and that the promise, if made, was too vague to be enforced. On a claim by the plaintiff,

HELD: as a matter of construction of the letters it was intended by the parties, not that the payment of a bonus should be within the discretion of the defendant, but that he should pay the plaintiff a reasonable sum, i.e., a sum which bore a reasonable relation to the relevant trading profit; the principle of quantum meruit was no less applicable where the remuneration in question was additional remuneration than it was where the basic remuneration was the only remuneration; and, therefore, the plaintiff was entitled to recover a sum agreed as reasonable in respect of the two years in question.

AS TO THE WAGES OF A SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 131-137, paras. 219-225; and FOR CASES, see DIGEST, Vol. 34, pp. 82-89, Nos. 601-656.

Cases referred to:

- (1) *Taylor v. Brewer*, (1813), 1 M. & S. 290; 105 E.R. 108; 34 Digest 83, 616.
- (2) *Way v. Latilla*, [1937] 3 All E.R. 759; Digest Supp.
- (3) *Bryant v. Flight*, (1839), 5 M. & W. 114; 151 E.R. 49; *sub nom. Briant v. Flight*, 8 L.J.Ex. 189; 34 Digest 84, 620.
- (4) *Broome v. Speak*, [1903] 1 Ch. 586; 72 L.J.Ch. 251; 88 L.T. 580; *affd. H.L.*, *sub nom. Shephard v. Broome*, [1904] A.C. 342; 73 L.J.Ch. 608; 91 L.T. 178; 9 Digest 105, 460.
- (5) *Loftus v. Roberts*, (1902), 18 T.L.R. 532; 34 Digest 83, 615.
- (6) *Roberts v. Smith*, (1859), 4 H. & N. 315; 28 L.J.Ex. 164; 32 L.T.O.S. 320; 157 E.R. 861; 34 Digest 83, 612.

APPEAL by the plaintiff from a decision of His Honour JUDGE GLAZEBROOK at Bromley County Court, dated Nov. 10, 1953.

The plaintiff, Pamela Irene Powell, was employed as his secretary by the defendant, Henry William Braun, who, on Mar. 18, 1946, wrote to her a letter in the following terms:

"You have now been with me for just two years, both of them very eventful, and during the first you did without question many things which were hardly within your contract of engagement . . . As I have mentioned to you on various occasions, it is my wish for you to act and work on your own initiative rather than to feel you must always refer matters to me. I am, of course, on hand for any business problem which may arise, but now we have two juniors it is more necessary than before that you are able to handle matters yourself both from the business angle and from [that of] your own personal prestige and authority as befits your position. I have not hitherto mentioned to you the question of a rise in salary, and with the added responsibility you now have I feel that some recognition of this and of past service is due to you. A stereotyped rise is all very well, but my opinion has always been that a bonus on the net trading profit is more

interesting to anyone. I, therefore, propose to adopt this with you, and that, say about May each year, I shall pay you an amount according to the trading results of the previous financial year to the end of March. I cannot say at this juncture what the amount will be, but I am sure you will not be disappointed with it from year to year. I will conclude with the hope that you may stay with me for many a day as my confidential secretary and senior member of the staff even if the latter be only small."

A To that letter the plaintiff on the same day replied:

"Your letter of today was quite unexpected, but a very pleasant surprise. Your idea of a yearly bonus is very considerable, and one which I much appreciate. I do agree with you that this is more interesting than an actual weekly increase, and it is certainly very encouraging."

B The defendant paid the bonuses until 1951, but he refused to pay a bonus for the years 1952 and 1953. On a claim by the plaintiff for, inter alia, bonuses for those two years, the defendant contended (i) that, on the true construction of the letter of Mar. 18, 1946, there was no firm promise to pay anything, (ii) that that document was of so vague and general a character that it was incapable of forming the basis of a claim in contract, and (iii) that a claim based on quantum meruit would not be maintained. The county court judge found that any further payment over and above the fixed salary was in the discretion of the defendant, and dismissed the claim. The plaintiff appealed.

M. B. Scholfield for the plaintiff.

Bramall for the defendant.

D SIR RAYMOND EVERSLED, M.R., stated the facts and continued: I have no doubt, on the facts as found by the judge, that the plaintiff's continued service with the defendant would never have occurred had it not been for her reliance on his promise in the letter of Mar. 18, 1946, and, as the judge expressly said, she thenceforth undertook more responsible work than otherwise she would have performed. Still, that is not necessarily an answer to the question E raised, namely, whether or not, having regard to the vague and general terms of that letter and the plaintiff's reply, the plaintiff can now sue for the sums claimed.

Two answers to the plaintiff's claim are put forward. First, it is said that, on the true construction of the letter of Mar. 18, 1946, there was no firm promise to pay anything, but that it was merely a statement that, if the plaintiff continued to serve and to undertake more responsible work as suggested, the defendant F would give her something or nothing as in his discretion he might from time to time think fit. Secondly, it is said that, in any case, the whole document is of so vague and general a character that it is incapable of forming the basis of a claim in contract. Further, it is said that a claim based on quantum meruit or its equivalent in a case of this kind is a novelty which finds no exact parallel in the decided cases. It emerges from a number of cases in which this kind of G question has been before the court that the first and vital question is that of the construction of the document or documents which must be taken to represent and evidence the joint intention of the two parties at the time, namely, Mar. 18, 1946.

The learned judge, perhaps influenced by the use of the word "bonus", concluded in his careful judgment that the true effect of this arrangement was H that, with regard to any further payment over and above the fixed salary, it should be—to quote BAYLEY, J. (1 M. & S. 291) in *Taylor v. Brewer* (1)—"in the breast of" the defendant whether he should pay the plaintiff anything or nothing. For my part, I am unable to accept that view. I think that the nature of the engagement, the service which the plaintiff had rendered, the circumstances in which the letter was written, the particular emphasis on the defendant's desire in his own business interest that the plaintiff should assume more responsibility and act more on her initiative—there having been two juniors:

engaged—all make it plain that this suggestion for what was called a bonus meant an obligation to pay something in lieu of an addition to salary. The conduct of both parties, to my mind, makes it plain that it was so understood by them both. The plaintiff, whom the judge clearly regarded as a truthful witness, said: "I should not have accepted it [this offer] if I had known that the defendant claimed, as he did shortly afterwards, that the arrangement did not operate for another fourteen months", and so, I think, made it clear that she relied on this promise as being something which she was accepting in lieu of increased salary and in consideration of continued service and greater responsibility. On the other side, there was no hint or suggestion on the part of the defendant until the action had been brought that he was under no liability at all, if he chose not to pay. When eventually the plaintiff left the defendant's service, the only point the defendant took was that there was only one year's so-called bonus "due" from him instead of two, as she claimed. Assisted, as I have been, by the cases cited, which illustrate the approach which the court makes in cases of this kind, I conclude here as a matter of construction that the parties did not mean and intend the payment of a bonus to be purely discretionary.

That, however, leaves the further question whether or not the whole document is in its terms and character too vague and general to be capable of supporting a claim of this kind. Again, I reject that view. Once it is concluded that this was not to be a reward in the discretion of the defendant, then, inevitably, it must be taken that the sum to be paid—unless the parties chose from time to time to agree some other figure—would be a reasonable sum, that is, a sum arrived at so as to bear a reasonable relationship to the trading profit. If there were no trading profit, no doubt, there would be no so-called bonus, but, in any other event, I think the principle of quantum meruit or of reasonable remuneration (which comes to the same thing) is no less applicable where the remuneration in question is additional remuneration—that is, over and above the fixed salary—that it is where the basic remuneration is the only remuneration.

That being so, the rest of the case is simple. The judge took the view himself that 12s. a week would be a fair sum to fix since that would be the sort of additional salary, according to the defendant, which would have been paid if there had not been a bonus, but the parties themselves have seen fit to come to an agreement that, having regard to the trading profits as they were during the two years ending Mar. 31, 1952, and Mar. 31, 1953, a reasonable remuneration on the basis of those profits would be £25 for the two years. In those circumstances I think that the appeal should be allowed, and that judgment should be entered for the plaintiff for £25.

DENNING, L.J.: It was said in the course of the argument that no case has been found in the books where a quantum meruit has been awarded in a case like the present. I hope that this case will provide the deficiency. In lieu of a rise in salary, the defendant agreed to pay the plaintiff a bonus each year on the net trading profit. The defendant made trading profits, but he refused to pay any bonus for the years 1952 and 1953 whereas the agreement clearly contemplated that he should pay something. The learned judge said that what he should pay was a matter for the defendant in his discretion, that is, whether he should pay something or nothing. I do not agree. I think the defendant plainly bound himself to pay something. The precise amount would not be an amount in his unfettered discretion. It would be an amount within his reasonable discretion, that is, it would be the amount which a fair and just man would pay in the exercise of a reasonable discretion. That being so, I think that we should award to the plaintiff that sum, namely, £25, and I agree that the appeal should be allowed.

ROMER, L.J.: I also agree. This court is not a court of morals, but I am bound to say that I think the attitude which the defendant has thought

proper to adopt in this dispute reflects very little credit on him. In March, 1946, he obtained from the plaintiff an advantage for himself and his business. He now seeks to adopt the attitude that he is under no liability over a period of two years to pay, on the ground that he was never under any legal liability to make any payment at all. When one looks at these two letters of Mar. 18, 1946, setting out the promise from the defendant and the acceptance of that promise by the plaintiff, it seems to me clear that she took the view that she was to get from the profits of the business, if any, a bonus instead of an increased salary, and the consideration which, as the learned judge found, she was going to give for that increased emolument was her promise to undertake further responsibilities. It has not been suggested that she failed in the fulfilment of that promise, but it appears to me clear that it never dawned on her (and there was no reason why it should have, having regard to the reference in the defendant's letter to the increase of salary) that she was going to take on this extra responsibility at a remuneration which rested solely in the discretion of the defendant. That, indeed, as far as I can make out, was not the view of the defendant himself at one time, because he admitted that there was one bonus now due, and, if he was under no liability to pay anything, the word "due" would seem to be an inapt word to use. I think that the judge was in error in finding that the intention of the parties was that the defendant should pay such portion of the profit as he in his discretion might decide. In my view, it was a matter of a legal bargain giving rise to a legal right, and the plaintiff was to get at all events something, provided there were profits. I think the case is covered by the type of authority exemplified by *Taylor v. Brewer* (1) and *Way v. Latilla* (2), and I agree that the plaintiff should be remunerated on a quantum meruit or reasonable basis in the way that SIR RAYMOND EVERSHED, M.R., has indicated.

Appeal allowed.

Solicitors: *Woodroffes* (for the plaintiff); *Meaby & Co.* (for the defendant).
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re LYBBE'S WILL TRUSTS. KILDAHL AND ANOTHER *v.* BOWKER AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 22, 26, 1954.]

Will—Accruer—Devolution of accrued share—Primary provision for accretion.

In exercise of a power of appointment conferred on him by a settlement, a testator, in a codicil to his will, directed his trustees to hold the trust fund "upon trust for the benefit of such of them [A., B. and C.] as shall be living at the time of my decease . . . in equal shares as tenants in common in manner following that is to say upon trust to pay the income of one such equal share to each of them the said [A., B. and C.] during her life . . . and after the decease of any of them . . . the trustees . . . shall stand possessed of the share of the person so dying as aforesaid upon trust in equal shares for all or any of the children of such person" as therein mentioned and the issue of any then dead "and I hereby declare that if there be no child or other issue of the person so dying as aforesaid who attains a vested interest . . . then the share of the person so dying shall be held upon trust for the benefit of the said [A., B. and C.] or the survivor of them or of their children similar to the trusts hereinbefore declared with regard to [the trust fund] so far as may be and the law will allow". A., B. and C. all survived the testator, but on Apr. 1, 1922, A. died a spinster. On Jan. 29, 1945, B. died leaving issue who attained vested interests. On Apr. 17, 1953, C. died a spinster. As to C.'s share of A.'s original share,

HELD: there was no sufficient context in the codicil to displace the primary meaning of the word "share", which meant "original share"

and did not include "accrued share", and, therefore, C.'s accrued share was undisposed of by the codicil and devolved as in default of appointment.

Re Allan ([1903] 1 Ch. 276), considered.

AS TO ACCRUER CLAUSES, see HALSBURY, Hailsham Edn., Vol. 34, p. 364, para. 413; and FOR CASES, see DIGEST, Vol. 44, pp. 1215-1217, Nos. 10507-10533.

Cases referred to:

- (1) *Re Allan*, [1903] 1 Ch. 276; 72 L.J.Ch. 159; 88 L.T. 246; 44 Digest 392, 2253.
- (2) *Barker v. Lea*, (1823), Turn. & R. 413; 37 E.R. 1160; 44 Digest 1094, 9444.

ADJOURNED SUMMONS to determine whether, on the true construction of a settlement dated Feb. 16, 1883, and the will and codicils of Philip Lybbe Powys Lybbe and in the events which had happened, the whole, or some and if so what part, of the trust funds held by the plaintiffs as trustees of the said settlement was held (a) on trust for the first five defendants in equal shares, or (b) on trust for the last four defendants as residuary legatees under the will of Helen Lybbe deceased, or (c) how otherwise.

By his will dated Apr. 23, 1870, Philip Lybbe Powys Lybbe ("the testator") gave his residuary estate on trust for Fanny Worth during her life and after her decease on trust for such one or more of the children of the said Fanny Worth living at the time of his decease who should attain the age of twenty-one years or being female marry and if more than one in such shares as the said Fanny Worth should appoint. By a settlement dated Feb. 16, 1883, the testator directed that the fund thereby settled should be held on trust to apply the income thereof in the manner therein mentioned during the lives of the said Fanny Worth and the testator and the life of the survivor of them, and after the death of the survivor in trust for such one or more of them Amy Lybbe, Mabel Lybbe and Helen Lybbe (the children of the said Fanny Worth) and of such other persons or person if any in such shares and proportions and generally in such manner as the testator should by deed or will or codicil appoint, and in default of such appointment in trust for such of them the said Amy Lybbe, Mabel Lybbe and Helen Lybbe as should attain the age of twenty-one years or marry under that age and if more than one in equal shares (subject to hotchpot). By a third codicil dated Nov. 16, 1887, to his will, the testator appointed that, after the decease of the said Fanny Worth and himself, the trustees of the settlement should stand possessed of the trust fund on trust

"for the benefit of such of them the said Amy Lybbe, Mabel Bowker [formerly Lybbe] and Helen Lybbe as shall be living at the time of my decease and shall as regards the said Helen Lybbe attain the age of twenty-one years or marry with the consent of the said Fanny Worth and myself or of the survivor of us in equal shares as tenants in common in manner following that is to say upon trust to pay the income of one such equal share to each of them the said Amy Lybbe, Mabel Bowker and Helen Lybbe during her life for the sole and separate use of such of them as shall be married . . . and after the decease of any of them the said Amy Lybbe, Mabel Bowker and Helen Lybbe the trustees or trustee shall stand possessed of the share of the person so dying as aforesaid upon trust in equal shares for all or any of the children of such person living at the time of such person's decease who being male attain the age of twenty-one years or being female attain that age or marry with the consent of her guardian or guardians and for all or any of the issue living at that time who being male attain the age of twenty-one years or being female attain that age or marry with such consent as aforesaid of any child of the person so dying who dies in the lifetime of such person leaving issue living at the time of

such person's death and so that such issue shall take per stirpes according to their stocks and in equal shares the share which the parent of such issue would have taken if living at the time aforesaid And I hereby declare that if there shall be no child or other issue of the person so dying as aforesaid who attains a vested interest under the trusts lastly hereinbefore contained then the share of the person so dying shall be held upon trust for the benefit of the said Amy Lybbe, Mabel Bowker and Helen Lybbe or the survivor of them or of their children similar to the trusts hereinbefore declared with regard to the said [trust fund] so far as may be and the law will allow."

On Sept. 12, 1897, the testator died, and on Aug. 5, 1919, the said Fanny Worth died. On Apr. 1, 1922, the said Amy Lybbe died a spinster. On Jan. 29, 1945, the said Mabel Bowker (then Vinall, a married woman) died, having had one child, Claude Herbert Bowker, who had died in the lifetime of his mother having had issue five children (the first five defendants) all of whom attained the age of twenty-one years. On Apr. 17, 1953, the said Helen Lybbe died a spinster.

J. V. Nesbitt for the plaintiffs, the trustees of the settlement.

Arthur Bagnall for the first five defendants, the children of Claude Herbert Bowker.

M. J. Albery for the last four defendants, the residuary legatees under the will of Helen Lybbe.

ROXBURGH, J.: I regard this point as one of the most difficult which I have ever had to decide. [HIS LORDSHIP stated the facts, read the relevant part of the third codicil of the testator, and continued:] I feel no doubt that where the word "share" comes first in the passage by which the appointment is made it means "original share" and that it is the accruer clause and not the word "share" which augmented that share. I feel no doubt that the word "share" where it occurs in the accruer clause means "the original share". It seems to me quite plain that it does, and moreover in the Court of Appeal, in *Re Allan* (1), a case which has caused me much difficulty and uncertainty, *STIRLING, L.J.*, recognises that prima facie such a word does not include an accruing share. Therefore, as a matter of construction, my conclusion would be straightforward, viz., that there is no second accruer for the simple reason that there are no words in the will to bring it about, but I recognise several things. The first is that that is unlikely to be the intention of the donee of the power. So far as I am concerned, that does not help me much because my answer would be that he did not think of a second accruer and that if anything goes in default of appointment it is certainly not because he intended it so to go, but it may be because he forgot to provide for that eventuality, and I should expect that that was the reason. There is, however, an old saying that a person is not likely to intend to die partially intestate, and I suppose the same sort of reasoning might (though not, perhaps, so strongly) be applied to the exercise of a power of appointment. What is much more difficult is that there is a rule which has been evolved and which is stated in the decision of the Court of Appeal in *Re Allan* (1), and I am most anxious to give effect to it, but I have experienced some little difficulty in ascertaining precisely what the rule is.

In *Re Allan* (1) there was an undoubted division in shares, and the accruer clause read as follows:

"I declare that if any one or more of my said daughters, Marion Harriett, Charlotte, and Sophia Henrietta, shall die without leaving any child, or the issue of a child lawfully begotten, living at their respective deceases, or if my said daughter Eleanor shall die without leaving any child or issue of a child by any husband other than the said George Mence, the shares

or share of my said daughters or daughter so dying shall fall into and become part of my residuary estate, and be held and disposed of on the same trusts as are hereinbefore declared thereof."

The Court of Appeal, reversing BUCKLEY, J., held that there was a second accruer. VAUGHAN WILLIAMS, L.J., said ([1903] 1 Ch. 284):

"Mr. Medd [counsel] says that the closing words, 'hereinbefore declared thereof', cannot mean to include that which is included in this clause itself, but that 'hereinbefore' must mean that which appears in this will antecedently to this clause. I do not at all mean to say that that is not a possible, and even a natural, construction of these words; but, in my opinion, we ought not so to deal with this case."

I understand that to mean that there is a rule which the court thought precluded them from giving the natural construction to those words. But, when I come to look for the rule, my difficulty arises. VAUGHAN WILLIAMS, L.J., continued (*ibid.*):

"This is a case in which, although there are both original shares and accrued shares, which in a testamentary instrument may very often be dealt with in different ways, it is obvious that the intention of the testator was to create one aggregate fund, and to dispose of that absolutely."

To what is he referring? I am not quite sure, I must confess, but it is quite certain that the testator did intend the fund which was settled to be split up and divided into parts. Therefore, I think that VAUGHAN WILLIAMS, L.J., must have been referring to the concluding words of the gift over, i.e., where the testator said:

"shall fall into and become part of my residuary estate, and be held and disposed of on the same trusts as are hereinbefore declared thereof."

He then read a passage from a judgment of SIR THOMAS PLUMER, M.R., in *Barker v. Lea* (2), and said (*ibid.*, 285):

"Here it seems to me to be manifest, following the words of SIR T. PLUMER that the disposition is of one aggregate fund which the testator meant should remain an aggregate fund, and should not be broken into fragments if some person to whom interests in it were given happened to die."

What does that mean? Again, I am not sure, but I think it means, on balance, that, again regarding the words to which I have referred, it is plain that the testator did not mean to die intestate as regards any part of this fund. STIRLING, L.J., adopted the reasoning of VAUGHAN WILLIAMS, L.J., and I need say nothing more about his judgment. COZENS-HARDY, L.J., based his conclusion on what, I think, is really the same ground as the other two, if I have rightly construed their language. He said (*ibid.*, 286):

"The . . . point raised by Mr. Medd created for a moment, I thought, a little more difficulty; but, on consideration, I am satisfied that there is sufficient in this will to show that the testator was dealing with his residue as a whole, and disposing of it as a whole."

I understand that to mean that there is sufficient context—it must not be a mere matter of guessing—to show that the testator did not intend to die intestate as to any part of his residue, and I think the context to which he was referring was the words which I have already read.

If that be so, then it seems to me that there are no words in this case which would enable me to depart from the natural meaning of the language used. True enough, I think that the testator intended to exhaust his power of appointment, but that is certainly not enough. I must not merely guess. I must find a

context, especially as it seems to me that the strong probability is that he overlooked the possibility of a second accruer, and for that reason alone failed to deal with that possibility. I cannot find any context. There are no words at all resembling the words which I have stressed in *Re Allan* (1). There is certainly no re-amalgamation of a secondly accruing share with the original trust fund as there was in *Re Allan* (1), because it is not "to be held upon the same trusts" but "upon similar trusts so far as may be and the law will allow", which seem to me to point to the view that the testator did not contemplate that there would necessarily be any complete re-amalgamation.

On the whole, I can see nothing in those words which could be used to enable me to put on the word "share" a construction which it does not naturally bear, and there will be no second accruer unless the word "share" includes "an accrued share". With doubt, because I am not at all sure that I fully understand the decision in *Re Allan* (1), I hold that there is no second accruer.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co.*, agents for *Pye-Smith, Hulbert & Kildahl*, Salisbury (for the plaintiffs); *Blyth, Dutton, Wright & Bennett* (for the first five defendants); *Robbins, Olvey & Lake* (for the last four defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

HILL v. HILL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), January 21, 22, 1954.]

Divorce—Desertion—Defence—"Just cause"—Estoppel—Pleading based on substantially same matters as relied on to support charges of cruelty in former unsuccessful suit alleging cruelty.

On May 7, 1949, the wife left the matrimonial home. On Aug. 19, 1949, she presented a petition for divorce on the ground of her husband's cruelty. On Mar. 7, 1950, the judge dismissed the petition on the ground that, although the wife's health had been affected, that was not due to any matrimonial misconduct by the husband. The husband now presented a petition for dissolution on the ground of the wife's desertion on May 7, 1949, and the wife, by her answer, pleaded "just cause", the matters she relied on in support of this plea being substantially the same as those alleged by her in her unsuccessful petition, or matters which could have been so alleged. In his reply the husband pleaded that in the circumstances the wife was estopped from alleging "just cause".

HELD: on the facts the matters alleged by the wife could not be of such a grave and weighty character that, even though they did not amount to cruelty, they could be relied on by the wife as just cause for her leaving her husband; but, in any event, just as the wife would not have been entitled in support of a plea of constructive desertion to rely on matters which she had previously alleged unsuccessfully, so she was not entitled to rely on such matters as constituting grave and weighty matters giving her good cause for leaving her husband and preventing him obtaining a decree of restitution of conjugal rights; in the circumstances of the case considerations of public policy and the duty laid on the court by s. 4 (1) of the Matrimonial Causes Act, 1950, did not demand that the court should inquire into the facts alleged by the wife in her answer; and, therefore, the husband was entitled to a decree.

AS TO RES JUDICATA AS AN ESTOPPEL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 159-236, Nos. 213-657.

Cases referred to:

- (1) *Bright v. Bright*, [1953] 2 All E.R. 939; 117 J.P. 529.
- (2) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
- (3) *Pike v. Pike*, [1953] 1 All E.R. 232.
- (4) *Dixon v. Dixon*, [1953] 1 All E.R. 910; [1953] P. 103.
- (5) *Timmins v. Timmins*, [1953] 2 All E.R. 187.
- (6) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.
- (7) *Edwards v. Edwards*, [1949] 2 All E.R. 145; [1950] P. 8; [1949] L.J.R. 1335; 113 J.P. 383; 27 Digest, Replacement, 366, 3022.
- (8) *Butland v. Butland*, (1913), 29 T.L.R. 729; 27 Digest, Replacement, 444, 3754.
- (9) *Yeatman v. Yeatman*, (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 27 Digest, Replacement, 365, 3019.
- (10) *Hudson v. Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 27 Digest, Replacement, 517, 4603.

PETITION by the husband for dissolution of the marriage on the ground of the wife's desertion.

On May 7, 1949, the wife left the matrimonial home, taking with her the two children of the marriage. On Aug. 19, 1949, she presented a petition for dissolution of the marriage on the ground of the husband's cruelty. The husband denied cruelty, and on Mar. 7, 1950, PILCHER, J., dismissed the petition. The husband now petitioned for a dissolution on the ground of the wife's desertion on May 7, 1949. The wife, by her answer, denied desertion. She admitted in para. 2 that she left the matrimonial home, but she alleged (a) that she did so at the suggestion of the husband, and (b) that she had just cause for leaving the matrimonial home and for not returning to him, particulars whereof were numbered (1) to (14). In para. 3 the wife alleged constructive desertion by the husband from May 7, 1949, and repeated as particulars the items under para. 2 (b). By his reply the husband alleged, *inter alia*:

"2. That [the wife] is estopped from alleging the matters set out in para. 2 (b) and (3) of the . . . answer and the particulars thereto by reason of the following matters:—(a) On Aug. 19, 1949, the [wife] presented a petition in this Honourable Court for dissolution of marriage on the ground of the [husband's] alleged cruelty; (b) the said petition was heard and determined in this Honourable Court by PILCHER, J., and was dismissed by him on Mar. 7, 1950; (c) no appeal has been entered or prosecuted against the said order dated Mar. 7, 1950, and the same is a valid and subsisting order; (d) the allegations contained in para. 2 (b) and (3) of the said answer herein and the particulars thereto are the same or substantially the same as those which were alleged or which could have been alleged in the said petition dated Aug. 19, 1949."

It was not disputed by the wife that, in view of recent authorities, decided after the date of filing the answer, she was estopped from pressing her cross-charge of constructive desertion. The case is reported on the question whether or not she was also estopped from pleading the defence of "just cause".

John Latey for the husband.

Marshall-Reynolds for the wife.

DAVIES, J., stated the facts and continued: For convenience counsel agreed, as, I think, was done in *Bright v. Bright* (1), that the plea of estoppel should be argued before the evidence was heard, because, obviously, if I were to decide against the wife on this point, a great deal of time and money would otherwise be wasted. There is no doubt—indeed, counsel for the wife does

not contend otherwise—that, with the exception of two or three minor and unimportant matters every single allegation that is made in this answer was contained in the wife's former petition for dissolution on the ground of cruelty. One or two small matters were not pleaded in the former petition, but it is clear that they could have been, and, therefore, in accordance with the well-known rule which is set out in *Hoystead v. Taxation Comr.* (2) ([1926] A.C. 170), the principle of estoppel applies just as much to them as it does to the matters which were expressly raised.

At the outset counsel for the wife admitted that on the present state of the authorities he could not pursue his cross-allegation of constructive desertion, but he was not prepared to assent to the proposition that the defence of just cause to the charge of desertion fell together with the cross-charge of constructive desertion. It was, therefore, necessary for certain authorities to be considered, and, in particular, four recent cases, none of which had been reported before the date of the answer, namely, *Pike v. Pike* (3), *Dixon v. Dixon* (4), *Timmins v. Timmins* (5), and *Bright v. Bright* (1). But before considering the authorities it is necessary that I should refer to the judgment of PILCHER, J., who tried the wife's petition, to see exactly what he decided. That was a petition on the ground of cruelty, and the answer was a straightforward denial. The learned judge mentioned the various complaints which the wife made, and said:

“Family life was extremely uncomfortable, so that on May 7, 1949, the wife, in pursuance of a decision which she arrived at somewhat earlier, left the house with the children and has never been back to live with her husband since . . . I have heard the evidence of the wife and of the husband very fully and one cannot help feeling considerable sympathy for both parties, but as a cruelty case it is quite hopeless—it does not begin to get near a cruelty case. I felt considerable doubt whether I ought not to stop the case after the [wife's] evidence was completed, but I thought, in all the circumstances, it might be more satisfactory to hear the husband's evidence, and, having heard it, I am confirmed in the view which I held at the conclusion of the [wife's] case . . . I have not the slightest doubt that the unhappy atmosphere which clearly existed in this household during the last two or three years has had its reaction on the wife, and if I had come to the conclusion that the husband had been guilty of matrimonial misconduct which entitled me to grant the wife relief provided I was satisfied that she had suffered in her health, on the evidence, I should have had little difficulty in concluding that her state of illness had been contributed to by the matrimonial misconduct of her husband. I am not going through the history of this case and the complaints made by the wife as outlined in the petition. A mere perusal of them indicates that the incidents in themselves are extremely trivial. While I do not blame the wife for arriving at the conclusion that she and her children and her husband could no longer continue to reside under the same roof, I think she was in quite a large measure the author of her own undoing . . . It is unnecessary I should say any more because I think the case is perfectly straightforward, and I think the wife fails hopelessly to make out the case which she has set out to do, and the petition will, therefore, be dismissed.”

So it appears that PILCHER, J., is there saying: “I think the wife's health was affected, but it was not due to any matrimonial misconduct on the part of the husband”. The question which I have to decide is whether or not, the learned judge having come to that conclusion on the allegations made by the wife in the former petition, she is now entitled, those charges having been adjudicated on and dismissed when she was using them to attack her husband in order to obtain a decree from him, to re-open and re-litigate those same matters again by way of a buckler or shield against her husband's charge of desertion and to allege that she had by reason thereof just cause for leaving her husband. There

are matters of difficulty in this branch of the law, and I cannot help expressing the opinion that it would be an advantage to the profession, and certainly to those who have to apply the law, if the highest court were to deal with this matter one day, but I have to deal with the law as it is, according to my understanding of it.

I do not need to refer to *Pike v. Pike* (3), and I am not going to refer to *Dixon v. Dixon* (4), which was a decision of my own where a precisely similar problem arose, not at the hearing, but on an application to strike out certain paragraphs of the pleading, save to say that I do not feel the difficulty in this case that I felt in *Dixon v. Dixon* (4). The difficulty there was that the commissioner who had adjudicated on the matter previously clearly indicated that the charges were not made out, but it was difficult to know precisely on what grounds he had based his reason. In the present case, however, there is no such difficulty, and I think that it is not necessary for me to go further back than the recent decision of the Court of Appeal in *Timmins v. Timmins* (5) where the husband filed a petition for restitution and the wife set up that she had good cause for leaving her husband. WALLINGTON, J., found that the wife had not established that her husband's conduct amounted to cruelty, and had not made out just cause for leaving him, and, although he was anxious whether or not he ought to do so, he granted a decree of restitution. Against that order the wife appealed, and the Court of Appeal (DENNING, L.J., and LLOYD-JACOB, J., HODSON, L.J., dissentiente) held that in the special circumstances of the case it was wrong to make a decree of restitution. An important passage ([1953] 2 All E.R. 191) in the judgment of DENNING, L.J., is as follows:

"We were referred to *Pike v. Pike* (3), and, in view of some comments made on it by DAVIES, J., in *Dixon v. Dixon* (4), I think I ought to explain some of the things I there said. In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a 'grave and weighty' character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty because it lacks the element of injury to health: as in *Russell v. Russell* (6) and *Edwards v. Edwards* (7); or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but, nevertheless, it may give good cause for leaving, as the cases which I have cited earlier amply show."

It is interesting to note that of the cases to which the learned lord justice referred all, except the somewhat odd case of *Butland v. Butland* (8), concerned acts, not of violence but acts which could not really be said to be aimed at the other party. DENNING, L.J., continues (ibid.):

"On the other hand, conduct which is not 'of a grave and weighty character,' and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman v. Yeatman* (9). It is conduct of that kind to which I referred in *Pike v. Pike* (3) when I said ([1953] 1 All E.R. 235) that conduct 'less than cruelty' does not justify a spouse in leaving."

I apply those words to the present case. PILCHER, J., did not dismiss the petition on the ground that there was no evidence of injury to health. He thought that there was injury to health, and he said in terms that, if he had been satisfied that there was matrimonial misconduct by the husband, he would have been prepared to say that such injury was occasioned by that conduct. The ground on which he dismissed the petition was that, if and in so far as the wife proved anything against the husband, the incidents were extremely trivial and she had entirely failed to make out any matrimonial misconduct of any sort or kind. That being so, it seems to me impossible to say that the matters alleged by the wife, not "were", but "could be", of such a grave and weighty character that, even though they had been held not to amount to cruelty, they could again

be re-litigated and relied on as constituting just cause for the wife to leave her husband. That really is sufficient to dispose of this case.

Bright v. Bright (1), a decision of WILLMER, J., is in point of time the most recent decision on this matter. WILLMER, J., refers to *Timmins v. Timmins* (5), and deals with the point, which I do not think it is necessary for me to deal with in this case, covered by the judgment of LORD MERRIMAN, P., in *Hudson v. Hudson* (10), namely, whether an estoppel can arise so as to bar or estop this court from making the inquiries which are incumbent on it by statute (now the Matrimonial Causes Act, 1950, s. 4). It was argued before WILLMER, J., that on the ground of public policy and the statutory duty of this court to inquire into the facts in the interests of the State in matrimonial disputes it would be wrong to strike out the allegations with which he was there dealing on the ground that the party was estopped from raising them. The learned judge said ([1953] 2 All E.R. 946):

"I think that that argument rests on a misapprehension, and on a failure to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the opposite party. It is one thing to say that the husband is not estopped from denying charges made by the wife, i.e., that the wife cannot in this court get relief simply because the husband is estopped from denying the charges. In that case the public interest, no doubt, does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But it is quite another thing to say that a petitioner, who is, if I may use the expression, the aggressor, the party bringing the charges, is entitled to persist in repeating allegations which have already been the subject of previous proceedings and have already been determined against him or her, and to do this merely for the purpose of obtaining relief for himself or herself."

Counsel for the wife has argued that the present case is decided in his favour by that. There, he says, WILLMER, J., was dealing with the case of a petitioner seeking to re-allege charges which had been disposed of, whereas in the present case a respondent is seeking to re-litigate as a matter of defence matters which have been disposed of when they were put forward as the ground of a petition. It seems to me that that is a distinction without a difference. There obviously might be cases where, despite an estoppel against a party, the court would think it necessary to inquire. One of the examples mentioned during the argument was a case where there had been a finding of no adultery in a previous suit and the court had reason to believe that, although the petitioner was estopped from raising the point again, there were grounds for suspecting that adultery had been committed. In such a case the Queen's Proctor could, no doubt, be asked to assist the court. But apart from cases of that kind it seems to me that when, in a case such as the present—and I am only dealing with this case and not attempting or purporting to lay down any general rule—when the wife in her petition filed in 1949 makes various allegations of matters said to have occurred prior to the final break-up of the marriage in May, 1949, and those allegations fall to the ground as being unproved, to allow her in answer to her husband's petition, filed after the statutory triennium has expired, on the ground of desertion to raise again those same matters which have been decided against her, would, I think, be as plain a breach of every known principle of estoppel, whether in this Division or any other, as it would be possible to conceive.

It is for these reasons that I rule that, just as the wife through her counsel admitted that she was not entitled in support of a plea of constructive desertion to rely on acts which she had previously unsuccessfully alleged, so the same principle applies to her attempt to rely on them as constituting just cause for her leaving her husband.

[HIS LORDSHIP dealt with the issue raised by para. 2 (a) of the answer, considered the evidence, and concluded:] This case is as plain as anything can be. The wife for reasons which seemed good to her made up her mind to go and she did go, and nothing that her husband might say would stop her. It may well be, as PILCHER, J., having heard all the evidence, was of the opinion, that it was best for both of them that they should part, but that does not alter the fact that the wife, in leaving her husband, deserted him unless she could show—as for the reasons which I have already explained, she is not entitled to show on the same material—that her action in doing so was justified. That being so, there must be a decree nisi on the petition.

Decree nisi.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Matthew Arnold & Baldwin*, Watford (for the husband); *Henry B. Sissmore & Co.* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Re DEANS (deceased). WESTMINSTER BANK, LTD. v. OFFICIAL SOLICITOR.

[CHANCERY DIVISION (Wynn-Parry, J.), January 29, 1954.]

Trust and Trustee—Trustee—Probate judge—Administration of Estates Act, 1925 (c. 23), s. 9—Trustee Act, 1925 (c. 19), s. 51 (1) (v).

Guarantee—Enforcement against estate of deceased person—No grant of representation—Vesting of estate in Official Solicitor—Vesting order—R.S.C., Ord. 16, r. 46—Trustee Act, 1925 (c. 19), s. 51 (1) (v).

By letters of guarantee, D. guaranteed payment of the debts and liabilities of L. to a bank. D. also deposited with the bank certificates relating to various shares and stock together with letters of deposit declaring that he had deposited the said shares and stock as security for all moneys due to the bank from him, D., whether as principal debtor or guarantor or surety or otherwise, and he agreed to pay such moneys on demand. On Nov. 11, 1951, D. died, and between Feb. 21, 1952, and Feb. 29, 1952, the bank demanded payment from L. of L.'s indebtedness to the bank. L. failed to comply with the demand. No grant of representation to D.'s estate was taken out, the sole executrix and beneficiary under his will having died in his lifetime, and no relative had been traced. In conformity with the letters of deposit, the bank sent a demand for payment to D.'s last known address. The bank, wishing to sell the shares and stock deposited by D., now sought an order under R.S.C., Ord. 16, r. 46, appointing the Official Solicitor to represent D.'s estate, a declaration that the deposited shares and stock were charged with all moneys owing by D. to the bank, a declaration that the shares and stock were vested in a trustee (viz., the probate judge) within the meaning of the Trustee Act, 1925, s. 51 (1) (v), and an order under that provision that the right to transfer the said shares and stock should forthwith vest in the Official Solicitor.

HELD: the probate judge was not, by virtue of the Administration of Estates Act, 1925, s. 9, a trustee within the Trustee Act, 1925, s. 51 (1) (v), and, therefore, the court had no jurisdiction to make the declaration and order sought under the latter provision; and, even if there were such jurisdiction, this was not a case in which the court would put any pressure on the Official Solicitor to consent to an order under R.S.C., Ord. 16, r. 46, because it was open to the bank to achieve its object by itself taking a grant of representation to the estate of D. and proceeding under the grant.

FOR THE TRUSTEE ACT, 1925, s. 51 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 131.

ADJOURNED SUMMONS for, inter alia, (i) a declaration that shares and stock were charged with the payment of all moneys owing by William Deans to the

plaintiff, Westminster Bank, Ltd.; (ii) an order that the defendant, the Official Solicitor, might be appointed to represent the estate of the said William Deans; (iii) a declaration that the said shares and stock were vested in a trustee within the meaning of the Trustee Act, 1925, s. 55 (1) (v), and (iv) an order pursuant to that section that the right to transfer the said shares and stock and to receive any dividends or income due or to accrue due thereon should forthwith vest in the Official Solicitor.

A By a letter of guarantee dated Dec. 21, 1948, William Deans guaranteed payment to the Westminster Bank, Ltd. ("the bank") of all advances and liabilities, to the extent of £750, of Gilbert Loughlin, and on the same date deposited with the bank a certificate of £300 "B" shares of £1 each fully paid in Barclays Bank, Ltd., and signed a letter of deposit. By a letter of guarantee dated Apr. 8, 1949, William Deans made a guarantee to the bank in respect of
B Gilbert Loughlin to the extent of a further £600 and on the same date deposited certificates of £175 10s. three per cent. guaranteed British Transport stock 1978-88 and of £50 2½ per cent. defence bonds and signed a letter of deposit. Other guarantees for the liabilities of Gilbert Loughlin to the bank were also given by his mother and sister.

C On Nov. 11, 1951, William Deans died. The sole executrix and beneficiary under his will made in 1935 had died in his lifetime and no relative of his could be traced. No grant of representation to the estate of William Deans had been made.

Between Feb. 21 and Feb. 29, 1952, the bank duly demanded payment from Gilbert Loughlin who thereupon went to Canada and had not been heard of since. The amount owed to the bank by the said Gilbert Loughlin was £2,457 16s. 6d.

D *J. W. Mills* for the plaintiff, Westminster Bank, Ltd.

W. F. Waite for the defendant, the Official Solicitor.

WYNN-PARRY, J. (having stated the facts): The bank wishes to realise the deposited securities. It is clear that they can achieve that end by obtaining a grant in the Probate, Divorce and Admiralty Division of this court and then
E taking the necessary steps pursuant to that grant. They desire, however to avoid taking that course because, as was said by their counsel, they do not wish to be involved in an administration action in this Division if there is any shorter, less troublesome and less expensive, way of achieving that object.

In those circumstances, the ingenuity of those advising the bank has produced the present summons. That summons, which was originally addressed to the
F Treasury Solicitor as defendant, now has as defendant the Official Solicitor. and what is sought is an order appointing the Official Solicitor to represent the estate of Mr. William Deans, under R.S.C., Ord. 16, r. 46; but, of course, an order made pursuant to that rule would not of itself be sufficient, because it appears clearly on the face of r. 46 that an order made thereunder will only bind the estate of the deceased person, whereas in this case it will be necessary to bind
G other persons, such as the Bank of England and the Postmaster-General, if the object which the bank has in view is to be achieved.

The summons originally asked, by way of relief, for a declaration that the securities to which I have referred are charged under the relevant documents in favour of the bank with the payment of all moneys owing by Mr. William Deans. It also asked for an account of what is due to the plaintiff bank under and by
H virtue of the deposits and letters of deposit and for its costs of the action, and a sale of the shares and the said stock and defence bonds.

The point having been appreciated that an order under R.S.C., Ord. 16, r. 46, would not of itself be sufficient, two further paragraphs were added to the summons, praying a declaration that the said shares, the said stock and the said defence bonds are vested in a trustee within the meaning of s. 51 (1) (v) of the Trustee Act, 1925, and an order pursuant to s. 51 (1) (v) of the Trustee Act, 1925, that the right to transfer the said shares, the said stock and the said

defence bonds and to receive any dividends or income now due or to accrue due thereon do forthwith vest in the Official Solicitor. In order to obtain, or to be entitled to obtain, a declaration that the shares, stock and defence bonds are vested in a trustee, reliance was placed on s. 9 of the Administration of Estates Act, 1925, which provides:

"Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Probate Judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary."

It is urged on me that, as the senior judge of the Probate Division can have no beneficial interest whatsoever in property which vests in him under that section, he must be regarded as a trustee thereof; and, not only that, he must be regarded as a trustee within the meaning of that word as used in s. 51 of the Trustee Act, 1925. That section provides, so far as material:

"(1) In any of the following cases, namely, . . . (v) Where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient; the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint."

In my view, the senior judge of the Probate Division cannot be said, by virtue of the language of s. 9 of the Administration of Estates Act, 1925, to be a trustee within the meaning of that word for any of the purposes of the Trustee Act, 1925. He has no duties whatsoever to perform. No obligations fall upon him. It is a mere matter of necessary convenience and protection which has led to the introduction of s. 9 in the Administration of Estates Act; and, although reference is made to the ordinary, the position of the senior judge of the Probate Division appears to me to be different from the position of the ordinary, in that, whereas the ordinary had, at any rate in later times, thrown upon him the obligation to discharge debts before holding the balance to pious uses, no such obligation is thrown on the senior judge of the Probate Division. The whole operation of that section is that where the condition is fulfilled of a person dying intestate, his estate, real and personal, vests in the senior judge of the Probate Division, and that property remains vested in him until the second condition is fulfilled, namely, that administration is granted in respect of that property. That appears to me to be plain language and to provide the only method by which the senior judge of the Probate Division can be divested of the property which vests in him under the section.

For those reasons, it appears to me that I have no jurisdiction whatsoever to make the declaration and the order asked under para. 6 and para. 7 of the summons. But I am not desirous of leaving the matter there. As I have said earlier, there is open to the bank a clear procedure, namely, that of obtaining a grant of administration in the Probate, Divorce and Admiralty Division of the court. Nothing stands in the way of their following that course. All they can urge in favour of the making of an order under R.S.C. Ord. 16, r. 46, assuming that I had jurisdiction to make such an order, is the saving of trouble and costs. The Official Solicitor, through Mr. Waite, has made his position perfectly clear. That is, that, although he fully recognises that it is his duty on all proper occasions to help and not to hinder, he sees no reason why he should do the work of the bank where there is this clear course open to the bank. He tells me, through his counsel, that had I had jurisdiction to make the order, he would not have consented to that order unless I had held a strong view that he ought to consent, in which case he would have done so. I think it, perhaps, may be helpful if I say this, in case the matter should go further, that, even if I were wrong on the first point as regards jurisdiction, I should not have regarded this as a case in

which I would have put any pressure whatsoever on the Official Solicitor to consent to an order being made under R.S.C., Ord. 16, r. 46.

In those circumstances, I make no order on the summons. I assume that no order for costs is required, because I have been told that the bank has agreed to indemnify the Official Solicitor in respect of all costs to which he may have been put on this summons.

A Solicitors: *Alfred Bright & Sons* (for the plaintiff); *Official Solicitor*.
[Reported by R. D. H. OSBORNE, Esq., *Barrister-at-Law*.]

CHARLES v. S. SMITH AND SONS (ENGLAND), LTD.

B [QUEEN'S BENCH DIVISION (Hilbery, J.), January 21, 22, 25, 26, 27, 1954.]

Factory—Dangerous machinery—Duty to fence—Injection moulding machine—Ram covered by metal box with perspex lids—Adjustable nuts inside box—Lid removed by operator to test whether adjustment necessary—Injury to operator—Contributory negligence—“Wilfully interfere with or misuse any . . . appliance”—Factories Act, 1937 (c. 67), s. 14 (1), s. 16, s. 119 (1), (2).

C The plaintiff was a mould press operator employed by the defendants in their factory. Part of the machine consisted of a heavy platen used to hold moulds in place, and the position of the platen could be adjusted by nuts on rods connected to it. These nuts were covered by a metal box with sloping sides at back and front. Each of these sides contained a pane of perspex which could be opened by means of a lip attached to it which
D formed a handle. Passing through the box close to the nuts was also a ram, with yoke attached, which automatically rammed granules of plastic material into a heating cylinder when the machine was in motion. The nuts connecting with the platen occasionally needed adjustment and this adjustment was normally carried out by the assistant foreman at the request of the plaintiff. On one side of the platen was the handle, or lever, for starting the machine.
E When it was in the neutral position it stood up vertically, and to start the machine it was moved over to the left. Wishing to see whether the nuts needed adjustment, the plaintiff stopped the machine but did not turn off the motor. He then opened the front perspex cover of the metal box and put his hand inside to test the nuts. As he did so, his leg accidentally caught the starting handle and started the machine, and the ram inside the box
F moved across and crushed his hand against the heating cylinder. The plaintiff claimed damages against the defendants for negligence and/or breach of statutory duty under the Factories Act, 1937, s. 14, s. 15 and s. 16. By their defence the defendants pleaded that the defendant was guilty of contributory negligence and was in breach of s. 119 (1) and (2) of the Act. The court found as a fact that the plaintiff had an implied licence to test
G whether the nuts required adjustment and that he was not guilty of contributory negligence.

H HELD: (i) s. 14 (1) of the Act of 1937 required a dangerous part of machinery to be securely fenced and it was not enough that it was provided with a means of achieving security; the box achieved security so long as the perspex cover was left shut, but, if the handle on the cover was used and the cover was lifted, it ceased to be a guard for anyone who put his hand inside the box; and, therefore, it was not a secure fencing of the machine and the defendants were in breach of s. 14 (1) of the Act.

(ii) the involuntary action of the plaintiff in setting the machine in motion when the fencing was not in position involved the defendants in a breach of s. 16.

Cummings v. Richard Thomas & Baldwins, Ltd. ([1953] 2 All E.R. 43), applied.

(iii) "wilfully" to "interfere with or misuse" an appliance, within the meaning of s. 119 (1), meant interference which was in the nature of a perverse meddling with the appliance, and did not merely mean an intentional interference, and, therefore, the plaintiff was not in breach of the sub-section.

(iv) as the plaintiff did not foresee the accidental pressure on the starting handle, and was not negligent in not foreseeing it, he was not, as far as he knew, doing anything likely to endanger himself, and, therefore, he was not in breach of s. 119 (2).

FOR THE FACTORIES ACT, 1937, s. 14, s. 15, s. 16 and s. 119, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1009-1011, and p. 1097.

Cases referred to:

(1) *Cummings v. Richard Thomas & Baldwins, Ltd.*, [1953] 2 All E.R. 43; [1953] 2 Q.B. 95.

(2) *Johnson v. Croggon & Co., Ltd.*, [1954] 1 All E.R. 121.

ACTION for negligence and/or breach of statutory duty.

The plaintiff was a mould press operator employed by the defendants at a factory owned by them. The machine which he was operating was known as an injection moulding machine and was used to mould hot plastic material into various shapes. At one end of the machine was a motor which provided the power for producing the hydraulic pressure by which the machine was worked. The motor was started and stopped by press buttons on the machine, and the supply of hydraulic fluid was controlled by a hand-wheel and a tap. Long metal spindles ran the length of the machine on which were two heavy platens shaped to hold various types of mould. Behind the right hand platen were nuts which kept the platen in position, and which required adjustment from time to time. These nuts were inside a metal box which had two sloping lids, one at the front and the other at the back. Each lid had a perspex pane with a raised lip so that it could be opened. Also passing through the box was a metal ram, with a yoke attached, which automatically rammed granules of plastic material into a heating cylinder when the machine was in motion. When the ram came forward, there was very little space between the yoke and the entrance to the cylinder. At the left-hand side of the metal box was the handle, or lever, for operating the machine. When the lever was in the neutral position it stood up vertically, and to start the machine the lever was pushed over to the left.

On Jan. 2, 1951, the plaintiff, wishing to test whether the nuts needed adjustment, stopped the machine and put the operating lever into the neutral position, but did not switch off the power. As he put his hand into the box, his thigh or leg caught the operating lever and moved it to one side, so that it started the machine, and, as the ram came forward, passing through the metal box close to the nuts, the yoke attached to the ram caught his hand and crushed it.

The plaintiff contended, inter alia, that the parts of the machine in question, and, in particular, the ram, were dangerous parts of the machinery, within s. 14, s. 15 and s. 16 of the Factories Act, 1937, and that (a) the defendants were in breach of their duty under s. 14, in that they had failed at the material time to fence the dangerous parts securely, and (b) that they had caused or permitted the machine to be in motion notwithstanding that the covers to the metal box were not in position, contrary to s. 16. By their defence, as amended during the hearing, the defendants denied that there was any negligence or breach of statutory duty on their part, and they pleaded that the accident was caused or, alternatively, contributed to by negligence and/or breach of statutory duty on the part of the plaintiff. They contended, inter alia, (a) that the plaintiff knew that it was not his duty to adjust the nuts; (b) that he failed to ask the assistant foreman to make the adjustment though he knew that it was the assistant foreman's duty to do so; (c) that he attempted to adjust the

A nuts from the wrong side of the machine, viz., through the front pane, instead of through the rear pane, knowing that it was dangerous to do so; (d) that he knocked the operating lever into a position which he knew would cause the ram to move while his hand was in jeopardy; (e) that, contrary to s. 119 (1) of the Act of 1937, he had wilfully interfered with and/or misused the guard provided in pursuance of the Act, and that he had failed to use the guard, which was an appliance provided for his use within the sub-section; and (f) that he had wilfully and without reasonable cause done an act likely to endanger himself, in breach of s. 119 (2) of the Act. His LORDSHIP found that it had, at first, been the plaintiff's practice to send for the assistant foreman when he thought that the nuts required adjustment, but that, on occasion, the assistant foreman had, by his demeanour, evinced dissatisfaction at being called when it was not necessary, so that the plaintiff obtained the impression that he was expected to see whether an adjustment was necessary before calling the assistant foreman. In his evidence the assistant foreman said that the adjustment was a simple job and that a machine operator qualified himself by experience to make minor adjustments to his machine.

Platts-Mills for the plaintiff.

C *Nelson, Q.C., Stephen Chapman and John Stephenson* for the defendants.

HILBERY, J., stated the facts, and found that, although it was never specifically made part of the plaintiff's duty, the plaintiff had an implied licence to see whether the nuts required to be adjusted; that, in putting his hand in the box when the machine was stopped and the operating lever was in the neutral position, the plaintiff was not doing something which a reasonable man D should have known was likely to endanger him, as he would not necessarily have anticipated that his thigh or leg would press on the operating lever and start the machine, this being a most unlikely thing to happen; and that the plaintiff had acted reasonably in adjusting the nuts through the front pane as he had seen the assistant foreman do it in this way. His LORDSHIP continued: The plaintiff was injured by a moving part of the machine that was dangerous, and the question is whether it had been securely fenced, and, if so, whether the fence was E maintained when the machine was in motion, so as to comply with s. 14, s. 15 and s. 16 of the Factories Act, 1937. I do not think that it really matters in this case whether the box, with the loose lid which anyone could open, fenced the machine securely, because, in any event, since the decision in *Cummings v. Richard Thomas & Baldwins, Ltd.* (1), though the plaintiff set the machine in F motion when it was unguarded, his act in so doing involves the master in a breach of s. 16 of the Act. But, in those circumstances, the fact that it is the action of the servant, though involuntary—it was voluntary in *Cummings v. Richard Thomas & Baldwins, Ltd.* (1)—which involves the master in the breach is a matter to be taken into account when one has to consider whether the master is wholly liable in respect of the accident or whether the servant is liable.

G I have, therefore, to consider whether the plaintiff was guilty of, first, contributory negligence in doing what he did, or, secondly, a breach of s. 119. I think that, in the circumstances, what the plaintiff was doing was, first, not a wholly unauthorised act, and was, secondly, not contributory negligence, and ought not to be so held. I think that the initial responsibility for the accident lies in the fact that the box was not a secure fencing of this part of the machine.

H It is not enough to provide something which will act as a guard if it is let alone and not made use of in the way in which a part of it is obviously intended to be made use of. Section 14 of the Act of 1937 requires a dangerous part of any machinery to be securely fenced, and it is not enough that it is provided with a means of achieving security. The box achieved security so long as the perspex cover was left shut. If the handle on the perspex cover was used and the perspex cover was lifted, then it ceased to be a guard for anyone who, for any reason, put his hand inside the box. If it was not a secure fencing of the machine

(and I think it was not, in those circumstances), then, before we arrive at the situation where the inadvertent action of the plaintiff himself set the machine in motion when the perspex panel was opened and the machine was unguarded so as to involve his master technically in a breach of s. 16, we have the situation that the master was already in breach of s. 14, and I think it could fairly be said that that breach of the master was, in the circumstances of this case, causally connected with the accident.

There only remains the question whether the plaintiff was guilty of a breach of s. 119. The section is singularly bare of authority. I have not had called to my attention, and I confess I do not know of, an authority which has stated how we are to construe the words in s. 119 (1), that is to say, what interpretation is to be given to the words:

"No person employed in a factory or in any other place to which any provisions of this Act apply shall wilfully interfere with or misuse any means, appliance, convenience or other thing provided . . ."

"Wilfully interfere with or misuse" have to be construed in this case to decide whether what the plaintiff did with the box which performed the function, it is said, of a guard was a wilful interference or misuse of that appliance. If "wilfully to interfere" only means intentionally to do something with the guard, then, of course, he did intentionally lift up the panel in order to put his hand inside the box. But I should not so construe those words. I think that the words "wilfully interfere with or misuse", in that context, and, particularly, "or misuse", are intended to mean something more than merely touch or misplace. I think that they mean something in the nature of a perverse intermeddling with the appliance, and the use of the word "wilful" can and does very often convey that meaning. We speak of a "wilful child", meaning, I think, a naughty child. It is true that in the criminal law and in our domestic law we use the word "wilful" as meaning "intentional", but, when I find that s. 119 (1) imposes a duty on the servant not "wilfully" to "interfere with or misuse any means", I think that, although the disjunctive is used, it is not intended to indicate something quite different, where "misuse" is concerned, from "wilful interference", but to indicate that the "wilful interference" is intended to be something which is also in the nature of a "misuse". Therefore, I do not think that s. 119 (1) applies to this case.

Section 119 (2) provides :

"No person employed in a factory or in any other place to which any provisions of this Act apply shall wilfully and without reasonable cause do anything likely to endanger himself or others."

For the reasons which I have given in dealing with the question of contributory negligence, I do not think that the plaintiff was wilfully or without reasonable cause doing anything likely to endanger himself. So far as he could tell, he was not endangering himself at all, and what he was doing, in his view, was not likely to endanger him. He did not foresee the accidental pressure on the starting handle, and he did not foresee—and I do not think that he was negligent in not foreseeing—that he might, possibly, on this occasion, though it had never happened before, start the machine by pressure on that handle.

In the circumstances, I think, though my mind, I am bound to say, has vacillated a good deal in the course of the case, that the plaintiff succeeds, and, in the circumstances, there is no apportionment to be made, under the Law Reform (Contributory Negligence) Act, 1945, distributing any part of the blame as attributable to him, because I do not think that it has been shown that s. 119 has been violated or that the plaintiff was guilty of contributory negligence. With the greatest respect to the judgment which PILCHER, J., has given in *Johnson v. Croggon & Co., Ltd.* (2), it is quite clear, in my view, that, even though a plaintiff in such a case is shown to have been in breach of s. 119, it does not make

the maxim *ex turpi causa non oritur actio* apply to his cause of action, but I need not deal at length with that, because it does not arise in this case.

[His LORDSHIP assessed the damages to which the plaintiff was entitled at £322.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

R. v. BIRKENHEAD BOROUGH JUSTICES. *Ex parte* SMITH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Slade, JJ.), February 9, 1954.]

Bastardy—Affiliation order—Enforcement—Warrant of commitment—Putative father American soldier—Magistrates' Courts Act, 1952 (c. 55), s. 64 (2) (b)—United States of America (Visiting Forces) Order, 1942 (S.R. & O., 1942, No. 966), schedule, para. 2 (3) (b)—Army Act, s. 145 (1).

On Jan. 15, 1953, the applicant was delivered of a bastard child, and on April 17, 1953, an affiliation order was made against a member of the United States Armed Forces then stationed in England, whereby he was ordered to pay a weekly sum for the maintenance of the child. He failed to comply with that order, and, on complaint made by the applicant, a summons was issued and served on him, but he did not appear before the justices. On a complaint by the applicant for a warrant under s. 64 (2) of the Magistrates' Courts Act, 1952, to bring him before the court so that he might be committed for his failure to pay under the order,

HELD: paragraph 2 (3) (b) of the schedule to the United States of America (Visiting Forces) Order, 1942, gave to the members of the American forces all the privileges and immunities conferred by (inter alia) the Army Act on members of the British home forces; under s. 145 (1) of the Army Act execution in respect of liability to maintain an illegitimate child of which he was the father shall not issue against the person or pay of a soldier of the British home forces; and, therefore, the justices had no power to issue a warrant under s. 64 (2) (b).

FOR THE ARMY ACT, s. 145 (1) and (2), see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 367.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 64 (2), see *ibid.*, Vol. 32, p. 470.

MOTION for an order of mandamus.

On Jan. 15, 1953, the applicant, Mary Josephine Smith, was delivered of a bastard child, and on Apr. 17, 1953, Birkenhead justices made an affiliation order in her favour against one Robert L. Warren, a serving member of the United States Armed Forces, directing him to pay the weekly sum of 20s. as maintenance for the child. On May 8, 1953, that sum was ordered to be increased to 30s. By July 21, 1953, Warren had paid only £7, and the applicant laid a complaint before the justices in respect of the arrears. Warren was summoned to appear on July 28, 1953, but he failed to attend and the hearing was adjourned to Aug. 14, 1953. On that date Warren again failed to attend, and the applicant applied for a warrant for his arrest. The justices refused the application and adjourned the case sine die, but they took steps to communicate with Warren's unit as a result of which on Sept. 18, 1953, he paid to the applicant £5. The applicant received no further payment, and she applied for the case to be restored for hearing. On Nov. 3, 1953, the case came again before the justices, Warren did not attend, and the justices adjourned it until Nov. 17, 1953, when they refused to grant a warrant for his arrest, and, to test the matter, advised the applicant to apply for an order of mandamus directing them to issue a warrant of commitment.

C. J. I. Cunningham for the applicant.

The Attorney-General (Sir Lionel Heald, Q.C.) and J. P. Ashworth as amici curiae.

LORD GODDARD, C.J.: Counsel for the applicant moves for the issue of an order of mandamus directing the Birkenhead justices to exercise the jurisdiction conferred on them under the Magistrates' Courts Act, 1952, s. 64 (2), on the ground that they refused to consider an application made by the applicant pursuant to that sub-section, which deals with the enforcement of affiliation orders. Section 64 (1) of the Act provides: A

" . . . where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may issue a warrant of distress for the purpose of levying the sum or issue a warrant committing the defaulter to prison." B

By s. 64 (2):

" A warrant of commitment may be issued as aforesaid either—(a) where it appears on the return to a warrant of distress that the money and goods of the defaulter are insufficient to satisfy the sum with the costs and charges of levying the sum; or (b) instead of a warrant of distress." C

By s. 74 it is provided:

" (1) Where default is made in paying a sum ordered to be paid by an affiliation order or order enforceable as an affiliation order, the court shall not enforce payment of the sum under s. 64 of this Act except by an order made on complaint . . . (3) A magistrates' court shall not hear a complaint under this section except in the presence of the defendant; and for the purpose of securing his presence a justice of the peace acting for the petty sessions area for which the court acts may, if the complaint is substantiated on oath, issue a warrant to arrest the defendant and bring him before the court, whether or not a summons has been previously issued." D

[HIS LORDSHIP stated the facts and continued:] The justices said that they were doubtful whether or not in the circumstances they had any power to issue a warrant which would lead to Warren's arrest, and, if the arrears were proved, to his committal to prison. They took the proper course, in my opinion, of refusing to issue a warrant and telling the applicant to go to the High Court and apply for mandamus if she thought they were wrong. They were, perhaps, faced with a novel point because, although they knew, no doubt, that an American soldier could not be brought before a petty sessional court sitting in a criminal capacity, they may have felt some difficulty about what were their powers when a civil matter, albeit one where their order might be enforced by imprisonment, was before them. E

Accordingly, we have to consider whether or not we should issue a mandamus. When the court is asked to issue such an order there is often more than one consideration. One is whether or not the applicant is entitled to the order, and another, subject to some limitations, is whether or not the court, in the exercise of its discretion, will issue a mandamus. First, let us see what is the position in law. The Visiting Forces (British Commonwealth) Act, 1933, was applied by the United States of America (Visiting Forces) Order, 1942 (S.R. & O., 1942, No. 996) to American forces then about to visit the country. The order was made on May 22, 1942, and it will be remembered and must be a matter of common knowledge, of which we should take judicial notice, that the declaration of war against Japan which led to the Americans entering the war took place in December, 1941, and their forces began to arrive in this country in working parties to get ready for the larger numbers in 1942. Paragraph 2 (3) of the schedule to the order provides: F

" Subject as hereinafter provided, any enactment (whether contained in G H

the Naval Discipline Act, the Army Act, the Air Force Act or any other statute) which . . . (b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person; or (c) in virtue of such a connection, excepts any property, trade or business, in whole or in part, from the operation of any enactment, or from any tax, rate, imposition, toll or charge; or (d) imposes upon any person or undertaking obligations in relation to the home forces, or any of them, or any member or service court thereof; or (e) penalises misconduct by any person in relation to the home forces or any of them, or any member or service court thereof, shall, with any necessary modifications, apply in relation to an American force as it would apply in relation to a home force of a like nature to the American force."

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B As I understand that, it seems to be clear that para. 2 (3) (b) was intended to confer on American soldiers the same privileges or immunities as were conferred by the Army Act on British soldiers. By the Army Act, s. 145 (1):

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"A soldier of the regular forces shall be liable to contribute to the maintenance of his wife and of his children, and also to the maintenance of any illegitimate child of which he may be proved to be the father, to the same extent as if he were not a member of the regular forces; but execution in respect of any such liability or of any order or decree in respect of such maintenance shall not issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessaries, or clothing; nor shall he be liable to be punished for the offence of deserting or neglecting to maintain his wife or family . . ."

D

It seems to be clear that for the purpose of enforcing an affiliation order one cannot take the person or the pay of a soldier in execution, and, in my opinion, it is equally clear that para. 2 (3) of the schedule to the Order in Council to which I have referred extends that immunity to American soldiers. Therefore, it would seem to follow that, if a court in this country are asked to make an order which can only result in the commitment of an American soldier, they would be right in refusing to do so.

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Counsel for the applicant has called our attention to various other matters and he has referred to the words of para. 2 (3) (d) in the schedule to the Order in Council which

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"imposes upon any person . . . obligations in relation to the home forces, or any of them, or any member or service court thereof"

and suggests that that imposes a duty on the American army authorities to deduct from the pay of the soldier some amount towards the payments under this affiliation order because under s. 145 (2) it is provided:

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"When any order or decree is made under any Act (including an Act of the Parliament of Northern Ireland and an Act of Tynwald) or at common law for payment by a man who is or subsequently becomes a soldier of the regular forces either of the cost of the maintenance of his wife or child, or of any illegitimate child of whom he is the putative father, or of the cost of any relief given to his wife or child by way of loan, a copy of such order or decree shall be sent to the Army Council, or any officer deputed by them for the purpose, and in the case—(a) of such order or decree being so sent; or (b) of it appearing to the satisfaction of the Army Council or any officer deputed by them for the purpose that a soldier of the regular forces has deserted or left in destitute circumstances, without reasonable cause, his wife or any of his legitimate children under sixteen years of age, the Army Council or officer shall order to be deducted from the pay of the soldier and to be appropriated in liquidation of the sum adjudged to be paid by such

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order or decree (including any sum paid on account thereof in accordance with the provisions of sub-s. (3) of this section), or towards the maintenance of the wife or children of the soldier, as the case may be, in manner directed by the order, such portion of the soldier's pay as the Army Council or officer in their or his discretion from time to time think or thinks fit . . ."

As I understand the argument of counsel for the applicant, he submits that the American army authorities are bound to pay the sums due under this order. I do not know that it is for us to give any decision on that because any opinion we do give would, I suppose, be obiter because what is being asked for here is the issue of a warrant, but I should be sorry to think that we should have to construe this legislation in the sense that his late Majesty in Council was purporting to impose a duty on the American command to make deductions from their soldiers' pay. That must be a matter for the American government to consider as, apparently, they did at one time. We cannot construe this provision in the order as imposing an obligation on the American army authorities to make deductions from the soldier's pay. If there were such an obligation, this is not the proper procedure to enforce it. I rather think counsel's suggestion was that, as the American army authorities are not making a deduction from Warren's pay, therefore, the other remedy must be open to the applicant. I am afraid I cannot agree to that. It seems that there is an absolute prohibition from taking a man in execution so long as he is a member of the American Armed Forces. A B C

In my view, therefore, the justices were right in saying that in the circumstances they would not issue their warrant, and, therefore, this court will not order them to do so. If, on the other hand, it was put that the justices ought to have gone on the footing that Warren was a civilian the affidavits which have been filed in this court exhibit letters from the American army authorities saying that he has gone abroad. Nobody has contradicted that, and, although the letters may not strictly be evidence, there seems to be no doubt that he has gone abroad. I cannot, therefore, see what use it would be at the present time for the applicant to have an order, because, if the justices did issue their warrant, there would be no means of serving or executing it in America. Warren is not extraditable from America. If he comes back to this country and is found to be a civilian, the applicant can then take proceedings against him. It is some satisfaction to hear from the Attorney-General that this matter is engaging the attention of Her Majesty's government and it may be that some reciprocal arrangement will be made, under which there will be some prospect of affiliation orders being enforced against those who are or have been American soldiers, but we cannot speculate on that. I am satisfied that the justices were right in refusing the order and, therefore, this application fails and must be dismissed. D E F

CASSELS, J.: I agree.

SLADE, J.: I also agree.

Application refused. G

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the applicant); *Treasury Solicitor*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DAVIES v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Lord Simonds, L.C., Lord Porter, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone), January 12, 13, 14, 15, February 19, 1954.]

Criminal Law—Evidence—Accomplice—Corroboration—Need of warning to jury—“Accomplice”—Particeps criminis.

A In July, 1953, a number of youths, including the appellant, attacked four other youths, including B. During the attack a knife was used and subsequently B. died of wounds. The appellant and five others, including L., were indicted for the murder of B., but at the trial the Crown offered no evidence against L. and three others, and the jury returned a formal verdict of “Not Guilty” of murder in respect of them. At the trial of the appellant and the fifth youth the jury disagreed. Later no evidence was offered against the fifth youth, and he was found “Not Guilty” of murder. At the second trial of the appellant L. was called as a witness for the prosecution. In his summing-up the trial judge did not warn the jury that L.’s evidence was, or should be treated as, the evidence of an accomplice.

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E HELD: in a criminal trial, where a person who was an accomplice gave evidence on behalf of the prosecution, it was the duty of the judge to warn the jury that, although they might convict on his evidence, it was dangerous to do so unless it was corroborated; this rule, although a rule of practice, now had the force of a rule of law and where the judge failed to warn the jury in accordance with it, the conviction would be quashed, even if, in fact, there was ample corroboration of the evidence of the accomplice, unless the appellate court could apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907; a person called as witness for the prosecution was to be treated as an accomplice if he was particeps criminis in respect of the actual crime charged in the case of a felony; L., if he was to be an accomplice at all, had to be an accomplice to the crime of murder, and, as there was no evidence that L. knew that any of his companions had a knife, he was not an accomplice in a crime which consisted in its felonious use; and, therefore, it was not necessary for the trial judge to give a warning to the jury.

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G Per curiam: In two cases persons falling strictly outside the ambit of the category of particeps criminis have, in particular decisions, been held to be accomplices for the purpose of the rule: viz., (i) receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*R. v. Jennings* (1912) (17 Cr. App. Rep. 242); *R. v. Dixon* (1925) (19 Cr. App. Rep. 36)); (ii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of the identical type on other occasions, as proving system and intent and negating accident: in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration: *R. v. Mohamed Farid* (1945) (173 L.T. 68).

H AS TO EVIDENCE OF ACCOMPLICES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 222-224, paras. 309-313; and FOR CASES, see DIGEST, Vol. 14, pp. 460-462, Nos. 4887-4919.

Cases referred to:

- (1) *R. v. Durham & Crowder*, (1787), 1 Leach, 478; 168 E.R. 341; 14 Digest 461, 4892.
- (2) *R. v. Atwood & Robbins*, (1788), 1 Leach, 464; 168 E.R. 334; 14 Digest 460, 4891.
- (3) *R. v. Jones*, (1809), 2 Camp. 130; 170 E.R. 1105; 14 Digest 461, 4893.

- (4) *R. v. Sheehan*, (1826), Jebb, Cr. & Pr. Cas. 54; 14 Digest 460, 4891 v.
- (5) *R. v. Farler*, (1837), 8 C. & P. 106; 173 E.R. 418; 14 Digest 463, 4927.
- (6) *R. v. Boyes*, (1861), 1 B. & S. 311; 121 E.R. 730; 14 Digest 350, 3675.
- (7) *R. v. Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 14 Digest 463, 4934.
- (8) *R. v. Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 72 J.P. 391; 14 Digest 464, 4942. A
- (9) *R. v. Moore*, (1942), 28 Cr. App. Rep. 111; 2nd Digest Supp.
- (10) *R. v. Davies*, (1930), 22 Cr. App. Rep. 33; Digest Supp.
- (11) *R. v. Lewis*, [1937] 4 All E.R. 360; 158 L.T. 454; 102 J.P. 35; 26 Cr. App. Rep. 110; Digest Supp.
- (12) *R. v. Mohamed Farid*, (1945), 173 L.T. 68; *sub nom. R. v. Farid*, 30 Cr. App. Rep. 168; 2nd Digest Supp. B
- (13) *R. v. Stubbs*, (1855), Dears. C.C. 555; 25 L.J.M.C. 16; 26 L.T.O.S. 109; 19 J.P. 760; 169 E.R. 843; 14 Digest 461, 4900.
- (14) *Re Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 648; 71 L.T. 403; 14 Digest 200, 1793.
- (15) *R. v. Everest*, (1909), 73 J.P. 269; 2 Cr. App. Rep. 116, 130; 14 Digest 463, 4932. C
- (16) *R. v. Rudd*, (1948), 64 T.L.R. 240; 2nd Digest Supp.
- (17) *R. v. Garland*, (Nov. 4, 1941), unreported.
- (18) *R. v. Christie*, [1914] A.C. 545; *sub nom. Public Prosecutions Director v. Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 14 Digest 360, 3811.
- (19) *R. v. Jennings*, (1912), 7 Cr. App. Rep. 242; 14 Digest 466, 4964. D
- (20) *R. v. Dixon*, (1925), 19 Cr. App. Rep. 36; Digest Supp.
- (21) *R. v. Abigail & Macnamara*, (1893), 14 N.S.W.L.R. 72; 9 N.S.W.W.N. 141; 14 Digest 456, q.
- (22) *R. v. Reeve*, (1917), 17 S.R.N.S.W. 81; 34 W.N. 123.
- (23) *R. v. McDonald*, (1945), 3 D.L.R. 764; O.W.N. 430; 84 Can. C.C. 177. E

APPEAL against an order of the Court of Criminal Appeal, dated Dec. 2, 1953.

The appellant, Michael John Davies, was convicted on Oct. 22, 1953, before HILBERY, J., at the Central Criminal Court of the murder of John Ernest Beckley. He appealed to the Court of Criminal Appeal, which dismissed the appeal.

Weitzman, Q.C., R. R. Russell and P. Weitzman for the appellant.

The Attorney-General (Sir Lionel Heald, Q.C.), Christmas Humphreys and M. J. H. Turner for the Crown. F

The House took time for consideration.

Feb. 19. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, this is an appeal from a judgment of the Court of Criminal Appeal, pursuant to the fiat of the Attorney-General, who certified that the case raised a point of law "of exceptional public importance". The appellant had, on Oct. 22, 1953, been convicted of the murder on Clapham Common of a youth called Beckley. He appealed to the Court of Criminal Appeal and his appeal was dismissed by that court on Dec. 2, 1953, the courts reasons for its judgment being delivered by SELLERS, J., two days later. On Dec. 10 the Attorney-General gave his certificate. The appeal was heard before your Lordships on Jan. 12 to 15, 1954, the House, at the close of the argument, intimating their decision to dismiss the appeal, but deferring till later their statement of their reasons for doing so. G

Before coming to the facts I should refer to the course of certain earlier proceedings. The trial of Oct. 22, 1953, was the sequel of an earlier trial at which the jury were divided. At the earlier trial, not only Davies but five other youths H

were indicted for the murder in question. The case was tried before PEARSON, J. All six pleaded "Not Guilty". Against four of them—Power, Lawson, Woodman and Allen, the Crown offered no evidence on the charge of murder, and the jury returned a formal verdict of "Not Guilty" on that issue. Coleman and the present appellant, Davies, stood their trial for murder. On Sept. 21, 1953, the jury disagreed as to both, and the Crown announced that there was no intention to proceed with the charge of murder against Coleman. On Sept. 22 no evidence was offered against him and the jury found him "Not Guilty" of murder. The five defendants acquitted of murder were then arraigned on a charge of common assault, pleaded Guilty and were sentenced to sundry terms of imprisonment. It is, perhaps, pertinent to add that at this first trial Lawson and Woodman, two of the persons against whom no evidence was tendered on the charge of murder, were called as witnesses against Coleman and the appellant Davies, and that the learned judge warned the jury that their evidence should be treated as that of accomplices. The second trial, in which the charge was murder and the sole defendant was Davies, came on for hearing before HILBERY, J., on Oct. 19, 1953. The trial resulted in the conviction of the defendant. The main ground of this appeal is that Lawson was again called as a witness, but that HILBERY, J., in his summing-up, did not give the jury the warning which, it was said, was appropriate and necessary in relation to the evidence of a witness who was, or might well be, an accomplice: that there was an inflexible rule of law calling for such a warning: and that, as it was not complied with, the conviction must be quashed. (There was a second and subsidiary ground with which I will deal briefly hereafter.)

Before dealing with the main contention I will summarise shortly the evidence given at this trial. On the evening of July 2, 1953, four youths, Beckley (the victim of the murder), Chandler, Ryan and Carter, were sitting on benches near a bandstand on Clapham Common. Two were on each of two benches facing each other, and each propped his feet on the bench opposite him, so that no one could pass between the benches towards the stand. Coleman came along and prepared to pass between the benches, but their occupants refused to give way and it would seem that one of them used, concerning Coleman, what he took to be an insulting expression. Coleman then went to a group of persons round the bandstand, and the four boys on the benches, fearing reprisals, withdrew towards what has been called "the Fountain", some way off. The group whom Coleman joined and to whom he said something about the affront he had suffered consisted of a number of people including Davies. From this group about eight, including Davies, later moved off towards the fountain in pursuit of the four. But it is important to note that before this happened two persons by the bandstand, a man called Leaver and a Miss Pilkington (neither of whom could by any stretch be called accomplices of Davies) agree that Davies, after hearing Coleman's communication, drew out a green-handled knife from his pocket—a small knife with a "push" handle. Leaver further says he heard Davies say: "I shall be all right with this". A lad called Wood also saw a green-handled knife in Davies' possession just after Coleman had spoken to Davies. Davies and his companions, including Lawson, then proceeded to the fountain, and a fight developed there between them and the four fugitives. Davies admits hitting Ryan, and Ryan later discovered a stab wound under his left arm-pit. Lawson was engaged in this fight. At some stage in it two of the fugitives allege that someone shouted: "Get out the knives". There is no evidence that at this stage Lawson was still there or that he heard this cry. He swears he did not. Ryan and Carter seem to have moved off from the fountain in one direction while Beckley and Chandler fled in a different direction to a motor omnibus, which they boarded while it was held up by traffic lights. When it reached its next stop they were torn from its tailboard by Davies and his followers. Davies admits "doubling up" Chandler with a blow on the stomach, in which region,

it appeared afterwards, he had been stabbed. Beckley was pursued to a point one hundred and thirteen yards beyond the bus stop. The evidence as to the precise succession of events at this stage is conflicting, but a Miss Frayling, sitting on the front right-hand bench on the top of the bus, testified that she saw Davies (whom she identified with the greatest confidence) "shake" someone, who could only have been Beckley, and who fell to the ground. She then saw Davies cross the road in front of the bus, and as he did so put a green-handled knife into his right-hand inside jacket pocket. In the same pocket later were found bloodstains. Beckley had eight or nine knife wounds, and died shortly after. There was further evidence of threats by Davies later on to two witnesses who said that if necessary they would say who was really responsible for Beckley's death.

It is manifest that this evidence would, on a proper direction to the jury, have been abundantly sufficient to support a verdict of guilty; there being ample evidence that Davies possessed and produced a knife and none that anyone else possessed one. But it is said that there was not a proper direction, inasmuch as Lawson was called and gave certain evidence; and Lawson was an "accomplice" of Davies; and the judge gave no warning that Lawson's evidence should be treated with corresponding caution. It is not disputed that the learned judge gave no such warning. Lawson's evidence was, briefly, that, some time after the affray, and after he had heard of Beckley's death, he met Davies at a coffee stall in Venn Street, and that Davies said to him that all he tried to do was to "run a knife up and down", and illustrated by a gesture the difference between this and stabbing. He agreed in cross-examination that at the earlier trial he had agreed that Davies might have said: "Somebody must have run a knife . . ." not "I must have run a knife" up and down, but that he thought it was the latter. In statements to the police, oral and written, Lawson had originally denied all participation in the fight. Later in further written statements to the police and in his evidence at both trials he admitted being present both at the fountain and the bus-stop phases of it, and in the box admitted that in his earlier statements to the police he lied. The judge, in his summing-up, dealt with Lawson's evidence and did not warn the jury that that evidence was, or should be treated as, the evidence of an accomplice. It is argued for the appellant that this was misdirection—or, to use the exact language of s. 4 (1) of the Criminal Appeal Act, 1907, a "wrong decision on a point of law". It was not, nor could it, in my view, be argued for the Crown that, if this contention were right, the conviction could, nevertheless, be upheld under the proviso to that sub-section on the ground that "no substantial miscarriage of law" had occurred: viz., on the ground that, if there had been no such misdirection, a reasonable jury must equally have convicted. The evidence, if admissible, was not unimportant, and the jury emerged from their retirement to ask the learned judge some questions about it.

My Lords, I will recur later to certain other features of the trial which appear indirectly relevant, but for the present will proceed to deal with three problems raised by the main ground of appeal, namely—(A) What is the scope and effect of the rule that a judge ought to warn juries in connection with the evidence of an "accomplice"? (B) What is an "accomplice" within the rule? (C) Whatever be the true answers to these questions, what (if any) is their application to the evidence of Lawson?

(A)—I do not propose to explore the remote historical origins of the rule, nor the old doctrine and practice of "approvement". It is clear that an accomplice is, and was, at all material times a competent witness, and that a conviction based on his evidence, though uncorroborated, could, and can today, be supported: and a judge may properly direct a jury that they are entitled if they choose to act on such uncorroborated evidence. But for over a century and a half it has been customary for judges to warn juries that it is dangerous to

convict on such evidence, free though they are, if they find it wholly convincing, to do so. For most of that period it has been laid down that such a warning was not a pre-condition of a valid conviction, but was within the judge's discretion to give or to withhold: *R. v. Durham & Crowder* (1); *R. v. Atwood & Robbins* (2), in which twelve judges to whom the question was referred stressed the discretionary nature of any directions given by the judge; LORD ELLENBOROUGH's observations in *R. v. Jones* (3); *R. v. Sheehan* (4) (Jebb, Cr. & Pr. Cas. 56); *R. v. Farler* (5) (8 C. & P. 107) where the warning is referred to as "a practice which deserves all the reverence of the law"; *R. v. Boyes* (6) (1 B. & S. 320)—where the warning is referred to as "a practice which deserves the reverence of law but is not law actually".

My Lords, these authorities treat the rule as prescribing at most a salutary and usual practice, to be followed or not, at the judge's discretion: and the whole current of the decisions until the twentieth century is in this sense. But after the enactment of the Criminal Appeal Act in 1907, what was no more than a "practice" manifests an increasing tendency to assume the hard lineaments of a rule of law: and as such, many of the decisions of the Court of Criminal Appeal, especially since *R. v. Baskerville* (7), treat it. But in other decisions of the same court the older, the "discretionary" view, still finds expression. A great many authorities were cited to your Lordships. It will be sufficient for the purpose of illustrating the dualism to which I have called attention, to cite relatively few. If I may summarise their effect in advance, I would say that the "discretionary" school of thought is illustrated by such authorities as *R. v. Tate* (8) and *R. v. Moore* (9) and the "peremptory" school of thought (if for brevity I may so call it) by decisions such as *R. v. Davies* (10); *R. v. Lewis* (11); and *R. v. Mohamed Farid* (12): and, subject to certain qualifications which I will indicate when dealing with it, the case of *Baskerville* (7) itself.

Tate's case (8) was the earliest of this series being, indeed, decided shortly after the Court of Criminal Appeal was established. In that case the court quashed the conviction for want of a warning to the jury as to the need for corroboration of the evidence of an accomplice, but added that, if there had been *in fact* enough corroboration, this would have excused the want of a warning and justified the maintenance of the conviction. It has been suggested that this last observation was obiter and the same suggestion may be made in regard to some of the decisions the other way. In *R. v. Moore* (9), however, the observation was not regarded as obiter, and again the existence of sufficient corroboration in fact was regarded as an adequate substitute for compliance with the rule. In 1916—between these cases—*Baskerville's* case (7) was decided. The point directly in issue in that case was not what consequences flowed from the omission to give a warning. A warning, and a more than sufficient one, had *ex concessis* been given: and the only question directly for decision was whether there existed evidence which could amount to the corroboration for which the warning called. The court held it did. The judgment, however, went much outside the immediate issue raised, in an attempt to quiet doubts and settle the law. In this sphere of general principle the following passages from the judgment of a court which commands high respect (LORD READING, C.J., SCRUTTON, AVORY, ROWLATT and ATKIN, JJ.), delivered by LORD READING, C.J., are relevant ([1916] 2 K.B. 663):

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *R. v. Atwood & Robbins* (2). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: *R. v. Stubbs* (13); *Re Meunier* (14). This rule of practice has become

virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed . . . ”

For this last proposition *R. v. Tate* (8) is cited, but does not support it, for in *R. v. Tate* (8), as has been observed above, the court would not have quashed the conviction, even in the absence of a warning, if there had been sufficient corroboration in fact. I continue to quote from *Baskerville's* case (7) (*ibid.*, 668): A

“ In *R. v. Everest* (15), the court said (2 Cr. App. Rep. 132): ‘ The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused ’. We think ‘ tell the jury to acquit ’ should read ‘ warn the jury of the danger of convicting ’ ”. B

Finally, LORD READING, C.J., says ([1916] 2 K.B. 670):

“ If the judge failed to give the warning, this court would be bound to set aside the conviction.”

These words, though they carry weight, having regard to their source, were unnecessary to the decision, as, indeed, were certain other parts of the judgment. C

Baskerville's case (7), however, when every allowance has been made for the possibility that part of it is obiter, undoubtedly supports the proposition that the rule is “ peremptory ” and a breach of it incurable. There is no reference in *Baskerville's* case (7) itself to the proviso to s. 4 (1). The view which it propounded was adopted in *R. v. Lewis* (11) subject to the possible operation of the proviso to s. 4 (1) of the Criminal Appeal Act. In this case the Court of Criminal Appeal decided that if the warning be omitted, the conviction can only stand if there exists corroborative evidence of such a convincing, cogent and irresistible character that “ the jury ”, if they had received the proper warning, must have come to the same conclusion. The court found itself unable to say in that case that “ the jury ” must inevitably have come to the same conclusion, and consequently quashed the conviction. The case, decided a few years earlier, of *R. v. Davies* (10), qualifies the principle later applied in *R. v. Lewis* (11) to this extent, that, even though the summing-up omitted any express warning as to accomplice evidence, the conviction could be supported in a case in which (22 Cr. App. Rep. 35) D

“ from first to last, the case was conducted on the footing that the issue was whether the evidence of the bankrupt and his wife was confirmed by other evidence ”, E

and counsel for the appellant at the appeal admitted that counsel who appeared for the appellant at the trial did refer to the evidence of these witnesses as that of accomplices. This being so, the Court of Criminal Appeal was of opinion that “ the jury ” would inevitably have arrived at the same conclusion if an express warning had been given by the judge. If these two decisions are right in substance, yet each is subject, in my judgment, to this corrigendum, namely, that for “ the jury ” should be read “ a reasonable jury ”. No appellate court can tell what a particular jury would have decided in circumstances which did not occur. Two other cases were cited to us—*R. v. Rudd* (16) and *R. v. Garland* (17), but these cases concern the proper procedure as to warning and the like where one co-defendant gives evidence implicating another—a case with which your Lordships are not troubled here. The only decision of your Lordships’ House in which the rule as to accomplices’ evidence is touched on is *R. v. Christie* (18), where LORD ATKINSON’S observations, inclining to the “ discretionary ” view, were plainly unnecessary to the decision, the evidence in dispute not being that of any accomplice, and the law as to accomplices’ evidence only introduced as an analogy. G H

My Lords, having indicated the rival versions of the rule as to warning propounded in *Tate's* case (8) and *Moore's* case (9), on the one hand, and the cases of *Baskerville* (7), *Davies* (10) and *Lewis* (11), on the other, I have formed the opinion that, whichever might be preferred if the matter were *res integra*, as things are the latter cases, laying down the stricter rule, have the preponderant weight of authority on their side, and should be adopted by your Lordships on this appeal. The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions, more particularly in the third. These propositions as amended read as follows:

“*First proposition*: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. *Second proposition*: This rule, although a rule of practice, now has the force of a rule of law. *Third proposition*: Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907.”

The rule, it will be observed, applies only to witnesses for the prosecution.

The remaining questions, therefore, on the main issue are—(B) and (C): What is an “accomplice” within the rule? And has the rule, on the proper construction of the word “accomplice” contained in it, any application to Lawson in the present case? There is in the authorities no formal definition of the term “accomplice”: and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—(i) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term “accomplice”. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz., (ii) receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*R. v. Jennings* (19); *R. v. Dixon* (20)), and (iii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident: in such cases the court has held that, in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration: *R. v. Mohamed Farid* (12).

In both of these cases (ii) and (iii) a person not a party or not necessarily a party to the substantive crime charged was treated as an accomplice for the purpose of the requirement of warning. (I say “not necessarily” to cover the case of receivers. A receiver may, on the facts of a particular case, have procured the theft, or aided and abetted it, or may have helped to shield the thief from justice. But he can be a receiver without doing any of these things.) The primary meaning of the term “accomplice”, then, has been extended to embrace these two anomalous cases. In each case there are special circumstances to justify or at least excuse the extension. A receiver is not only committing a crime intimately allied in character with that of theft: he could not commit the crime of receiving at all without the crime of theft having preceded it. The two crimes are in a relationship of “one-sided dependence”. In the case

of "system", the requirement of warning within the special field of similar crimes committed is a logical application within that collateral field of the general principle, though it involves a warning as to the evidence of persons not accomplices to the substantive crime charged.

My Lords, these extensions of the term are imbedded in our case law and it would be inconvenient for any authority other than the legislature to disturb them. Neither of them affects this case. Lawson was not a receiver, nor was there any question of "system"; Lawson, if he was to be an accomplice at all had to be an accomplice to the crime of murder. I can see no reason for any further extension of the term "accomplice". In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use. It should be borne in mind in this connection that all suggestion of a concerted *felonious* onslaught had, by consent at the instance of counsel for the defence himself been expunged from the Crown's case and from the issues put to the jury. Your Lordships would, I feel, be slow to permit counsel for the defence, having got that suggestion buried, to disinter it for the purpose of suggesting that Lawson was constructively an accomplice to the crime of murder and for that reason attracted the rule as to warning.

My Lords, I have tried to define the term "accomplice". The branch of the definition relevant to this case is that which covers "*participes criminis*" in respect of the actual crime charged, "whether as principals or accessories before or after the fact". But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a "*particeps criminis*" in the case in hand? In many or most cases this question answers itself, or, to be more exact, it is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a "participant". In such a case the issue of "*accomplice vel non*" is for the jury's decision: and a judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so. The delimitation which I have outlined as proper, between the provinces of judge and jury in this particular matter, seems to me to be supported both by English authority and by Dominion decisions (e.g. *R. v. Dixon* (20), *R. v. Abigail & Macnamara* (21); *R. v. Reeve* (22) (Australia), *R. v. McDonald* (23) (Canada); and cf. RESTATEMENT OF AMERICAN LAW, 2nd ed., vol. 22, para. 797). This disposes of the main ground of the appeal.

There was a second ground, very shortly and faintly argued, which can be dismissed in a few words. It was said that it was improper for the evidence

A of Superintendent Davies to be admitted, to the effect that in a very large number of statements (I think two hundred) made to him there was no allegation that anyone but the appellant possessed a knife. It is a sufficient answer to this that it was counsel for the appellant himself who cross-examined Superintendent Davies about the sufficiency and result of these inquiries. He was anxious to discover whether any of these statements contained any allegation of the possession by other members of the Davies' group of a knife or knives; his interrogation was directed to this purpose; and he cannot complain if the superintendent returned negative replies. The fact that the questions were put made the replies admissible if they were not otherwise so. Moreover, no objection was taken at the time to his answers.

B My Lords, I think you will agree that this appeal has been most ably argued on both sides. There was certainly no contention open to counsel for the appellant to which he did not do full justice. Nevertheless, for the reasons I have now given, your Lordships were constrained to dismiss the appeal.

LORD PORTER: My Lords, I concur in the opinion that has just been expressed.

C LORD OAKSEY: My Lords, I concur.

LORD TUCKER: My Lords, I concur.

LORD ASQUITH OF BISHOPSTONE: My Lords, I also concur.

D *Appeal dismissed.*

Solicitors: *Thomas V. Edwards & Co.* (for the appellant); *Director of Public Prosecutions.*

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re POWLES (deceased). LITTLE v. POWLES AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), February 2, 1954.]

Trust and Trustee—Discretionary trust—Discretion to trustees to “resort to and spend” any part of capital of trust fund “and apply the same for [the beneficiary’s] maintenance and general benefit during his life or until the cesser of his interest”—Protected life interest—Capital of fund to fall into residue on death of beneficiary or on forfeiture—Trustees’ power to hand over capital absolutely to beneficiary.

By her will, dated Mar. 8, 1929, the testatrix, who died on June 16, 1929, directed her trustees to stand possessed of investments sufficient to yield the clear annual income of £375 on trust “to use the same for the maintenance and general benefit of” her son, F., during his life or until he “committed or suffered any act default or process of law whereby such income or any part thereof if belonging absolutely to him would become vested in or payable to any other person,” and after his death, or on the determination of the trust during his life, the sum so invested was to fall into and form part of her residuary estate in which he had no share. The testatrix went on to declare: “My trustees may in their uncontrolled discretion resort to and spend any part of the capital of the annual sums hereinbefore bequeathed or appointed in trust for [F.] and apply the same for his maintenance and general benefit during his life or until the cesser of his interest”. F., who was now seventy years of age, asked the trustees to transfer to him for his own use and benefit absolutely the capital of the fund which had been set aside for his benefit under the provisions of the will. On a summons to determine whether the trustees had power under the will to pay over the capital to F. without regard to the purposes for which it was required,

HELD: the trustees could pay the capital of the fund to F. only after they had made inquiry as to the purposes for which he required it, and if, after making the inquiry, they considered that the transfer would be for his general benefit.

AS TO TRUSTEES’ DISCRETION AS TO EXERCISE OF POWER, see HALSBURY, Hailsham Edn., Vol. 33, pp. 244-249, paras. 431-443; and FOR CASES, see DIGEST, Vol. 43, pp. 875, 876, Nos. 3192-3201.

Case referred to:

- (1) *Re Vestey’s (Baron) Settlement*, [1950] 2 All E.R. 891; [1951] Ch. 209; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (i) whether, on the true construction of the will of Marianne Elizabeth Annie Powles, and in the events which had happened, the trustees of the will, the plaintiff and the second defendant, had power under cl. 15 thereof to pay or transfer the whole of the capital of the trust fund set apart pursuant to cl. 13 (b) of the will to the first defendant, Francis Brooksbank Powles, for his own use and benefit absolutely without regard to any purposes for which it might be required by him and without making any inquiry with respect thereto; or (ii) whether their power under cl. 15 was limited to the application of the capital or any part thereof for the maintenance of the first defendant or for some other specific or particular purpose which the trustees in their discretion should consider to be for his general benefit, or was limited in any other and what way.

By cl. 13 of her will dated Mar. 8, 1929, the testatrix gave the residue of her real and personal estate to her trustees on trust for sale and conversion, and, after payment of her funeral and testamentary expenses and death duties, on trust to invest the proceeds of such sale and conversion in any of the investments therein mentioned and to stand possessed of such investments (thereinafter called the residuary trust fund) on the trusts which she then declared. By cl. 13 (b) the trustees were to stand possessed of investments sufficient to yield an

annual income of £375 on trust to use the same for the maintenance and general benefit of her son, Francis, the first defendant, during his lifetime or until he should attempt to charge or alienate his interest, and after his death or on the determination of the trust during his lifetime the investments were to form part of the residuary trust fund. By cl. 13 (a) and cl. 13 (c) investments were to be set aside for the benefit of the testatrix's sons, John Copley Powles and Robert Cowley Powles, and by cl. 13 (d), subject to the trusts declared in cl. 13 (a), (b) and (c), the residuary trust fund was to be held on trust as to one third part thereof for John and as to the remaining two third parts thereof for Robert absolutely. By cl. 15 the trustees were given an uncontrolled discretion to spend any part of the capital of the fund set aside for the benefit of the first defendant and to apply it for his maintenance and general benefit during his life or until the cesser of his interest.

The testatrix died on June 16, 1929, and her will was duly proved on Aug. 22, 1929. John died in September, 1939, resident in Canada, having given the residue of his estate by will to persons resident in Canada. Robert died on Jan. 3, 1946. The second defendant, as one of the trustees of Robert's will, was interested in the testatrix's residuary trust fund. The first defendant, who was now seventy years old, requested the trustees to pay or transfer to him for his own use and benefit absolutely the whole of the capital representing the trust fund set apart under cl. 13 (b), and claimed that such payment was within the scope of the powers given to the trustees by cl. 15 as being an application of the capital of the fund for his general benefit.

H. E. Francis for the plaintiff.

G. G. G. Robb for the first defendant.

Burnett-Hall for the second defendant.

HARMAN, J.: The testatrix, Marianne Elizabeth Annie Powles, had three sons, John Copley Powles, Francis Brooksbank Powles, and Robert Cowley Powles, all of whom survived her. She died in 1929, leaving a will of which the plaintiff is now one of the two trustees, and the whole estate, except one fund set aside under cl. 13 (b) of the will, has been distributed. By cl. 13 the testatrix dealt with the residue of her estate, and, after directing three funds to be set aside for the benefit of the three sons, by cl. 13 (d) she directed the distribution of the residue to John and Robert in unequal shares. There are marked differences between the provisions made for the sons. First, by cl. 13 (a), investments sufficient to yield the clear income of £100 were to be transferred to John and were bequeathed to him absolutely. There is, therefore, a clear absolute gift to that son of his fund. Secondly, by cl. 13 (b), a fund was to be set aside for the benefit of Francis, and that is the fund in controversy. Thirdly, by cl. 13 (c), the trustees were directed to invest a sum to yield £300 a year and to pay the £300 to Robert during his life with power for him to distribute the capital by will. Therefore, during his life Robert could not touch the capital, but he had dominion over it by his will, which he has exercised. To return to the fund for the benefit of Francis, by cl. 13 (b) the trustees are

“to stand possessed of investments which shall be sufficient to yield the clear annual income of £375 upon trust to use the same . . .”—

the words are “to use”, and not “to pay”—

“for the maintenance and general benefit of my son Francis . . . during his life or until he shall have committed or suffered any act default or process of law whereby such income or any part thereof if belonging absolutely to him would become vested in or payable to any other person or persons . . .”

Then there is a certain confusion, the words in the will being “or after his decease and upon the determination . . .”, but I think they should read:

“and after his decease or upon the determination of this trust during his

lifetime the sum so invested shall fall into and form part of my residuary trust fund . . . ”

The testatrix then goes on to declare her wishes:

“ I declare it to be my wish that the said sum shall be applied by my trustees as follows:—For the board lodging and clothing of my said son £300 and as an allowance to him £75 per annum.”

So far it is perfectly clear. The £375 is to be used for the maintenance and general benefit of Francis, and that means, if she has her wish, for his board, lodging and clothing, and by way of an allowance. If Francis should attempt to anticipate his income in any way, he is to forfeit and it will fall, in his lifetime, into the residue in which he has no part or share.

The difficulty is raised by cl. 15 of the will, which is in these terms:

“ My trustees may in their uncontrolled discretion resort to and spend any part of the capital of the annual sums hereinbefore bequeathed or appointed in trust for my said son Francis . . . and apply the same for his maintenance and general benefit during his life or until the cesser of his interest.”

The fund for the benefit of Francis was set aside, and the income has been paid to him. He has also been paid by the trustees, in the exercise of their discretion, £10 a month, that being, in their view, an application or expending of the capital for his maintenance or general benefit. He has now reached the age of seventy, and wishes the trustees to hand over the fund to him so that he may do as he likes with it. He has given them no reason why they should do so beyond the fact that he would be better off with the £7,000 in his pocket than if it were to remain in trust, and the trustees hesitate whether they should hand it over to him. Counsel for the second defendant contended, on behalf of the persons interested in remainder, not all of whom are before the court, that it was not within the power of the trustees to hand over the fund to Francis, and that they could pay the capital or “resort to capital” only if it would be, to their satisfaction, for his general benefit. Counsel drew my attention to *Re Vestey's Settlement* (1), where the trustees had a discretion to apply the income of the trust fund for the support or benefit of a specified class of persons which included infants. In the purported exercise of their discretion the trustees allocated part of the income to the infant beneficiaries, and then, as none of the income so allocated was required for the maintenance of the infants, they went on to direct its accumulation in accordance with the Trustee Act, 1925, s. 31. What they did was a mere device to avoid surtax. The Court of Appeal held that the allocations were within the powers of the trustees under the settlement, being applications for the benefit of the infants notwithstanding that the infants did not need them, and that, although there was no power to accumulate as s. 31 of the Trustee Act, 1925, did not apply in the circumstances of the case, the allocations were valid. That case, however, is entirely different from the present one and does not help me. The power in *Re Vestey's Settlement* (1) was a very special one, and, in my view, the case does not illustrate any principle.

In the present case the testatrix was quite clear in regard to what she wanted to be paid and what she wanted to be handed over. That is apparent from the provisions of cl. 13. Clause 15 is not the usual clause which is common in wills, and which allows capital to be handed over on the attainment of the years of discretion. This is a carefully guarded power. It is a power to the trustees to spend or to have resort to capital if they consider that the application of it will be for the general benefit of Francis, remembering always that he has only a protected interest, and that, if he anticipates his income, he will forfeit. Therefore, if he were to create a charge on his interest, the trustees, in my view, would have no power to pay this further money because he would have forfeited

his interest. In these circumstances, the trustees cannot, in my view, hand over the money to Francis without inquiring what he intends or wishes to do with it. On the other hand, I am unwilling to fetter their discretion more than is proper. If they do consider it to be for the general benefit of Francis to have the capital, I think that they would be entitled to say: "We think it better for him to have it than that we should keep it", and, if they come to that conclusion, who is to say to them: Nay?—not I, because the testatrix has said differently. Therefore, I propose to declare that on the true construction of the will the trustees may only resort to and spend or apply capital of the fund by paying it to the defendant Francis if they consider that such expenditure or application will be for his general benefit.

Declaration accordingly.

Solicitors: *Rowe & Maw*, agents for *Clutterbuck, Trevenen & Mawson*, Carlisle (for all parties).

[*Reported by Miss PHILIPPA PRICE, Barrister-at-Law.*]

NOTE.

The following note has been issued by the National Savings Committee :—

INHERITED NATIONAL SAVINGS

It is sometimes thought that savings certificates which are specifically bequeathed in a will or form part of the residue, or which are left by a holder who has died intestate, cannot be transferred, but must be encashed. The National Savings Committee point out that this is not so, as they may be transferred, with the approval of the Postmaster-General, to the person beneficially entitled to their value. When any person inherits savings certificates which bring his holding in certificates above the various maxima laid down in the savings certificates regulations he may hold the excess without becoming liable to any penalty, or to income tax in respect of his holding, provided that, in the case of the 9th (current) issue, he does not purchase, or have purchased for him, any further certificates while holding seven hundred or more than seven hundred unit certificates of that issue.

Similarly, it is not necessary to encash defence bonds on the death of a holder. They may be transferred even if the holding of the person inheriting is thereby raised above the normal personal limits allowed.

Deposits in the Post Office or Trustee Savings Banks (both Ordinary and Special Investment Departments) acquired by transfer from a deceased holder or depositor may be held in addition to whatever sum is already held.

Feb. 18, 1954.

SOUTHGATE CORPORATION v. PARK ESTATES (SOUTHGATE), LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), February 11, 1954.]

Highway—Private street works—“Unreasonable”—Proposed works premature—Proposal to make up street before land fully developed—Private Street Works Act, 1892 (c. 57), s. 7 (d).

Section 7 of the Private Street Works Act, 1892, provides “. . . any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the [private street] works may . . . object to the proposals . . . on any of the following grounds . . . (d) that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive . . .”

The respondents owned a building estate on which they had built a number of houses, and they intended to build on the remaining vacant land. In 1951 the appellants resolved to execute certain private street works in a road on the estate which had been a private street since about 1934, the proposed works being to place three inches of tar macadam on a basis of hard core, the existing surface of the road to be retained in so far as it provided this basis. The respondents, as owners under s. 5 of the Act, were liable to be charged about £3,000 towards the cost of making up the road, and in January, 1952, they objected under s. 7 (d) to the appellants' proposals to execute the works on the grounds that they were insufficient or unreasonable or that the estimated expenses were excessive, which objections were dismissed by a court of summary jurisdiction. In May, 1952, the respondents applied to the appellants, as agents for the planning authority, pursuant to the Town and Country Planning Act, 1947, Part III, for permission to develop the vacant land by erecting houses on it, but permission was refused in June, 1952. The respondents intended to appeal to the Minister of Housing and Local Government, and, if their appeal were allowed, their building operations would necessitate cutting into the road to provide the houses with gas, water and electricity, while the heavy traffic on the road which the building operations would involve would inevitably damage the proposed new surface. In July, 1952, the respondents appealed to quarter sessions against the dismissal of their objections under s. 7 (d) of the Act of 1892, and the appeal was allowed on the ground that the proposed works were unreasonable because they were premature. In October, 1953, the appellants' appeal by Case Stated to the Divisional Court was dismissed. On appeal to the Court of Appeal,

HELD: the word “unreasonable” in s. 7 (d) of the Act of 1892 was capable of an interpretation sufficiently wide to entitle justices to allow an objection to proposed works on the ground that, in view of all the circumstances, those works were not reasonable at the time they made their decision, and, therefore, in considering whether or not the proposed works were unreasonable, quarter sessions were justified, in the very special circumstances, in reaching the conclusion they did.

Decision of DIVISIONAL COURT ([1953] 2 All E.R. 1008), affirmed.

Sheffield Corpn. v. Anderson (1894) (64 L.J.M.C. 44), and *Mansfield Corpn. v. Butterworth* ([1898] 2 Q.B. 274), applied.

AS TO OBJECTIONS BY OWNERS, see HALSBURY, Hailsham Edn., Vol. 16, p. 456, para. 663; and FOR CASES, see DIGEST, Vol. 26, pp. 543-547, Nos. 2409-2447.

Cases referred to:

(1) *Sheffield Corpn. v. Anderson*, (1894), 64 L.J.M.C. 44; *sub nom. Sheffield Corpn. v. Alexander*, 72 L.T. 242; 26 Digest 544, 2422.

(2) *Mansfield Corpn. v. Butterworth*, [1898] 2 Q.B. 274; 67 L.J.Q.B. 709; 78 L.T. 527; 62 J.P. 500; 26 Digest 544, 2424.

APPEAL by Southgate Corporation from an order of the Divisional Court, dated Oct. 6, 1953, and reported [1953] 2 All E.R. 1008.

On July 29, 1952, the respondents, Park Estates (Southgate), Ltd., appealed to the Middlesex Quarter Sessions against the dismissal on May 2, 1952, by a court of summary jurisdiction, of all objections made by them under the Private Street Works Act, 1892, s. 7 (d), in respect of private street works to be carried out in Seafield Road, Southgate. It was proved or admitted that on July 31, 1951, the appellant corporation resolved to execute private street works in Seafield Road pursuant to s. 6 of the Act. On Nov. 27, 1951, the appellants resolved to approve the specification of the works, together with the plans, sections, estimate of probable expenses and the provisional apportionment. They complied with s. 6 (3) of the Act. The respondents were the owners (as defined by s. 5 of the Act) of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. They were also owners of vacant land on the same site, on which they desired to build houses. This vacant land had been zoned in the draft development plan for the county of Middlesex as a permanent open space, subject to compulsory purchase within ten years. If the respondents' objection to this draft plan were not successful, the appellants would, in due course, purchase the vacant land at its existing value. Seafield Road had been a private street since 1934, the approximate date when the respondents completed building some of the houses. The work of making up the road which the appellants proposed consisted of laying three inches of tar macadam on a basis of hard core, the existing surface of the road being retained insofar as it provided this basis, and the approximate cost of such work would have been £6,000, of which the respondents would have been liable for £3,000. On Jan. 22, 1952, the respondents objected to the appellants' proposals to execute the proposed works on the grounds that they were insufficient or unreasonable or that the estimated expenses were excessive. On May 21, 1952, the respondents applied to the appellants, pursuant to the provisions of the Town and Country Planning Act, 1947, Part III, for permission to develop the vacant land by erecting houses on it. On June 24, 1952, the appellants, acting as agents for the local planning authority, the county council of the administrative county of Middlesex, refused permission to develop the vacant land in accordance with the application. The respondents intended to appeal against this decision to the Minister of Housing and Local Government. The building operations which the respondents proposed to carry out if the appeal were allowed would have necessitated cutting into the road to lay on gas, electricity and water services, and the heavy traffic which these operations would have necessitated for a considerable length of time would have inevitably damaged the proposed new surface of the road, with the result that the £6,000 spent on the making up of the road would have been largely, if not wholly, wasted. It was contended on behalf of the appellants that, in considering an objection under s. 7 (d) of the Act of 1892, that the works were unreasonable, the justices were not entitled to consider whether it was reasonable that the works should be executed at all, and the possibility of damage to the road as a result of the development proposed by the respondents was not a matter to be taken into consideration by the justices in determining such an objection. Whether or not private street works should be carried out in the road was a matter solely within the discretion of the appellants, and the justices had no power to adjudicate on the exercise of that discretion in considering an objection under s. 7 (d) of the Act. There was no evidence before the justices on which they could find that the appellants had exercised their discretion in respect of the making up of the road on any wrong principle. The works were not unreasonable within s. 7 (d) of the Act. It was contended on behalf of the respondents that the appellants'

proposal to make up the road was premature in that, in the event of the Minister allowing the respondents' appeal against the appellants' refusal to grant them permission to develop the vacant land, then the road, as made up, would have to be cut into to provide the various public utility services for the new houses on the land, and, further, having regard to the very light form of surface construction proposed, the road would be churned up by heavy vehicles used in the construction of the houses which the respondents proposed to build. The work was "insufficient" within the meaning of s. 7 (d) of the Act, in that the appellants proposed to adopt a very light form of surface construction for the road, which would suffer very serious damage from the continuous heavy traffic to which it would be subjected for a substantial period in the event of the Minister granting the respondents permission to develop the land. The appellants were not making a bona fide exercise of their powers under the Act of 1892 in requiring the respondents to pay approximately £3,000 towards making up the road on land now belonging to the respondents, which land they refused to allow the respondents to develop and which they would, in due course, compulsorily purchase if the Minister approved its zoning as a permanent open space, which zoning the appellants had originally recommended.

Quarter sessions found the facts as stated in the respondents' contention to be true and on those facts decided that the works were premature and, therefore, unreasonable within s. 7 (d) of the Act of 1892, and they, accordingly, allowed the respondents' appeal. The appellants then appealed by Case Stated to the Divisional Court which held that the word "unreasonable" in s. 7 (d) of the Act of 1892 was a word of very wide import and was not to be construed in a narrow or restricted sense, that it gave quarter sessions and justices jurisdiction to say whether or not, having regard to the scheme as a whole, it was reasonable that the proposed works should be done at all, and, therefore, whether it was reasonable or not that the proposed works should be done at any particular time, and, accordingly, quarter sessions had power to reach the decision they did.

J. R. Willis and C. C. P. Hodson for the appellants.
Ackner for the respondents.

SOMERVELL, L.J., stated the facts and continued: The question is whether the matters relied on by quarter sessions as amounting to unreasonableness are within the proper construction and meaning of the word "unreasonable" in its context in s. 7 (d) of the Act of 1892. Counsel for the appellants suggested that if the decision of quarter sessions stood (and the Divisional Court has held that it was right), it would justify interference by the justices in matters of procedure which Parliament must have intended to leave to the local authority. In particular, he said that if the justices could decide that the works were unreasonable because they were premature, that would indicate that they could dictate to the local authority the precise times at which they could undertake the various works which, pursuant to their statutory duties, they resolved to undertake. I do not take that view, but I think I may, with respect, criticise the word "therefore" in the opinion of quarter sessions which was:

"On the facts . . . the justices came to the conclusion, and so found, that the said works were premature, and were, therefore, unreasonable within the meaning of s. 7 (d) of the Act of 1892."

I think it would be more accurate to say: "the said works were premature and were in the circumstances unreasonable . . ."

The facts here seem to be of a very special character. The only matter which prevented further building on this estate in the near future was the provisional planning scheme. By the time the matter came before quarter sessions the respondents had expressed their intention to appeal against a decision in

accordance with that scheme. We are told that that appeal has been successful and that the respondents are to be allowed to build the houses as they wish to do. It was, therefore, a case in which there was a real possibility of further housing development within a short time. As I read the Case Stated, the appellants, perhaps unwisely, were not expressing an intention of postponing any action until the matter of the appeal had been settled. Quarter sessions, however, interpreted what was said to them as evidencing an intention to proceed, whatever happened with regard to it. Therefore, on the findings and on the assumption that the appeal was successful and leave was given, the money spent on the work would be wasted if the heavy traffic involved in building new houses used the road constructed in accordance with the appellants' resolution. In my view, it would have been difficult to think of anything less reasonable than to spend money in one year in work on a road which would be largely destroyed, possibly in the following year. Therefore, unless some authority constrains me to say that that is a matter outside the jurisdiction of the justices, it seems to me, on the ordinary meaning of the word "unreasonable", precisely the type of waste of money against which frontagers who will be asked to contribute ought to be, and, under the Act, are, entitled to protest.

I think the question of construction is settled so far as this court is concerned by *Sheffield Corpn. v. Anderson* (1). The headnote is (64 L.J.M.C. 44):

"A court of summary jurisdiction, upon the hearing of a frontager's objection to a private street work under s. 53 (d) and s. 54 of the Sheffield Corporation Act, 1890, and *semble* under s. 7 (d) and s. 8 of the Private Street Works Act, 1892, has jurisdiction, when determining whether the proposed work, as for instance sewerage a street, is itself unreasonable, to take into consideration the existing state of the drainage of the houses in such street."

Counsel for the appellants agreed that the words in the Act which were being construed were to all intents and purposes the same as we have to construe. The sewerage concerned was part of a wider scheme which contained many other matters. I asked counsel, therefore, whether he felt that that was relevant, i.e., whether, if the matter with which the justices were dealing had been the only point in the scheme, that would have made a difference to their jurisdiction. He said, quite rightly if I may say so, that he did not make that suggestion. The points which were taken in this case by counsel seem to me to have been taken in substance in argument in the *Sheffield* case (1) and rejected by this court. There is this further point. The question whether there should be a particular drain in a street is very much the type of matter for the local authority to consider, but here is a decision of this court saying that the justices are entitled to consider, in certain circumstances whether that work is or is not reasonable. LORD ESHER, M.R., said (*ibid.*, 47):

"If he [the magistrate] meant by this Special Case to ask the court whether, in considering whether the resolution is reasonable or not, he has the right to take into consideration the existing state of the drainage of these houses, I have no difficulty in saying that he has."

LOPES, L.J., said (*ibid.*, 48):

"To my mind, that section [s. 53 of the Act of 1890] entitles the magistrate, for the protection of frontagers, to say that the proposed works are unreasonable, and that is all that he has done in this case."

The Divisional Court, perhaps, relied rather less on the decision in that case than the statement by WILLS, J., in *Mansfield Corpn. v. Butterworth* (2), where he said ([1898] 2 Q.B. 282):

"The word 'unreasonable' has undoubtedly a wider meaning, and I think that it does give the justices jurisdiction to say whether, having

regard to the scheme as a whole, it is reasonable or not that the proposed works should be done at all."

I think both established principles of construction and the authorities to which I have referred clearly indicate that the limitations which it is sought by the appellants to place on this word are not to be accepted. On the wider construction, I have no doubt at all that quarter sessions in the special circumstances of this case which existed at that time were justified in coming to the conclusion which they did. I would like, in conclusion, to emphasise that I think the circumstances were special and I am not for a moment suggesting that there may not be matters which the justices ought properly to regard as outside their jurisdiction under this section. In my opinion, this appeal should be dismissed. A

BIRKETT, L.J.: I am of the same opinion. I would emphasise that I think the facts in this case are of a highly unusual kind, so much so that there was a very remarkable occurrence when the case came before the Divisional Court. When it originally came before that court, quarter sessions had allowed the appeal and the work had, in consequence, been stopped. The respondents had, by that time, heard that the Minister of Housing had allowed their appeal, and they were proposing to build the houses. The Divisional Court considered it absurd to hear this case in that very unusual state of affairs, and they, therefore, adjourned the matter for six months on this ground (quoting from LORD GODDARD, C.J. ([1953] 2 All E.R. 1010)): B

"It seemed to the court then that . . . if the building was going on, it was obvious that this work might easily be entirely thrown away, and work which would have to be done if the street became a street with houses on both sides would be very different from what was required when it contained only a few houses. We adjourned the case in the hope that there would be some settlement between the parties, but by a series of misfortunes the . . . work has not yet been started." C D

The Lord Chief Justice was clearly impressed by the considerations put forward by counsel for the appellants, as, indeed, I think, was this court. I can see how very important it is to a local authority that their powers should not be cut down in any way that will render their work less effective, unless there is clear ground and clear authority by which it can be done. The Lord Chief Justice was clearly most impressed by those considerations and said that in certain circumstances he would like to consider the matter more fully, but he felt he was bound by the authorities which my Lord has cited today, particularly *Mansfield Corpn. v. Butterworth* (2). E F

For myself, looking at the words in s. 7 (d), "that the proposed works are . . . unreasonable", and giving them a proper meaning, I think if the facts showed, as they did in this case, that in all the circumstances the £6,000, £3,000 of which was to have been paid by the respondents, to be expended on the work would have been entirely thrown away, it was open to the justices to say that it was unreasonable. For that reason I would support the judgments of the Divisional Court and of my Lord, and I agree that this appeal should be dismissed. G

ROMER, L.J.: I agree. I wish only to say a few words about the construction of the Private Street Works Act, 1892, s. 7. As I understood it, counsel for the appellants contended that in s. 7 (d) the word "unreasonable" was intended to be used in contradistinction to the word "insufficient", which precedes it, and to bear a meaning which is the very opposite of "insufficient"; in other words, that it was intended to mean "superfluous". That is not the language which the legislature has used. If that had been the intention of the legislature it would have been easy to say "insufficient or excessive" or "insufficient or unnecessary", or something of that kind. But they have not used either of those words; they have used the word "unreasonable". As a H

A mere matter of construction I think that "unreasonable" here means unreasonable on any ground other than that of insufficiency, because it might well be said that works which were insufficient were unreasonable because of their insufficiency. Therefore, as I say, I think the word "unreasonable" there means unreasonable on any ground other than insufficiency, coupled, possibly, with the further exception of unreasonableness on the ground of undue lavishness of expenditure. I say that because of the final words in para. (d), "or that the estimated expenses are excessive". I think that the wide meaning of "unreasonable" in that section which I have suggested not only emerges from the construction of the section itself, but is supported by the language to which my Lord referred of WILLS, J., in the *Mansfield Corporation* case (2). In his judgment in that case, WILLS, J., first of all referred to insufficiency and said ([1898] 2 Q.B. 281):

B "I think 'insufficient' means that the specified works are insufficient to carry out the purpose which is proposed to be effected by them . . ."

Then he turns to the word "unreasonable" and says (*ibid.*, 282):

C "The word 'unreasonable' has undoubtedly a wider meaning, and I think that it does give the justices jurisdiction to say whether, having regard to the scheme as a whole, it is reasonable or not that the proposed works should be done at all."

D It appears to me to be impossible to accept the suggested meaning of the word "unreasonable" without running counter both to those observations of WILLS, J., which I respectfully think were right, and to the decision of this court in *Sheffield Corpn. v. Anderson* (1).

Once one escapes, as I think one does, from this narrow interpretation of the word "unreasonable", one is entitled to attach to it the meaning which it ordinarily bears and which is a meaning of considerable scope. Certainly, in my opinion, it is wide enough to justify the view that the justices may reject any proposed works on the ground that it is not reasonable that they should be carried out at the present time, whatever the position may be in the future. E If so, there can be no doubt that in the circumstances of this case quarter sessions could not have arrived at any conclusion other than that from which this appeal is brought. To spend £6,000 on a road which might be destroyed at any time in the near future if the respondents were given the liberty to develop for which they were appealing to the Minister, seems to me to be as profound a waste of money as the human mind is capable of conceiving. F For these reasons and those which my brethren have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *G. H. Taylor*, town clerk, Southgate (for the appellants); *Vincent & Vincent & Rawlinson & Son* (for the respondents).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re ALLEN (*deceased*). FAITH *v.* ALLEN AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 9, 1954.]

Will—Condition—Condition precedent or qualification—Devise to person “who shall be a member of the Church of England and an adherent to the doctrine of that church”—Date at which qualification must be satisfied.

By his will and a codicil thereto dated respectively Nov. 4, 1906, and Nov. 10, 1907, a testator devised his dwelling-house and certain hereditaments to his sister for her use and occupation during her life if she so chose, and thereafter he devised the house and property to his nephew Frederick absolutely, but, if he should die leaving no son, then to his (the testator's) wife for life or until her re-marriage, and thereafter to his nephew Francis for life “and from and after his death to the eldest of the sons of . . . Francis (except his son Hugh) who shall be a member of the Church of England and an adherent to the doctrine of that church . . . In case there shall be no son of . . . Francis (other than . . . Hugh) who shall be a member of the Church of England or an adherent to the doctrine of that church . . .” then to his cousin W., absolutely. The testator died in 1908 and his sister never lived in the dwelling-house. In June, 1932, Francis died leaving two sons other than Hugh. In August, 1941, Frederick died leaving no son. In 1945 one of the sons of Francis capable of benefiting died, and in September, 1952, the testator's widow died without having re-married. On a summons to determine at what date the son of Francis had to be a member of the Church of England and an adherent to the doctrine of that church in order that an interest in the property might vest in him,

HELD: the qualification must be satisfied as a condition precedent to the vesting of the interest when that interest vested in possession, namely, on the determination of the last life interest, that of the testator's widow, in September, 1952.

Barlleman v. Murchison (1831) (2 Russ. & M. 136), applied.

AS TO TIME OF ASCERTAINING DONEES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 265-292, paras. 314-343; and FOR CASES, see DIGEST, Vol. 44, pp. 758-760, Nos. 6170-6189.

Cases referred to:

(1) *Re Allen (decd.)*, [1953] 1 All E.R. 308; [1953] Ch. 116; *revsd.* C.A., [1953] 2 All E.R. 898; [1953] Ch. 810.

(2) *Barlleman v. Murchison*, (1831), 2 Russ. & M. 136; 9 L.J.O.S.Ch. 60; 39 E.R. 346; 44 Digest 758, 6164.

ADJOURNED SUMMONS to determine whether the person to take under the devise, contained in the will of Henry George Allen, of the testator's dwelling-house and certain hereditaments, subject to certain life interests, to the eldest of the sons of Francis Seymour Allen (except his son Hugh) who should be a member of the Church of England and an adherent to the doctrine of that church was the eldest of the sons of Francis Seymour Allen (except as aforesaid) who was a member of the Church of England and an adherent to the doctrine of that church (a) at or immediately after the death of the testator, or (b) at or immediately after the death of Francis Seymour Allen (the younger nephew of the testator), or (c) at or immediately after the death of Frederick Seymour Allen (the elder nephew of the testator), or (d) at or immediately after the death of the late defendant, Elizabeth Constance Allen, or (e) at some other and what moment or during some and what period.

The testator, Henry George Allen, made his will dated Nov. 4, 1906, and a third codicil thereto dated Nov. 10, 1907. By his will, he gave his sister, Isabella, the right to live in his dwelling-house “Paskeston” during her life and on her death he devised the house and certain hereditaments to his nephew, Frederick Seymour Allen, absolutely. By his third codicil, he provided that, if the said

Frederick should die leaving no son surviving him, then he (the testator), devised the house and the hereditaments to his (the testator's) wife, Elizabeth Constance Allen, for life or until she married again, and on her death or second marriage he devised the said house and hereditaments to his nephew, Francis Seymour Allen, for life and

“from and after his death to the eldest of the sons of the said Francis (except his son Hugh) who shall be a member of the Church of England and an adherent to the doctrine of that church . . . In case there shall be no son of the said Francis (other than the said Hugh) who shall be a member of the Church of England or an adherent to the doctrines of that church, then, on the death of the said Francis . . . to my cousin Judge Wilfred Allen and his heirs.”

On Nov. 25, 1908, the testator died. On June 8, 1932, Francis Seymour Allen died leaving two sons, excluding Hugh. On Aug. 31, 1941, Frederick Seymour Allen died leaving no son surviving him. In 1945 one of the sons of Francis died, and on Sept. 8, 1952, Elizabeth Constance Allen died.

R. O. Wilberforce for the plaintiff, one of the trustees of the will.

Hunter-Brown for the third defendant, one of the trustees of the will.

H. A. Rose for the fifth defendant, a son of Francis.

Elles for the second, sixth and seventh defendants.

The first defendant, Elizabeth Constance Allen, died after the date of the issue of the summons, and the fourth defendant did not appear.

HARMAN, J.: This question concerns a bequest, already much canvassed in these courts, which forms the subject-matter of a decision of the Court of Appeal, *Re Allen (decd.)* (1). [HIS LORDSHIP stated the facts and continued:] The Court of Appeal decided that the qualification of being

“a member of the Church of England and an adherent to the doctrine of that church”

was not void for uncertainty. Inquiry is now to be made as to which (if either) son of Francis Allen satisfies that qualification, but, as a preliminary to that inquiry, the present question is: What is the material date at which a son of Francis had to satisfy the qualification?

A number of dates are suggested. First, it is said that the death of the testator is the material date on the ground, as I see it, that there is nothing in the will to suggest the necessity of surviving the life tenants. The gifts to the children of Francis remained contingent until the death of Frederick, because, if he had a son who survived him, that son would take to the exclusion of the children of the younger brother. It is said that there is no reason why the son of Francis need survive beyond the date of the testator's death in order to qualify, and that the word “shall” is merely a word of futurity in the sense of “shall at my death be a member of the Church of England . . .” That is a perfectly logical construction. Secondly, it is said that the date of the death of Francis is the material date, since the number of candidates was limited by that event after which he could have no further sons. It is said, moreover, that there is, in the will, a very clear reference to Francis' death which is twice treated as the material date, first

“from and after his death to the eldest of the sons . . . who shall be a member of the Church of England”,

and, secondly:

“In case there shall be no son . . . who shall be a member of the Church of England . . . then, on the death of the said Francis”

a gift over. It is said, therefore, that there are strong indications in the will that the material time is the death of Francis, when the class of his children closed. Thirdly, the material date is said to be the date of Frederick's death without male issue, for that is the date when the interest of Francis' child vested in

interest, if it ever vested at all. It ceased to be a contingent interest at that date. The last date suggested is the date of the death of the last tenant for life, when the interest vested in possession.

It seems to me that it is difficult to choose any but the first or last of those dates. As I read the will, either one must adhere to the principle that no beneficiary need do more than survive the testator for his interest to vest, unless the will provides the contrary, or one must treat this as a qualification which, indeed, it is, and, in considering the taking of an interest, look at the date when the interest is to vest in possession. The second and third dates seem to me to be highly artificial, although the second has, as I say, the force to be derived from the words "upon the death of . . . Francis". As counsel for the fifth defendant pointed out, however, those words were inserted only because the testator assumed that everybody would die in due order. That, however, did not happen here, and all that is meant by the words "on the death of . . . Francis" is on the falling in of the last life interest. Suppose one read it thus: "and on the falling in of the last life interest to the eldest of the sons of Francis who shall be a member of the Church of England and an adherent to the doctrine of that church". To my mind, that suggests a living person of whom the trustees can inquire as to the state of his belief both formally and spiritually, i.e., they must discover whether he is formally a member of the church by baptism and communion, and, secondly, whether his adherence to the doctrines of the church is sincere. It does not seem to me likely that the testator intended that his trustees should inquire as to the nature of those qualifications in the case of a dead man. He intended that a living Protestant and not the representatives of someone who died a Protestant twenty years ago should inherit his real property. To my mind, as a matter of construction, it is that to which the will points.

I am helped, to some extent, to that conclusion by *Bartleman v. Murchison* (2), a case before LORD BROUGHAM, L.C., sitting on appeal from SIR LANCELOT SHADWELL, V.-C. The will provided:

"I give and bequeath unto my mother . . . the sum of £100 sterling money per annum, payable every six months during her natural life, and after her decease to my sister . . . that is to say, if my sister be a widow, but not otherwise . . ."

The sister was not a widow either at the death of the testator or at the death of the testator's mother, but, becoming a widow thereafter, she claimed the legacy. LORD BROUGHAM said (2 Russ. & M. 140):

"A court of equity will not presume that a party who is not in esse is intended to take, unless such an intention be made plain and put beyond dispute by the words of the will; and it is only following out the same principle to hold that a person, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession."

That is, of course, quite a different case, but it seems to me that those last words of the Lord Chancellor are pertinent. When a qualification is required for the vesting of an estate, it is natural to look for the person who has that qualification at the date when his interest, if any, vests in possession. In this case, that is the death of Elizabeth in 1952.

Declaration accordingly.

Solicitors: *Thicknesse & Hull* (for the plaintiff and the third defendant); *Robbins, Olivey & Lake*, agents for *Sampson, Horner & Co.*, Bradford (for the second, fifth, sixth and seventh defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

S. A. MARITIME ET COMMERCIALE OF GENEVA v.
ANGLO-IRANIAN OIL CO., LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), February 12, 15, 1954.]

Shipping—Charterparty—Construction—Charterparty for series of voyages by named ship—Clause giving owners liberty to substitute another ship—Right of owners to make more than one substitution.

By a charterparty, dated Mar. 27, 1951, the owners agreed to charter a named tanker to the charterers for a series of voyages during the period from Sept. 1, 1951, to Sept. 30, 1952. A clause in the charterparty provided: "Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention". Before the voyages commenced, the owners substituted an identical vessel for the one named in the charterparty. Before the last voyage, the substituted vessel having become inefficient, the owners proposed to substitute for it the original vessel. On the question whether the owners had the right to make the second substitution,

HELD: on the true construction of the clause, at any time before or at any time during the charterparty the owners were to have the liberty of substituting another vessel for any voyage, provided that the substituted vessel was of similar size and position, and the owners could make the substitution whenever it became convenient.

Decision of DEVLIN, J. ([1953] 2 All E.R. 1325), affirmed.

AS TO SUBSTITUTION CLAUSE IN CHARTERPARTY, see HALSBURY, Hailsham Edn., Vol. 30, p. 283, note k to para. 481.

APPEAL by the charterers, Anglo-Iranian Oil Co., Ltd., from an order of DEVLIN, J., dated Nov. 5, 1953, reported [1953] 2 All E.R. 1325, on a Special Case stated by an arbitrator.

The arbitrator stated the Case in the form of alternative awards depending on the construction of cl. 38 of a charterparty which provided:

"Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention."

The charterparty was for a series of voyages to be undertaken by a named vessel, the Driade, but before one of the voyages was undertaken, the owners, acting under cl. 38, substituted an identical vessel, the Nayade. Before the last voyage was undertaken, the Nayade having become inefficient, the owners proposed to substitute the ship originally named in the charterparty—the Driade. The charterers contended that the owners had no power under the charterparty to make the second substitution, and as a result they refused to load the Driade. The point reserved by the arbitrator for the consideration of the court was whether or not, on the true construction of the charterparty, the original substitution of the Nayade for the Driade constituted a final exercise of the option to substitute conferred on the owners by the provisions of cl. 38.

DEVLIN, J., held that in considering the provision in the charterparty which permitted substitution it was necessary to examine the commercial reason for that provision, which, in the present case, was to provide a ship that would perform the voyages which the charterers wanted performed; that the clause was inserted to prevent an accident to a particular ship bringing the charterparty to an end; that the substitution of an identical ship could not affect adversely the position of the charterers; and that, therefore, on its true construction the clause gave the owners liberty to substitute more than once, and that the

original substitution was not a final election that the ship then substituted should complete the charterparty.

Megaw, Q.C., and *M. R. E. Kerr* for the charterers.

Eustace Roskill, Q.C., and *B. B. W. Goodden* for the owners.

SOMERVELL, L.J.: By a charterparty, dated Mar. 27, 1951, the owners of a tanker called the *Driade* agreed to charter that ship to the charterers, Anglo-Iranian Oil Co., Ltd. The freight was to be "139s. 9d. per ton of twenty hundredweights of oil intake quantity". It was neither a voyage charter nor a time charter in the ordinary sense, as it was on these terms:

"This charterparty is to remain in force for as many consecutive voyages as vessel can perform on the basis of giving notice of readiness to load on the last voyage on or before Sept. 30, 1952."

Readiness to load in respect of the first voyage was Sept. 1, 1951. Clause 37 of the charterparty reads:

"Owners have the liberty of effecting periodical dry-docking six/nine months after vessel was last dry-docked and owners undertake to give charterers reasonable notice of such intention."

Clause 38, on which the controversy arises, reads:

"Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention."

It will be seen, therefore, that the general lay-out of the contract was that, subject to contingencies, during the period between September, 1951, and September, 1952, the vessel was to be ready to perform as many voyages as she could. On Aug. 7, 1951, the agents for the owners wrote to the charterers:

"*Driade* or substitute. Charterparty dated Mar. 27, 1951. The *Nayade* will be performing this charterparty and this vessel, as far as we can see, is a much more suitable vessel for your purposes, in that she is younger and is now dry-docking and repairing at La Spezia in order to present herself in absolutely first-class condition for the first voyage under this charterparty. It is calculated that the *Nayade* will leave La Spezia about Aug. 20 and E.T.A. Persian Gulf will be about Sept. 5/10."

By a letter dated Aug. 5, 1952, advice was given of the dry-docking of the *Nayade*. The letter went on to say:

"In the circumstances owners wish us to propose substitution of the *Nayade* with the *Driade* which under cl. 38 will assure you of uninterrupted service under the present consecutive voyage charter."

The charterers object to the second substitution on the ground that under cl. 38 there should be only one substitution.

HIS LORDSHIP stated the facts and continued: There is what I will call a subsidiary point which at one time I thought might be conclusive. I will mention it although it is not necessary for me to deal with it. In the court below counsel for the owners submitted that, on the basis for which the charterers contend, namely, that the clause allows only one substitute, there was here only one substitute because there were only two vessels involved, the original *Driade* named in the charterparty and the *Nayade*. As was pointed out, however, the original substitution was indefinite in period and would have been effective if the *Nayade* had done all the voyages in the twelve months. There had, therefore, to be a further notice to replace the *Nayade* by the *Driade* in the twelve months. If there had been a substitution which was expressly for one voyage or for one month only, different considerations might have arisen. I, therefore, do not think that there was clearly only one substitution.

I will proceed, as did the learned judge, on the basis that the point to be decided is whether this clause provides for only one substitution or whether it provides for successive substitutions if the owners so require for the different voyages which may fall under the agreement. The learned judge said ([1953] 2 All E.R. 1326):

A "I do not think that the language of the clause gives any indication, on the face of it, one way or the other. I say 'on the face of it' because counsel for the charterers has analysed it and he relies on certain words as supporting his construction; but there is nothing on the face of it, no clear phrase, that is a signpost to one meaning or the other."

B I agree with that in this sense. There are certain things which can only happen once for all. I gave an example in the course of the argument. If a man undertook to marry A. to B. before or after a certain date, the parties would, normally, be contemplating only one ceremony. I think that, if the words in this contract were, by their context, restricted to an event which could be contemplated as happening only once, they would not be inapt. They would not have to be distorted to make them cover such a situation. But I am quite clear in my own mind that as a matter of English they are capable of covering successive substitutions. On the construction for which the charterers contend, the words C "at any time" are, in my opinion, mere surplusage. Although one finds surplusage in contracts, deeds, and Acts of Parliament, one leans towards treating words as adding something, rather than as mere surplusage. I think these words are capable of meaning that at any time before or at any time during the charterparty the owners may have the liberty of substituting for the first, D second, or any other, voyage another vessel, provided that she is of similar size. I think that that is their natural meaning in this contract. It was suggested that the learned judge went outside the agreement itself and the intention of the parties as found in its terms. I do not think that he did so, although one might find a sentence or two in his judgment which gives the impression that he might be doing so. Had he proceeded on that basis, then, with great respect, E he would have been wrong. I think that, in construing this document, one must have regard to its provisions as a whole. There was no suggestion that it contained words used in some technical or trade sense. This being a charterparty under which the vessel originally named is to perform successive voyages, or as many as she can, and the owners are given liberty to substitute, I think the natural meaning is that they can do so whenever it may become convenient. For these F reasons I think that the learned judge came to the right conclusion and I would dismiss the appeal.

BIRKETT, L.J.: I am entirely of the same opinion. [His LORDSHIP stated the facts and continued:] Counsel for the charterers contended that the primary meaning of the words in cl. 38 was that the owners could substitute once, and that, having done so, their powers were exhausted and they could G not do it again. Secondly, he contended that, if the words were not capable of being so simply and clearly disposed of and there was an ambiguity, then, the clause being in favour of the owners, the ambiguity had to be resolved in favour of the charterers. He further contended that, if there were an ambiguity, then the learned judge was not entitled to discuss and decide what was the commercial object of cl. 38, and, finally, that, if he were entitled to do so, he was H wrong in his conclusion.

I think that the words,

"Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty . . ."

if read in the context of the charterparty and together with the other clauses, clearly mean that the owners were taking power under the charterparty and the additional clauses to say: "At any time before the charterparty comes into

operation or at any time during the continuance of the charterparty we have the liberty of substituting a coiled vessel of similar size and position". I think that the present case is very different from a case where one vessel only was contemplated. When there is a long series of consecutive voyages it seems to me that these words are not ambiguous at all. In the context in which they are set I think that is the true, ordinary and reasonable meaning, and I am in favour of dismissing the appeal.

ROMER, L.J.: I agree. I think that, if one took cl. 38 alone, one could legitimately construe it either in the way contended for by the charterers or in the way relied on by the owners without doing undue violence to the language used. But it is not permissible to construe one clause in isolation from the others. Counsel for the charterers drew our attention to certain other indications in the charterparty which he relied on as supporting the view that only one substitution was in contemplation and permitted under cl. 38. For example, he drew our attention to the fact that, whereas in cl. 38 the words are "at any time before or during this charterparty", in some other clauses the words used are "and/or". If one takes into consideration the duration of the charter and the purposes and objects which the parties had in mind, as disclosed expressly or as a matter of legitimate inference from the charterparty itself, taking it as a whole, and attributing proper weight to every clause, I think that the original ambiguity (which, as I say, does exist in cl. 38 if taken by itself) disappears and the clause, accordingly, should be construed in the sense which my brethren have indicated. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son* (for the charterers); *Stokes & Mitcalfe* (for the owners).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

STREET v. DENHAM.

[HAMPSHIRE ASSIZES (Lynskey, J.), December 19, 21, 1953.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Licence to occupy—Purchaser acquiring property with notice of licence—Limitation to licence—Relinquishment by wife of licence—Occupation of other accommodation.

In December, 1942, the husband deserted the wife, leaving her at the matrimonial home with the two children of the marriage and his grandmother, and went to live with the plaintiff, with whom he had since resided. In 1943 the wife proposed to move to Portsmouth, but, as that place was unsafe owing to enemy action, the husband asked her to remain in the matrimonial home, saying that she could stay there so long as she had the children and the grandmother with her. In September, 1950, the husband found alternative accommodation to which the wife agreed to move, and in reliance on that agreement he contracted to purchase the alternative accommodation. Nothing, however, was arranged between the spouses as to whether the wife should go into the alternative accommodation as licensee of the husband or as owner of the freehold, and on Oct. 25, 1950, she refused to move. On Nov. 7, 1950, she wrote a letter making it clear that she had decided that the husband's grandmother should no longer reside at the matrimonial home. On Jan. 14, 1952, the husband conveyed the title to the matrimonial home to the plaintiff who now sued for possession.

Held: the wife had an irrevocable right to remain in possession of the matrimonial home and this right was enforceable against the plaintiff who had acquired the property with full knowledge of the facts: observations

of DENNING, L.J., in *Bendall v. McWhirter* ([1952] 1 All E.R. 1315), applied; unless and until the terms on which the wife was to occupy the alternative accommodation had been agreed, there was no concluded agreement between her and the husband whereby she was bound to give up her right to remain in possession; the husband could not limit this right by purporting to make it a condition that she should allow his grandmother to reside with her, and her refusal to allow the grandmother so to remain could not amount to a breach; and, therefore, the plaintiff's claim failed.

AS TO A LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-12, paras. 5, 6; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 526-543, Nos. 1635-1773.

Cases referred to:

- B (1) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407; 2nd Digest Supp.
- (2) *Errington v. Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp.
- (3) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.
- C (4) *Ferris v. Weaven*, [1952] 2 All E.R. 233; 3rd Digest Supp.
- (5) *Lee v. Lee*, [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.; 3rd Digest Supp.
- (6) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; 3rd Digest Supp.
- (7) *Lloyds Bank, Ltd. v. Oliver's Trustee*, [1953] 2 All E.R. 1443.
- (8) *Hole v. Cuzen*, [1953] 1 All E.R. 87; [1953] 1 Q.B. 300.
- (9) *Jones v. Maynard*, [1951] 1 All E.R. 802; [1951] Ch. 572; 2nd Digest Supp.

D ACTION by the plaintiff for possession of premises situate at No. 58, St. Michael's Grove, Fareham.

The defendant was married to the husband on Sept. 2, 1929, and there were two children of the marriage. In 1934 the defendant and the husband went to live with the husband's grandmother at Montgomery Road, Portsmouth. In 1937 the husband began negotiations for the purchase of No. 58, St. Michael's Grove, Fareham, the subject of the present claim. On June 3, 1937, the completion of the purchase took place, and on June 4, 1937, the husband executed a deed of mortgage to a building society. The husband gave each week to the defendant the whole of his earnings, then about £3 a week plus money earned by repairing wireless sets, and received back 2s. a week pocket money. Up to December, 1942, the wife worked only for a few weeks and took in a little sewing. She made monthly payments in respect of the mortgage out of money provided by the husband's earnings. In December, 1942, the husband deserted the wife and went to live with the plaintiff, with whom he had since resided. On May 7, 1943, the justices made a maintenance order on the ground of the husband's desertion and ordered him to pay £2 a week as maintenance for the wife and 10s. a week as maintenance for each child, making a total of £3 a week. The defendant then proposed to move to Portsmouth, but as that place was unsafe owing to enemy action, the husband did not want the defendant, or his children, or his grandmother, to move there, and told the defendant that she could continue to live at St. Michael's Grove until she found somewhere safe to go and so long as she had the children and the grandmother with her. Thereafter, until December, 1949, he paid the defendant not only £3 a week as ordered, but also £1 a week to enable her to maintain the monthly mortgage repayments and to pay the rates. On May 7, 1949, one of the children was married and went to live elsewhere, and, as the other child was serving in the forces, only the defendant and the grandmother resided at St. Michael's Grove. The husband took the view that the defendant should find other accommodation so that he could dispose of those premises, and in September, 1950, he and the defendant found a house at Henrietta Street, to which the defendant agreed to move if certain

repairs and alterations were carried out. In reliance on that agreement the husband contracted to purchase that house and effected the repairs, it being agreed that structural alterations should be carried out after the completion of the purchase. The vendors agreed to give possession of the house before the completion, and it was arranged that the defendant should move in on Oct. 25, 1950. On that date, however, the defendant consulted her solicitors and refused to move since, although she had agreed to accept the house as alternative accommodation, nothing had been arranged as to whether she should take possession as licensee of the husband or as owner of the freehold. On Nov. 7, 1950, the wife wrote to the grandmother's daughter making it clear that she had decided that the grandmother should no longer reside at St. Michael's Grove. On Dec. 22, 1950, the house at Henrietta Street was conveyed to the husband. The defendant continued to refuse to go and live there, and the husband and the plaintiff took up residence there. On Jan. 14, 1952, the husband executed a conveyance of the premises at St. Michael's Grove to the plaintiff, and on Jan. 19, 1952, the solicitors acting for the plaintiff wrote to the defendant demanding possession.

The plaintiff now sued for possession, contending that the defendant was in possession by permission of the husband and that that permission had been withdrawn prior to the conveyance of the premises to the plaintiff. The defendant denied the plaintiff's right to possession, and alleged that the premises were the matrimonial home, that the husband had deserted her, and that she had an irrevocable licence to remain in the premises, valid not only against the husband but also against the plaintiff who had acquired the premises with full knowledge of the facts. The plaintiff, in reply, denied the defendant's allegations, and alleged in the alternative that, if the defendant had any licence from the husband to remain in the premises, it was an express licence the terms of which the defendant had failed to observe, or that the licence had been rescinded by an agreement by the defendant to accept alternative accommodation at Henrietta Street, which had been provided for her by the husband on Oct. 25, 1950.

Field-Fisher for the plaintiff.

I. N. D. Wallace for the defendant.

Cur. adv. vult.

Dec. 21. The following judgment was read.

LYNSKEY, J., stated the facts and continued: The question I have to consider is whether or not, as a deserted wife living in the matrimonial home, the defendant has an irrevocable claim to remain in those premises, not only as against the husband, but also as against the plaintiff. If I were not bound by authorities I should have taken the same view as that expressed by **ROXBURGH, J.**, in *Thompson v. Earthy* (1)—that the deserted wife's right is a personal right against her husband and does not give her any legal or equitable or other interest in the premises so as to bind them in the hands of the purchaser. Since that decision *Errington v. Errington & Woods* (2), *Bendall v. McWhirter* (3) and *Ferris v. Weaven* (4) have, it seems to me, established that where a wife has been deserted by her husband and left by him in the matrimonial home, she must be held to be, not a tenant of the husband-owner nor a bare licensee, but in the special position of a licensee with a right under which the husband cannot evict her except by order of the court. This is the view of **ROMER, L.J.** ([1952] 1 All E.R. 1316), in *Bendall v. McWhirter* (3), where he adopts a judgment of **DENNING, L.J.** ([1952] 1 All E.R. 155) in *Errington v. Errington & Woods* (2). In *Bendall's* case (3) **DENNING, L.J.**, said ([1952] 1 All E.R. 1315):

"I must say, however, that, even if a successor cannot compel the husband to apply under s. 17 [of the Married Women's Property Act, 1882], but the successor has himself to bring an action at law, nevertheless, I should have thought the court would have a discretion whether to order possession, for that is the only way in which effect can be given to the wife's right as now established. Any other view would lead to great injustice. It would

mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilised community could tolerate such a cynical disregard of the married state. Equity demands that the successor in title should be in no better position than the husband."

In that statement, DENNING, L.J., visualised the facts of this case. In *Ferris v. Weaven* (4) JONES, J., held that a purchaser with notice of the wife's right and position could not recover possession of the house against her. In the present case the husband in evidence admitted that the plaintiff had full knowledge of all the facts and that every step taken by him in relation to the defendant had been discussed by him with the plaintiff.

In these circumstances I feel bound to hold that the defendant's irrevocable right is enforceable against the plaintiff, subject, of course, to the remaining questions which I have to decide. The next question is: Has the wife lost that right on account of her actions in September and October, 1950, when she was offered and accepted accommodation at Henrietta Street? The case for the plaintiff is that there was a concluded agreement by the wife to leave St. Michael's Grove and remove to Henrietta Street. I am satisfied that she agreed so to do, and that, in reliance on that agreement, the husband expended moneys in decorations and alterations and entered into a contract to purchase the premises in Henrietta Street. The question I have to ask myself is whether or not there was a concluded legal agreement, or whether or not the husband acted prematurely. The defendant changed her mind at the last moment on the advice of her solicitors as seems clear from the correspondence. What seems equally clear from the correspondence is that the Henrietta Street premises were being purchased in the name of the husband. According to the letter of the husband's solicitor of Oct. 25, 1950, the question of the beneficial ownership of the new house had not been finally decided. In view of this statement, I am not surprised that the solicitors for the defendant advised her to remain at St. Michael's Grove for the time being. In my view, until the terms on which the defendant was to occupy the new house had been agreed, an essential element of the concluded contract was missing. When the offer to give her the freehold was made later, she did not accept it. The result is, in my view, that the plaintiff has failed to establish any concluded agreement between the defendant and her husband to give up her right to remain in possession of the house in St. Michael's Grove.

The other point I must consider is the other argument put forward on the part of the plaintiff that the defendant was there under a contractual licence, made when the husband said she could remain there until she found somewhere safe to go, so long as the two children and the grandmother resided with her. It is clear that by Nov. 7, 1950, the defendant was saying in fact that she would no longer have the grandmother residing with her, and, if this was a contractual licence, that would have been a breach of the terms of the licence. The difficulty, I feel, following DENNING, L.J., is that the defendant, although she may not have known it, had a right to remain in these premises as the deserted wife in the matrimonial home, and the fact that the husband said she could remain on certain other terms does not give her any further right. There was no consideration for her agreeing to allow the children and the grandmother to remain in the house. So the plaintiff cannot take advantage of the breach of what is alleged to be a contractual licence, which was an attempt to limit the existing right of the wife to remain in the matrimonial home. In the result, the plaintiff's claim fails.

Judgment for defendant.

Solicitors: *Churcher & Churcher*, Gosport (for the plaintiff); *Hobson Thomas, Sherwell & Wells*, Portsmouth (for the defendant).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

GALLER v. GALLER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), February 4, 1954.]

Divorce—Adultery—Evidence—Accomplice—Need of corroboration.

The sole evidence of adultery by a husband, respondent to cross-charges in a divorce suit, was given by a nurse who had lived in his house for two years to look after the children after the wife had left the house and said that she and the husband had constantly committed adultery there during that period. The husband denied adultery. The commissioner, who heard the petition and cross-charges, held that the nurse's evidence must be scrutinised carefully, but he found that she was a truthful witness and so he rejected the husband's denial and pronounced a decree on the ground of the adultery.

HELD: an adulterer who gave evidence of his own adultery was in the same position as an accomplice in a criminal case, and, as the commissioner had given no indication that he had directed himself that the court should be slow to act on such evidence in the absence of corroboration, his order must be set aside and a new trial ordered.

Fairman v. Fairman ([1949] 1 All E.R. 938), approved and applied.

AS TO PROOF OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 660, para. 973; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 312-329, Nos. 2606-2730.

Cases referred to:

- (1) *Fairman v. Fairman*, [1949] 1 All E.R. 938; [1949] P. 341; [1949] L.J.R. 1073; 113 J.P. 275; 2nd Digest Supp.
- (2) *Ginesi v. Ginesi*, [1947] 2 All E.R. 438; *affd.*, C.A., [1948] 1 All E.R. 373; [1948] P. 179; [1948] L.J.R. 892; 112 J.P. 194; 27 Digest, Replacement, 313, 2620.
- (3) *Spring v. Spring & Jiggins*, [1947] 1 All E.R. 886; 2nd Digest Supp.
- (4) *Statham v. Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 27 Digest, Replacement, 294, 2394.
- (5) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 27 Digest, Replacement, 379, 3131.
- (6) *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R. 124; [1951] A.C. 391; 2nd Digest Supp.
- (7) *Mordaunt v. Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 27 Digest, Replacement, 457, 3928.

APPEAL by the husband against an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Oct. 2, 1953, rejecting the prayer of the husband's petition and pronouncing a decree nisi of divorce on the wife's answer on the ground of the husband's adultery.

The husband's petition was based on the ground of desertion, the wife having left him in October, 1948, and not having returned. In her answer the wife denied the desertion and alleged that she had good cause for refusing to live with her husband, that he had deserted her, that he had treated her with cruelty, and that he had committed adultery. These allegations were denied in the reply. In the course of the cross-examination of the husband on the issues of desertion and cruelty (on which other evidence was to be given, but in the event was not called), the commissioner formed an unfavourable view of the husband's truthfulness. It was then agreed that the issue of adultery be decided first, leaving open the other issues of desertion and cruelty, and the cross-examination of the husband was concluded with questions on the alleged adultery. The commissioner found against the husband on the issue of adultery, and, no application being made by either party to proceed with the other issues, pronounced a decree nisi of divorce in favour of the wife on that ground. The husband appealed.

Panto for the husband.

Willett for the wife.

A HODSON, L.J., referred to the proceedings and continued: The commissioner having decided the issue of adultery against the husband, the matter was left there, and no application was made by counsel on either side to proceed with the other issues in the case. It should be recognised that the other issues in the case would be material, whichever way the decision as to adultery went, because by the proviso to s. 4 (2) of the Matrimonial Causes Act, 1950, on a petition for divorce on the ground of adultery, if the court is satisfied that the case has been made out, the court is not bound to pronounce a decree and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court the petitioner has been guilty, inter alia, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of. Paragraph (ii) of the proviso deals with cruelty on the same footing as desertion and the discretionary bar to the same. But, the matter having proceeded so far, and neither counsel having made any application to pursue the matters of desertion or cruelty, the commissioner, it might be said, would have been in this position, that, not having formed the opinion that any other offence had been established against the husband, he was freed from the fetter imposed by the proviso. So that the first point made by the husband, that the court never dealt with the charge of desertion, might, if it had stood alone, have failed. That point, however, does not stand alone, because as the case went the issue of adultery was interlocked with the other issues in this way. The husband was cross-examined at length before any question of adultery had been raised against him either in cross-examination or by evidence being led of the case which he had to meet, and in the course of that cross-examination he gave answers which caused the learned commissioner to take an unfavourable view of his truthfulness. It is quite true that questions as to credit may extend over a wide field and not be confined to the issues raised in the case, and if that had been the position there might have been nothing of which to complain, but many of the questions, if not most, directed to the petitioner were directed to the issues in the case, and on those issues there was other evidence to be called, other evidence ready and available on behalf of the petitioner husband himself, and evidence of the wife which was never heard, and it might well have been, if the case had proceeded to its conclusion in the ordinary way, that the unfavourable impression created by the petitioner in his cross-examination might have been removed.

The most serious matter in this case is the nature of the charge of adultery itself and the evidence called in support of it by the wife. That evidence consisted entirely of the evidence of the woman with whom the husband was said to have committed adultery. The pleaded case against him contained this paragraph:

G "The petitioner has habitually committed adultery with Gladys Florence Thompson."

No particulars were asked for on this paragraph, so that on the pleadings the wife was quite at large as to the evidence which she could tender.

H The position between the parties was this. The wife having left the husband in October, 1948, there were living in the house the children of the marriage under the husband's care. The wife had left them there when she left her husband, although the boy, the eldest child, was born on Mar. 25, 1944, and was only four years old; a girl, Ingrid, born on Nov. 13, 1945, was rather more than a year younger; and Michele, born on Aug. 11, 1947, would, of course, be a baby at that time. The husband had to get someone to look after these children, and, although there is some uncertainty about the date, it appears from the evidence of one witness that it was in 1950 that Mrs. Thompson, who

was a married woman living apart from her husband, came to the house and acted as a nurse for the children. She slept in one room with the two girls, and the eldest child, the boy, slept in another bedroom with the father. She was, as I understand it, approached by the wife after the petition of the husband had been presented, and the evidence that she gave was that she had been in the house as the children's nurse until March, 1952, when she left after a quarrel with the husband, and had frequently committed adultery with him during that period in her bedroom, in which she slept with the two girls, the eldest of whom in 1951 would be six years of age. She also gave evidence that, on one occasion while the family was away at Ramsgate at an hotel, she committed adultery in the hotel with the husband, although that was not a matter of which counsel who examined her was aware, and it was a matter which was not included in the pleaded case. She also said in her examination-in-chief that the husband had been the cause of her having a miscarriage and had given her money to bring about that end. In cross-examination she enlarged on that, and altered her evidence by saying that she had had no fewer than four miscarriages in that flat, for each of which the husband was responsible, and she also said that she was pregnant by the husband at the time of her departure. That story was entirely uncorroborated. It was oath against oath, and the learned commissioner contented himself with saying that, having formed an unfavourable view of the husband in the witness box, he accepted the evidence of the woman who was, on her story, a joint wrongdoer with the husband.

The commissioner having dealt with the background of the case, said:

"That is the background in which Mrs. Thompson comes here to give evidence. It is true that the court must scrutinise her evidence very carefully, and apart from any question of whether she is, so to speak, trying to get her own back on the petitioner, the court has to consider whether she has told the truth in regard to the matters about which she has given evidence in the witness box today. Quite shortly, her evidence is that she heard or gathered from some friends that [the petitioner] was in need of a nursemaid for the children, and in consequence she got in touch with [the petitioner], and she was engaged, I gather, at the beginning of 1950, and went to 82, Avenue Road, Swiss Cottage. There she occupied a room on the floor which the petitioner was occupying, the children's bedroom. She says that to start with things were all right, and the petitioner, the husband, behaved quite correctly to her. Then he started showing attention to her, and she says they were intimate on a number of occasions in her bed in the bedroom where she was with the children. She did not give the number of occasions, but she says in consequence she had four miscarriages by the petitioner, and furthermore her condition of pregnancy at the time she left in March, 1952, was due to the petitioner. As I have already indicated, the husband gives a total denial to those matters, and says that there was never anything of the sort between him and Mrs. Thompson."

The commissioner described the visit to the hotel at Ramsgate, and said:

"She says he bought her a suit which she is now wearing and which cost him £25, and he also bought her nylon stockings. And she further says, as the husband stated (although not for the same period of time), that he first of all paid her for about six weeks £3 a week, and then he gave her £5 a week until she left, which was in March, 1952. The husband again denies categorically those matters about giving her presents, and he says he only gave her such an amount of money that was essential to buy clothes, and that he never gave her more than £3 a week."

Then her cross-examination is referred to, which was directed in part to the fact that children were in the room, and the commissioner said:

"She admitted that on some occasions the children woke up with fits of

coughing. But she persists in saying that, nevertheless, the sexual relations did take place in that bedroom. She does in cross-examination further admit that she and the petitioner had quite a few words before she left in March, 1952. But she says that she does not feel bitter any more now, and she says she would not have come forward to give evidence had it not been that the respondent approached her about the matter."

When he came to assess Mrs. Thompson as a witness the learned commissioner said:

- A "With regard to Mrs. Thompson, I have observed her when she was giving her evidence. I did not think she was exaggerating, and I did not think she was trying to make matters worse than they were. I think she gave her evidence quite straightforwardly, and the conclusion I came to about her is that she is a witness of truth. In those circumstances there is no question but that adultery is proved. I accept Mrs. Thompson's evidence, and I reject the petitioner's evidence in regard to his denial."

- B This is a case where, there being no corroboration, the learned commissioner has given no indication in his judgment that he had directed himself that, where evidence of this kind is being given, the court should be very slow to act. It is not the law that the court cannot act on the evidence of a person in the position of Mrs. Thompson without corroboration, but it is the law that it is unwise so to do and that juries are to be directed that it is unsafe to act on uncorroborated evidence of this nature, although they are at liberty to do so if they feel sure.

- C This matter was considered by the Divisional Court comprising LORD MERRIMAN, P., and ORMEROD, J., in *Fairman v. Fairman* (1). The headnote reads ([1949] 1 All E.R. 938):

- D "The husband, against whom a maintenance order had been made on the ground of his desertion, applied for the discharge of the order on the ground of his wife's adultery with a man who had been staying with her as a lodger. The only evidence of the offence was that of the lodger himself who swore that over a period of at least three years he and the wife had habitually committed adultery in the house where they were living. The wife denied adultery. HELD: the same strict proof was required of adultery as was required of an offence against the criminal law; the evidence of the lodger was that of an accomplice; it was not corroborated; and, therefore, it should not be accepted and adultery had not been proved."

- E The Divisional Court was dealing with an appeal from justices. A man with whom it was alleged the wife had committed adultery had sworn that he had done so habitually over a period of three years in the bedroom of the wife, who had denied it. The President said ([1949] 1 All E.R. 939):

- F "The crux of her case is that the finding against her that between 1943 and 1946 she was continually committing adultery with this man depends on his evidence alone and his evidence is plainly that of an accomplice. There is little doubt how the law stands."

- G The learned President referred to the authorities named in the headnote. Dealing first with *Statham v. Statham* (4) he said (*ibid.*):

- H "In that case, RUSSELL, L.J., called attention to the fact that there was no evidence of the commission of the offence except the statement of the wife, and said ([1929] P. 150): 'The offence of sodomy is an offence of so serious a nature that a rule has grown up, that in criminal trials for certain offences (which include sodomy) the judge must warn the jury of the seriousness of convicting, in the absence of some evidence to corroborate the story of the other party to the act alleged. If no such warning has been given a conviction will be quashed. Notwithstanding the warning the jury may convict—but the warning must be given or the conviction will not stand. Is this

rule to be confined to criminal trials for the offence? I can see no reason why it should be so confined."

The President considered *Ginesi v. Ginesi* (2), which depended, not on a criminal offence, but on proof of adultery, and cited (*ibid.*, 940) part of the judgment of the court in *Churchman v. Churchman* (5) ([1945] 2 All E.R. 195):

"The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called."

He continued ([1949] 1 All E.R. 940):

"In *Ginesi v. Ginesi* (2) the Court of Appeal unreservedly approved that observation in relation to a charge of adultery, including as WROTTESELEY, L.J., expressly said ([1948] 1 All E.R. 376) connivance, while leaving open the question whether the current generality of the observation applied to other matrimonial offences. As a footnote to the phrase I then employed I would like to add that I have always directed juries and myself on the basis that adultery is a quasi-criminal offence . . . it is not enough in such a case as the present merely to say: 'Here is a witness on one side; here is a witness on the other. Which do we prefer?' I cannot see any trace of a direction by these justices to themselves in the terms summarised by RUSSELL, L.J., in the passage I have read from *Statham v. Statham* (4)."

He then went on to disapprove of the dictum of a judge in an earlier case, *Spring v. Spring & Jiggins* (3) to the effect that corroboration in such a case was not necessary.

It has been my experience that, when evidence of this kind is given in divorce cases, it is treated with the caution which I have described for, I think, the obvious reason that a charge of this kind is particularly difficult to rebut. Any man who is in the position of being alone in a house with or without children may have a nurse to look after the children or a housekeeper to look after him, and if that person chooses to make an accusation of this kind against him, it is a matter which he must find very difficult to deny by any affirmative evidence other than his own. A person who is making the accusation is putting forward her own wrongdoing and is in the same kind of position as that of an accomplice, and it has always been considered that a warning should be given before evidence of an accomplice is accepted without corroboration.

I have used the language which I have because, since *Fairman v. Fairman* (1) was decided, the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action, is the same as that in a criminal case, and whether the same rules apply, has been considered by the House of Lords in *Preston-Jones v. Preston-Jones* (6). LORD MACDERMOTT said ([1951] 1 All E.R. 138):

" . . . I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt."

The subject was the word "satisfied" in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937 (now s. 4 (1) of the Matrimonial Causes Act, 1950), and there had before this case been discussion in this country, and, I think, in the High Court of Australia, as to whether the word "satisfied" meant something less than "satisfied beyond reasonable doubt". I think the courts of this country may be taken to have come down on the side of the view that there was no distinction to be drawn between the word "satisfied" standing alone and the word "satisfied" accompanied by the words "beyond reasonable doubt". LORD SIMONDS expressly assented to and adopted the language of LORD MACDERMOTT, who continued (*ibid.*):

"The jurisdiction in divorce involves the status of the parties and the

public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt v. Moncreiffe* (7), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

A It might appear from the passages which I have read from the judgment in B *Fairman v. Fairman* (1) ([1949] 1 All E.R. 939) that the analogy of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt. I see no reason to depart from the view, which I think has always been held, that an adulterer who gives evidence of his own adultery is in the same position as an accomplice in a criminal case. The dangers of relying C on his or her unsupported evidence are great, and a warning should be given. For this reason, therefore, fortified, as I think it is, by the possible injustice to the husband which may have been done by his cross-examination on issues which were raised in the pleadings in the case, but were never determined, although the effect of the cross-examination might have been altered if the case had proceeded in a normal way, I think that there must be a new trial.

D JENKINS, L.J.: I agree that, for the reasons given by HODSON, L.J., the trial of this case cannot be regarded as having been satisfactory, and there should be a new trial accordingly.

SINGLETON, L.J.: I agree.

E *New trial ordered.*
Solicitors: *Bernard Oberman & Co.* (for the husband); *Walmsley & Stansbury*, agents for *E. W. Marshall Harvey & Dalton*, Bournemouth (for the wife).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. SHEER METALCRAFT, LTD. AND ANOTHER.

[SURREY ASSIZES (Streatfeild, J.), November 20, 1953.]

Statutory Instrument—Validity—Order made by Minister of Supply and laid before Parliament—Schedules forming part of order not printed, and not certified by Minister as not requiring to be printed—Statutory Instruments Act, 1946 (c. 36), s. 2 (1), s. 3 (2)—Statutory Instruments Regulations, 1947 (S.I., 1948, No. 1), reg. 7.

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The defendants were charged on indictment with buying steel sheets at prices which were in excess of the permitted prices set out in the deposited schedules forming part of the Iron and Steel Prices Order, 1951. It was stated in the order that it was made by the Minister of Supply on Feb. 16, 1951, and laid before Parliament on Feb. 20, 1951. When the order was sent to the Queen's printer to be printed as a statutory instrument, the Minister of Supply failed to certify, under the Statutory Instruments Regulations, 1947, reg. 7, that it was unnecessary to print the schedules, but, although there was no certificate of exemption from printing, the schedules were not printed. At the trial it was submitted on behalf of the defendants that, as the Minister had not certified, under reg. 7, that it was unnecessary to print the deposited schedules, the Statutory Instruments Act, 1946, s. 2 (1), required the schedules as well as the order itself to be printed, and that, therefore, as the schedules were not printed as part of the order, the order was not validly made and was not admissible in evidence.

HELD: (i) after a statutory instrument had been made by the Minister concerned and laid before Parliament, it became a valid statutory instrument within the Act of 1946; the other requirements of the Act and of the regulations of 1947 in regard to the printing, publishing and issue of the instrument were merely matters of procedure, and did not affect the validity of the instrument; and, therefore, the order of 1951, having been made by the Minister and laid before Parliament, was validly made and was admissible in evidence, although the deposited schedules had not been printed and the Minister had failed to certify, under reg. 7 of the regulations of 1947, that it was unnecessary to print them.

(ii) under s. 3 (2) of the Act, the burden lay on the Crown of proving that at the date of the alleged contraventions reasonable steps had been taken to bring the order to the notice of persons likely to be affected by it.

EDITORIAL NOTE. The Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended, was revoked and replaced by the Iron and Steel Prices Order, 1952 (S.I., 1952, No. 361), which was in turn revoked and replaced by the Iron and Steel Prices Order, 1953 (S.I., 1953, No. 169).

FOR THE STATUTORY INSTRUMENTS ACT, 1946, s. 1, s. 2 and s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 441, 442; and FOR THE STATUTORY INSTRUMENTS REGULATIONS, 1947, reg. 7. see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 1, p. 18.

Case referred to:

(1) *Defiant Cycle Co., Ltd. v. Newell*, [1953] 2 All E.R. 38.

TRIAL on indictment.

The defendants, Sheer Metalcraft, Ltd., and Albert Rustin, were jointly charged on an indictment containing fourteen counts for that between May 1, 1951, and Jan. 24, 1952, they bought steel sheets at prices in excess of the scheduled maximum prices, in contravention of the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended. The defendant company was the manufacturer of articles involving the use of steel and the defendant Albert

Rustin was its managing director. Twelve of the counts related to purchases from M. C. Monckton and Co., suppliers of sheet metal, and the other two counts to purchases from Sphinx Export Co., Ltd. It was alleged by the prosecution that invoices rendered in respect of consignments of steel to the defendants were faked so as to disguise the real nature of the transactions, and that, altogether, the defendants had paid £8,712 to M. C. Monckton and Co. and £1,314 to Sphinx Export Co., Ltd., whereas, if they had paid the maximum controlled prices, the amounts should have been £5,500 and £911, respectively. It was submitted on behalf of the defendants that the order of 1951 was invalid, and, therefore, inadmissible in evidence, since the deposited schedules, which formed part of the order, had not been printed, as required by the Statutory Instruments Act, 1946, s. 2 (1), and the Minister of Supply, on sending the order to the Queen's printer of Acts of Parliament, had failed to certify, pursuant to the Statutory Instruments Regulations, 1947, reg. 7, that it was not necessary to print the deposited schedules.

Melford Stevenson, Q.C., and E. Clarke for the prosecution.

Pollock, Q.C., and R. D. L. Du Cann for the defendants.

STREATFEILD, J.: This matter comes before the court in the form of an objection to the admissibility in evidence of a statutory instrument known as the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252). It appears that part of that order consisted of certain deposited schedules in which maximum prices for different commodities of steel were set out. The order is said to have been made by the Minister of Supply on Feb. 16, 1951, and to have been laid before Parliament on Feb. 20, 1951, and to have come into operation on Feb. 21, 1951. It is under that statutory instrument that the present charges are made against the two defendants in this case. The point taken by counsel for the defendants is that the deposited schedules have not been printed and have not been certified by the Minister of Supply as being exempt from printing, and that, therefore, under the Statutory Instruments Act, 1946, the order is not valid. That point was taken in *Defiant Cycle Co., Ltd. v. Newell* (1), but was not decided, being expressly left open. The point was not pursued in view of an admission made in that case by the Solicitor-General, which, however, does not arise in the case before me.

The point arises in this way. The Iron and Steel Prices Order, 1951, has its origin under the Defence (General) Regulations, 1939, reg. 55AB (1), which provides:

"A competent authority [which in this case is the Minister of Supply] may by order provide for controlling the prices to be charged for goods of any description or the charges to be made for services of any description, and for any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide; and any such order may prohibit the doing of anything regulated by the order except under the authority of a licence . . ."

That regulation visualizes and empowers the making of orders by the competent authority. In the order of 1951 it is said that the order was made in exercise of the powers conferred on the Minister of Supply by reg. 55AB and reg. 98 of the Defence (General) Regulations, 1939, and other statutory authorities. It was contended on behalf of the defendants that the making of that order is governed by the provisions of the Statutory Instruments Act, 1946, which repeals and simplifies the more cumbrous procedure under the Rules Publication Act, 1893. The material provisions of the Act of 1946 are these. Section 1 (1) provides:

"Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on [Her] Majesty in Council or on any Minister of the Crown then, if the power is expressed—(a) in the case of a

power conferred on [Her] Majesty, to be exercisable by Order in Council; (b) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument, any document by which that power is exercised shall be known as a 'statutory instrument' and the provisions of this Act shall apply thereto accordingly."

That sub-section, therefore, visualizes the making of what is called a statutory instrument or order by a Minister of the Crown. Section 2 provides for the publication of an order which has been made. Section 2 (1) reads:

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"Immediately after the making of any statutory instrument, it shall be sent to the [Queen's] printer of Acts of Parliament and numbered in accordance with regulations made under this Act, and except in such cases as may be provided by any Act passed after the commencement of this Act or prescribed by regulations made under this Act, copies thereof shall as soon as possible be printed and sold by the [Queen's] printer of Acts of Parliament."

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In other words, that sub-section visualizes that after the making of an order, or statutory instrument, it shall be sent to the Queen's printer to be printed, except in so far as, under regulations made under the Act, it may be unnecessary to have it printed. Regulations for providing that any classes of statutory instrument shall be exempt, either altogether or to some extent, from the requirement of being printed by the Queen's printer are authorised by s. 8 (1) (c) of the Act, and the Statutory Instruments Regulations, 1947 (S.I., 1948, No. 1), have been made thereunder.

C

Regulation 7 of the regulations of 1947 provides:

"If the responsible authority considers that the printing and sale in accordance with the requirements of s. 2 (1) of [the Statutory Instruments Act, 1946] of any schedule or other document which is identified by or referred to in a statutory instrument and would, but for the provisions of this regulation, be required to be included in the instrument as so printed and sold, is unnecessary or undesirable having regard to the nature or bulk of the document and to any other steps taken or to be taken for bringing its substance to the notice of the public, he may, on sending it to the [Queen's] printer of Acts of Parliament, certify accordingly . . ."

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It is said that the Minister did not certify that the printing of the very bulky deposited schedules to the order of 1951 was unnecessary within the meaning of reg. 7. It was contended, therefore, that, as he did not so certify it, there was an obligation under s. 2 (1) of the Act to print the deposited schedules as well as the order itself, and that, as the schedules were not printed as part of the order, the order cannot be regarded as being validly made.

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To test that matter it is necessary to proceed further and examine s. 3 of the Act of 1946. By s. 3 (1):

"Regulations made for the purposes of this Act shall make provision for the publication by [Her] Majesty's Stationery Office of lists showing the date upon which every statutory instrument printed and sold by the [Queen's] printer of Acts of Parliament was first issued by that office . . ."

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There does not appear to be any definition of what is meant by "issue", but presumably it means some act by the Queen's printer of Acts of Parliament which follows the printing of the statutory instrument. Section 3 (1), therefore, requires that the Queen's printer shall keep lists showing the dates on which statutory instruments are printed and issued. Section 3 (2), which is important, reads:

H

"In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by [Her] Majesty's Stationery

Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

Counsel for the prosecution submits that s. 3 (2) throws considerable light on what is meant by the making of a statutory instrument, because it visualizes that, if there is a statutory instrument which has been contravened, something is provided by way of defence to a charge for the contravention, viz., that the statutory instrument has not been issued. It seems to follow, therefore, that the making of an instrument is one thing and the issue of it is another. If it is made, it can be contravened. If it has not been issued, then that provides a defence to a person charged with its contravention. It is then on the Crown to prove that, although it has not been issued, reasonable steps have been taken for the purpose of bringing the instrument to the notice of the public or of persons likely to be affected by it. I agree with counsel for the prosecution with regard to this matter. I do not think that it can be said that, in order to make the statutory instrument valid, it is necessary that all these stages should be gone through: namely, the making, the laying before Parliament, the printing, and the certification of that part of it which it might be unnecessary to have printed. In my judgment, the making of an order is complete when it is, first, made by the Minister concerned and then, secondly, laid before Parliament. When that has been done it becomes a valid order, in my view, totally made under the provisions of the Act.

The remaining provisions to which my attention was drawn are, then, in my judgment, purely matters of procedure for the issue of an order made, and validly made, those provisions being (a) that in the first instance the order must be printed by the Queen's printer, except any part of it which the Minister has certified as not requiring to be printed; (b) that the order must then be included in a list published by Her Majesty's Stationery Office showing the date when it is issued [reg. 9 of the regulations of 1947]; and (c) that it is to be issued by the Queen's printer of Acts of Parliament. If those provisions were not matters of procedure, but were stages in the perfection of a valid statutory instrument, as counsel for the defendants contends, I cannot see that s. 3 (2) of the Act of 1946 would be necessary, because there could be no infringement of a statutory instrument which was invalid, and, therefore, it would be unnecessary to provide that it would be a defence to a person charged with an offence consisting of a contravention of any such statutory instrument to show that it had not been issued at the date of the alleged contravention. In my view, the very fact that s. 3 (2) refers to a defence that the instrument has not been issued postulates that the instrument must have been validly made and contravened.

In those circumstances I hold that the order of 1951 was validly made and approved and that it was made by or signed on behalf of the Minister on its being laid before Parliament. That so appears on the face of the order itself. In my view, the fact that the Minister failed to certify under reg. 7 of the Statutory Instruments Regulations, 1947, does not invalidate the order of 1951 as an order, but lays the burden on the Crown, as counsel for the prosecution has already agreed that it does, of proving that at the date of the alleged contraventions reasonable steps had been taken for the purpose of bringing the instrument, viz., the order of 1951, to the notice of the public or of persons likely to be affected by it. In those circumstances the submission of counsel for the defendants fails, and I rule that the order is admissible in evidence.

Submission overruled.

[The trial then proceeded, and evidence was given that the Ministry of Supply issued information regarding the deposited schedules to trade journals; that the maximum permitted prices during the relevant months appeared in the "Board of Trade Journal", the "Metal Bulletin", and the "Ironmonger";

and that the British Iron and Steel Federation sent copies of the schedules to the defendant company when the order of 1951 came into existence. Evidence was also given in regard to the alleged contravention of the order. HIS LORDSHIP, in his summing-up, left to the jury the issues (i) whether the defendants had committed the offences with which they were charged, and (ii) whether the Crown had taken reasonable steps for the purpose of bringing the purport of the order of 1951 to the notice of the defendants or other persons affected by it. The jury returned a verdict of Guilty on all counts.]

Solicitors: *Treasury Solicitor* (for the prosecution); *Peters & Peters* (for the defendants).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

NATIONAL COAL BOARD v. ENGLAND.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), January 18, 19, 20, 21, February 25, 1954.]

Coal Mining—Shot-firing—Breach of statutory duty and negligence of shot-firer—Respondent himself in breach of safety regulations—Liability of mine owner—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (e), (h).

The Explosives in Coal Mines Order, 1934, cl. 2, provides: "(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter . . . (h) Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person . . . shall himself couple up the cable to the fuse or detonator wires and shall . . . also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

The respondent, a miner, and W., a shot-firer, were employed by the appellants in a coal mine. While working in the mine, W. agreed to fire a coal hole at the respondent's request. After the hole had been rammed, the respondent agreed with W. to connect the cable to the detonator wires, while W. went back toward the firing apparatus, uncoiling the cable as he went. While the respondent was making the connection, W. fired the shot with the result that the respondent suffered severe injuries. In an action by the respondent against the appellants for breach of statutory duty and negligence at common law,

HELD: W. was in breach of his statutory duty under cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order, 1934, and this breach constituted negligence at common law; the doctrine of common employment having been abolished, under the doctrine of respondeat superior the appellants were liable for W.'s negligence at common law; the maxim *ex turpi causa non oritur actio* had no application here, but the respondent's injuries resulted to a substantial degree from his own fault; and, therefore, the amount of damages awarded to him must (LORD TUCKER and LORD ASQUITH of BISHOPSTONE dissentiente), under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), be reduced.

Decision of COURT OF APPEAL ([1953] 1 All E.R. 1194), reversed in part.

AS TO REGULATIONS GOVERNING THE USE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656, and 1953 Supp.; and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, 744, 745, Nos. 2498-2507, 1190-1195, and Digest Supps.

Cases referred to:

(1) *Harrison v. National Coal Board*, [1951] 1 All E.R. 1102; [1951] A.C. 639; 2nd Digest Supp.

(2) *National Coal Board v. Nicol*, (1952), 102 L.Jo. 357.

(3) *Matuszczyk v. National Coal Board*, 1953 S.C. 8.

(4) *Smith v. Fife Coal Co., Ltd.*, [1914] A.C. 723; 83 L.J.P.C. 359; 111 L.T. 477; 7 B.W.C.C. 253; 34 Digest 301, 2498.

(5) *Paleokas (or Pollock) v. Mount Vernon Colliery Co., Ltd.*, [1931] A.C. 597; 1931 S.C. (H.L.) 123; 100 L.J.P.C. 225; 145 L.T. 460; 24 B.W.C.C. 283; Digest Supp.

A (6) *Kerr v. Baird & Co., Ltd.*, 1911 S.C. 701; 48 Sc. L.R. 646; [1911] 1 S.L.T. 446; 4 B.W.C.C. 397; 34 Digest 302, *i*.

(7) *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; [1948] L.J.R. 361; 177 L.T. 92; 2nd Digest Supp.

(8) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663.

(9) *Boulter v. Clark*, (1747), Bull. N.P. 16; 43 Digest 436, 633.

B APPEAL by the National Coal Board from an order of the Court of Appeal, dated Apr. 27, 1953, reported [1953] 1 All E.R. 1194, reversing an order of CROOM-JOHNSON, J., at Swansea Assizes, dated July 26, 1952. The Court of Appeal held that the respondent was precluded from recovering from the appellants for breach of statutory duty, but he was entitled to recover on the ground that neither the fact that the duties of the shot-firer, with whom the respondent was working, were precisely defined by the regulations, nor the fact that the respondent was doing an act prohibited by the order, deprived him of his remedy at common law.

Gardiner, Q.C., and *D. Meurig Evans* for the appellants.

H. Edmund Davies, Q.C., and *Alun Davies* for the respondent.

D The House took time for consideration.

Feb. 25. The following opinions were read.

LORD PORTER: My Lords, this is an appeal by the National Coal Board, who were the defendants in the action, from an order of Her Majesty's Court of Appeal, whereby it was ordered that the appeal of the respondent (the plaintiff in the action) be allowed, that the judgment of CROOM-JOHNSON, J., be set aside, and that judgment be entered for the respondent for £2,400 with costs.

E The case arises out of an injury sustained by the respondent on Jan. 25, 1950, when employed underground as a collier in the appellants' Bwlfa Colliery, Aberdare. He assisted a shotsman (one Edward Williams) to prepare to fire a shot in that colliery first by ramming a hole with explosive charge and then by connecting the charge to the firing apparatus by means of a cable. Before doing so, the respondent said to the shotsman: "I will couple up, Ted", and he replied: "O.K., Harry". The respondent then began to couple up the four loose ends of the cable to the detonator wires while the shotsman went back toward the firing apparatus, uncoiling the cable as he went. When the respondent had connected one cable end to one of the detonator wires and was in the act of connecting the other end of the cable to the other end wire of the detonator, the charge was exploded by the shotsman with the result that the respondent suffered severe injuries. Eventually he issued a writ against the appellants claiming damages for negligence and breaches of statutory duty under the Coal Mines Act, 1911, and the regulations thereunder. In his pleadings the respondent alleged that the appellants, their servants or agents were in breach of cl. 2 (e) and (h) of the Explosives in Coal Mines Order, 1934, and that Edward Williams, the shotsman, was negligent in firing the shot without ensuring that no one was in the vicinity or that those near had taken shelter, in not giving warning to the respondent, in inviting or permitting the respondent to connect the cable to the detonator, and in failing to allow time for the respondent to reach a position of safety before firing the shot. Clause 2 (e) and (h) is in the following terms:

H

"(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable

steps to prevent any person approaching the shot . . . (h) Where shots are fired electrically they shall only be fired by a person authorised by the manager for the purpose. The authorised person . . . shall himself couple up the cable to the fuse or detonator wires and shall do so before coupling the cable to the firing apparatus . . . Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

As a further ground of claim it was alleged that the respondent, in accordance with the prevailing practice, of which the appellants knew or ought to have known, coupled the cable to the detonator wires, and that the appellants took no steps to prevent that practice.

The appellants, while denying that the accident was caused by any negligence or breach of statutory duty by them or their servants or agents, admitted that the shotsman did not himself couple up the cable to the detonator wires as required by the 1934 order, and also that the respondent (being then a person in the vicinity of the shot) had not taken shelter at the material time. They alleged, however, that the respondent's injuries were caused or contributed to by his own negligence or breach of statutory duty; that he had, by his conduct, voluntarily accepted and impliedly consented to run the risk of injury resulting therefrom; and that his injuries had been sustained in consequence of his own illegal act in coupling up the detonator wires to the cable, or by his acting pursuant to an illegal agreement between him and the shotsman to contravene the 1934 order.

The appellants further relied on the provisions of s. 75 and s. 102 (8) of the Coal Mines Act, 1911. Those sections provide:

" 75. Any person who contravenes or does not comply with any of the provisions of this Part of this Act . . . shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act . . . by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance. 102 (8) The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

As the respondent was ill and unable to attend the trial of his case, his proof of evidence was, by consent, read as the evidence he would have given, subject to the stipulation that none of the statements contained in it were to be taken as admitted. The shotsman Williams was not called. A number of witnesses on behalf of the respondent deposed to a practice in that colliery of colliers helping the shotsmen and firemen by coupling up the cable to the detonator. They admitted, however, that they knew that they were doing wrong and that they had never carried out this practice in the presence of the manager or under-manager. The appellants did not challenge the evidence that a number of shotsmen and firemen had, over a substantial period of time, acquiesced and participated in carrying on this practice. It was common ground, however, that both the shotsman Williams and the respondent had contravened the 1934 order by their conduct on the day of the accident.

The case was tried by CROOM-JOHNSON, J., who found that the accident happened as described above; that a number of colliers employed in the colliery at varying times disobeyed the 1934 order, that they knew that, by their disobedience, they were doing that which they ought not to have done, and that their acts were forbidden by that order; that the respondent, in coupling up the ends, was contravening it, and knew that his action contravened it and was forbidden; that the shotsman Williams also contravened the order; that the attention of

any manager of the mine had never been called to the practice of the colliers to couple up the leads and that there was no evidence that anybody in "any position of responsibility", as far as the appellants were concerned, knew of the practice; that all persons in authority under the appellants had taken all reasonable means to prevent the contravention of the 1934 order; and that the appellants had sufficiently published it. With regard to the claim for negligence the learned judge held that, inasmuch as, in his view, the appellants did not know that colliers were coupling up the leads, it could not be alleged that they or their servants failed to take any proper steps to prevent a practice of which they were ignorant. With regard to the claim for breach of statutory duty, the learned judge declared that he would adopt what he considered to be the effect of the obiter dicta of your Lordships' House in *Harrison v. National Coal Board* (1). He said that, as all due care had been taken by the appellants to prevent a breach of the 1934 order, and that as no personal liability was imposed directly on the appellants by that order, they were not responsible for the acts or omissions of the shotsman Williams, or of the respondent, and, accordingly, the action against them failed. In case, however, he should be held to be wrong in his decision he assessed the damages in respect of the injury at £2,400, but said that, had the appellants' liability been established, he would have awarded only half that amount on the ground of the respondent's contributory negligence in doing what he knew to be wrong and his acquiescence in the shot-firer's breach of the 1934 order. He gave judgment for the appellants with costs.

The respondent appealed from the decision and the Court of Appeal unanimously allowed the appeal. To the question discussed but not decided in *Harrison v. National Coal Board* (1), viz.—whether, the doctrine of common employment being abolished, a plaintiff who fails to prove negligence but establishes a breach of statutory duty imposed, not on the owner, but on a workman, could succeed against the owner on the basis of vicarious liability for the statutory breach—the Court of Appeal gave no answer as they did not find it necessary to decide the point. They held that Williams' action, in the absence of any explanation, inevitably established negligence at common law, and they negatived the proposition that, the shotsman's duties being precisely defined by the 1934 order, it was not open to the respondent to rely on the negligence of the shotsman as establishing liability against the appellants. In their view, the order did not deprive a workman of his common law rights. Further, they held that the accident was caused, not by the respondent's breach of the order, but by the later, independent negligence of Williams, and that, therefore, the respondent's wrongful act afforded no defence. Accordingly, they held that there was no ground for reducing the damages. Moreover, they were of opinion that, whatever the cause of the accident, the respondent was not negligent. As regards the submission for the respondent that the shotsmen and firemen were responsible officials of the National Coal Board and acquiesced in the practice of the colliers' coupling the cable to the detonator, and, therefore, the respondent could rely on a de facto dangerous system of work, the learned lords justices said that, in view of their judgment on the ground of Williams' negligence, it was unnecessary to arrive at, or express, any conclusion.

My Lords, in these circumstances the respondent sought to support his claim on three grounds, viz.:—(i) that the appellants were liable for the shot-firer's breach of his statutory duty; (ii) that, whether they were so liable or not, the shot-firer was guilty of common law negligence and, on the principle of "respondeat superior", the mine owners must answer for his wrongdoing; and (iii) that the appellants had failed to provide a safe working system. Further, it was contended on his behalf that no contributory negligence on his part had been established and that, even if it had, such negligence was not the cause of his injury. Undoubtedly, Mr. Williams, the shot-firer, was in breach of his statutory duty in more respects than one, but it has been urged to your Lordships that those

duties are imposed on the shot-firer himself, who must be appointed by the manager and, it is said, is not under the control of his owners in these respects. Therefore, it is maintained on behalf of the employers that they are not vicariously liable, on the ground that Williams acted contrary to the regulations which he was bound to follow. My Lords, having regard to the opinion which I hold on the second argument, it is not, I believe, necessary for your Lordships to determine this question, which, as I have said, has indeed been argued already in your Lordships' House in *Harrison v. National Coal Board* (1), and there left undetermined, inasmuch as its solution was unnecessary. In the present case, in my view, a solution is again unnecessary, and, as the problem is one of some complexity, it should remain undetermined until it is directly in issue.

As a variant of this argument, the appellants contended that, inasmuch as the regulations prescribe the duty which the shot-firer has to carry out, his common law obligation of exercising due care is superseded, he is liable only for breach of statutory duty, and the appellants are not liable for his failure to perform it. This question must be decided by your Lordships since, if that were the shot-firer's only duty, the appellants would be absolved from any liability at common law or, indeed, from any obligation provided they were not liable for the shot-firer's breach of the statutory regulations. This matter, also, was argued in *Harrison's* case (1), but no decision on it was called for in the circumstances of that case and it was left undetermined. So far as I am aware there is no decision on the matter under English law, but it has twice been decided in Scotland, once by LORD GUTHRIE in *National Coal Board v. Nicol* (2), a case reported only in the LAW JOURNAL NEWSPAPER, but of which we have been furnished a transcript, and again in *Matuszcyk v. National Coal Board* (3). In each case the contention was rejected and, in my opinion, rightly. I may quote a passage from LORD GUTHRIE's opinion which expresses the view which I hold and states the reason on which it is founded. His words are as follows:

"In my opinion the argument is unsound. The fireman, in doing his work as a shot-firer, was acting in the course of his employment by the defenders. In the performance of his work he was required by the regulations to adopt certain precautions which Parliament has prescribed for the safety of those employed in coal mines. But it is not correct to say that he was not acting for his master. The firing of the shots was the work which he was employed by the defenders to do. His failure to take the precautions which Parliament has required of him in doing that work did not take him outwith the scope of his employment. Accordingly his acts were still within the areas in which the vicarious responsibility of a master operates."

In these circumstances, the shot-firer was guilty of common law negligence in the course of his employment unless it can be shown either that he had no reason to apprehend danger from his action, or the accident which followed was not the result of his negligence. Two courts have already held him guilty of negligence and I find it difficult to see any flaw in their decision. He was not called to explain or excuse his action, and, quite apart from the regulations, I should, myself, have found that any reasonable man ought to have foreseen the danger. Nor do I think that the existence of the regulations can be neglected. In the ordinary course of affairs their provisions and object must have been known to all mine workers, and, if known, must have made it abundantly clear not only that an accident might happen, but that its consequence would be to injure his fellow workman. Similar considerations apply to the respondent, who, in my view, was also guilty of common law negligence, and, accordingly, I do not stay to deal with the allegations of breach of statutory duty on the part of the latter.

Two matters remain for consideration (i) What, in a legal sense, was the cause of the accident? and (ii) If it was the result of the negligence of both men,

should your Lordships alter the proportion attributed by the learned judge to each ?

The Court of Appeal, basing their decision on a dictum of LORD DUNEDIN in *Smith v. Fife Coal Co., Ltd.* (4) ([1914] A.C. 729), held that the legal cause was the act of Williams, who fired the shot. The circumstances of that case were in many respects similar to those in that now under consideration, but the question at issue was not concerned with a master's vicarious liability at common law for the negligent act of a shot-firer, but was whether a miner, who had coupled up the detonator to the charge, was acting within the scope of his authority. Your Lordships' House held that he was, but it appears from the observations of LORD PARMOOR (*ibid.*, 732) and the later observations of LORD HAILSHAM in *Paleokas (or Pollock) v. Mount Vernon Colliery Co., Ltd.* (5), that the ground of the decision was that the workman had finished coupling the wires and was no longer engaged in a forbidden task, whereas if he had been, as was the miner implicated in the last-mentioned case, still in the act of coupling the wires to the detonator, he would have been outside the scope of his authority.

The judgment in the case now before your Lordships was delivered by SOMERVELL, L.J., who quotes LORD DUNEDIN's words ([1953] 1 All E.R. 1199), which were:

" 'I think I can best make my view clear by taking the case of *Kerr v. Baird & Co., Ltd.* (6), and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself—I mean without the presence or help of the shot-firer at any stage of the proceeding. It was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty—to insert and stem the detonator—and that he did. The next step—the connecting of the detonator wire to the cable—he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident, namely the connecting of the cable to the battery and the putting the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorised duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.' "

In so expressing himself he was dealing with the question at issue in holding that the miner had finished his unauthorised act and returned to the sphere of his employment. In such circumstances the act of coupling the wires to the detonator, in his view, was so closely connected with the subsequent accident that his unauthorised act was the efficient cause of the accident. I would add that the question whether LORD DUNEDIN's dictum should be applied generally to a class of case which he was not considering does not call for determination by your Lordships in the present instance and I reserve my opinion on it until it directly arises.

The appellants, however, relying on the fact that the explosion took place before the miner had completed his self-imposed task, maintained that a miner caught in the act of coupling up the detonator was altogether outside the scope of his employment and, therefore, solely responsible for his own injury. They sought support for their view from a number of workmen's compensation cases and, in particular, from *Paleokas (or Pollock) v. Mount Vernon Colliery Co., Ltd.* (5). In that case, however, the matter under discussion was whether the

accident arose out of and in the course of his employment and was not directed to a consideration of common law negligence. Where no question of compensation is under consideration a different approach is, I think, justified, and it should be held that, in the present case, the respondent, in acting as he did, was rather engaged in carrying out his employment as mine worker in a wrong way than altogether departing from it.

Before coming to the conclusion whether the proportion of blame attributed to each party should be disturbed, there is one further matter which your Lordships have to determine, i.e., were Williams and the respondent alike engaged in a crime so that the maxim *ex turpi causa non oritur actio* applies and the latter cannot recover. My Lords, save in one case, I cannot find that such a plea has ever been put forward in circumstances similar to these as excusing common law negligence. If it were sound it would be a defence to many actions in which it was not raised and might also be a defence to many claims for compensation. Conceivably it may be a defence in certain cases between the parties participes criminis, but the argument that it may be a defence between the two persons involved does not support a conclusion that a third party whose servant is one of two involved in disobeying a regulation, and so participating in a criminal offence, is thereby excused from liability. The present is one of the latter cases, and it may be that, on some future occasion, it will be necessary to find an answer to the conundrum, though in a case of the former category. So far as the present case is concerned, however, I am prepared to adopt the answer given by COHEN, L.J., in *Cakebread v. Hopping Bros. (Whetstone), Ltd.* (7), where he says ([1947] 1 All E.R. 395):

"I feel some doubt whether the workman could be said to be aiding and abetting the employers' breach of duty, but, even assuming in favour of the employers that they established the requisite facts, I still think this argument is ill founded. The maxim *ex turpi causa* is based on public policy, and it seems to me plain that on the facts of this case public policy, far from requiring that this action shall be dismissed, requires that it shall be entertained and decided on its merits. The policy of the [Factories Act, 1937] makes it plain that such a defence as was put forward by counsel for the employers in this case would be inconsistent with the intention of Parliament when it passed the Act."

Like him, I cannot believe that a breach of a statutory obligation drafted to ensure the adoption of a careful method of working is a "*turpis causa*" within the meaning of the rule. Indeed, the adage itself is generally applied to a question of contract, and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort. This view is, in my opinion, in conformity with the Law Reform (Contributory Negligence) Act, 1945, which, after enacting, in s. 1 (1), that a claim shall not be defeated by reason of the fault of one person where the damage is partly caused by the fault of another, then goes on, in s. 4, to define "fault" as meaning

"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".

In this definition no distinction, at any rate in terms, is made between a breach of statutory duty which constitutes a criminal offence and that which, if there be such, involves no crime and appears to deal with all types of breach of statutory duty. It may, perhaps, be enough to quote *Stapley v. Gypsum Mines, Ltd.* (8), in order to give an instance illustrating a set of facts in which the argument must have prevailed if it had been taken, and, indeed, in that case it would have been the duty of your Lordships' House to take notice of it, whether pleaded or not.

Finally, the ratio in which the damages are to be attributed to each party comes up for consideration. As a rule an appellate body does not interfere with the

discretion exercised by the judge who tried the case. Your Lordships did, however, in *Stapley's* case (8), think that the wide difference between their view and that held in the court of first instance warranted a variation in the proportional amount awarded. In the present case, I suggest that the same course should be adopted. Indeed, the case now before the House exhibits, I think, a stronger ground for altering the figures, inasmuch as the learned judge made no exact determination, but merely said, in a case in which, in his opinion, the claim had failed, that he would not give the respondent more than one-half of the damages he would have awarded if he had found any liability. For my own part, I should diminish the total sum by no more than one-quarter, and award the respondent a sum of £1,800.

LORD OAKSEY: My Lords, I agree. The appellants' contentions in this case were—(i) that since the respondent, a coal miner, and Williams, a shot-firer, were both guilty of a breach of the statutory duty imposed on shot-firers by cl. 2 (h) of the Explosives in Coal Mines Order, 1934, the appellants were not responsible for the damage suffered by the respondent because it is contrary to public policy that a master should be held responsible for the criminal conduct of his servant either on the ground that such conduct cannot be within the course of his employment or that the maxim *ex turpi causa non oritur actio* is applicable; (ii) that, even if this is not so, the conduct of the respondent and Williams was negligence at common law and that, even if the appellants are liable for the negligent conduct of Williams, the damage which the respondent suffered was "the result partly of his own fault" within the meaning of s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945; and (iii) that the trial judge's apportionment of the damages in the event of the appellants being held liable should be upheld.

I am of opinion that the appeal must be allowed on the ground that the conduct of the respondent and Williams was negligence at common law and that the damage the respondent suffered was partly the result of his own fault. I think it is true that there may be certain breaches of statutory obligations which do not constitute negligence at common law, but the breach in question was, in my opinion, clearly negligence at common law. No ordinarily prudent miner would usurp the duty of the shot-firer that "he shall himself couple the cable to the firing apparatus." Any ordinarily prudent miner who was not a novice (and the respondent was not a novice) would, in my opinion, appreciate the danger of allowing two or more people to take part in shot-firing by electricity. Nor can it be suggested that the Coal Mines Act, 1911, or any other Act indicates an intention on the part of the legislature that the penalties imposed should be the only remedy for their breach.

It was argued for the respondent that, the statutory duty being imposed directly on the shot-firer, the damage was the result of his fault alone, but the evidence of all the miners called for the respondent and the finding of the trial judge as to the respondent's own knowledge prove that miners are well aware that it is wrong and against the regulations for anyone but a shot-firer to take part in electrical shot-firing. In this connection it was argued for the respondent that the evidence as to the practice of miners in helping shot-firers in the way in which the respondent did was evidence of a breach of the employers' obligation to lay down a safe system of working. This was not raised by the pleadings and does not appear to have been argued in the courts below. What was said was that the practice existed, but it was admitted by all, or nearly all, the witnesses that the persons concerned knew it was wrong and that they never did it in the presence of the manager or of sub-managers of the mine. CROOM-JOHNSON, J., found that no one in authority knew of the alleged practice and that, therefore, even if it existed, it did not affect the appellants.

On the appellants' first contention I agree with the judgment of LORD GUTHRIE in *National Coal Board v. Nicol* (2), which my noble and learned friend, LORD

PORTER, has cited, that it cannot be said to be necessarily outside the course of the employment of a workman that he performs his work in a manner which is in breach of a statutory regulation. Here it was within the shot-firer's employment to fire the shot electrically, but he did it without due care and in breach of the regulation. Unless there is something in the statute which creates the obligation indicating the intention that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine respondeat superior. The maxim *ex turpi causa non oritur actio* is, in my opinion, inapplicable to the breach of such a statutory obligation as that in question here, and no authority was cited in which the maxim has ever been applied in such circumstances as the present. A

The only question which remains to be considered is the question of the apportionment of the damage. On this question I agree with my noble and learned friend, LORD PORTER, that this is a case in which the trial judge's apportionment seems to me on the whole to give a great deal too much weight to the share of the respondent in the responsibility for the damage, and I, therefore, agree that the respondent should bear one-quarter of the damage rather than one-half. B

LORD REID: My Lords, the respondent was seriously injured by the firing of a shot in his stent in Bwlfa Colliery on Jan. 25, 1950. He and a shotsman, Williams, together did the preliminary work up to the stage of stemming. The regulations required that the shotsman alone should connect the cable wires to the wires from the detonator and perform the rest of the operation necessary for firing the shot. But it appears from the evidence that, unknown to the management, it was, in fact, a common practice in the mine for the shotsman to leave the miner to connect the cable to the detonator and on this occasion Williams went off laying the cable, which is about twenty-five yards long, and left the respondent to make the connection. The respondent assumed that Williams would warn the men whom he passed when laying the cable, but that after connecting the cable he (the respondent) was to warn the men on the other side of the stent: apparently, he did not expect the shotsman to return after he had laid the cable. The respondent took some little time to make the connection and while he was completing this Williams fired the shot. The shotsman was not called as a witness and we do not know why he fired the shot when he did. He must have supposed that the respondent and any other men on the far side of the stent had already taken shelter. Whatever his reasons may have been his act in firing the shot when he did was a grave breach of duty. Clause 2 (h) of the Explosives in Coal Mines Order, 1934, provides that, where shots are fired electrically, the shot-firer C
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"shall himself couple up the cable to the fuse or detonator wires and shall do so before coupling the cable to the firing apparatus . . . He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter". G

Apart from failing to obey this statutory regulation Williams was also, in my opinion, clearly guilty of common law negligence in firing a shot without taking any reasonable steps to see that it was safe to do so. I assume that he could not see whether the respondent had left the stent: if he could, he ought to have looked. If he could not see it was plainly dangerous to depend on hearing a shout or to assume that long enough time had elapsed. It was suggested that Williams might have moved the handle or switch of the firing apparatus accidentally. I do not know whether that is possible, but, if it is, then it was dangerous to risk such an accident by coupling the cable to the apparatus before seeing that it was safe to fire the shot. And I think that, again, apart from the regulations, the respondent failed to take proper care for his own safety. As he did not expect Williams to come back and make certain that he H

and others beyond him had taken shelter—he says it was his intention after coupling to warn the others—it was obvious, and he ought to have realised, that his safety depended on Williams not making a mistake in firing prematurely, and that it is easy to make such a mistake if the shot-firer acts on thinking he has heard a shout or on some ground of that kind.

- The case for the respondent is simple. His injury was caused by the negligence of Williams: the defence of common employment being no longer available,
- A the appellants are responsible to him for damage caused by their servants' negligence: and even if his own negligence contributed to the accident that now only results in a reduction of the amount of damages. The appellants deny liability on three grounds. First, they say that the respondent cannot recover damages because he was injured while committing an offence, and that he would not have been injured if he had not been doing so. Secondly, they
- B say, founding on the decision of this House in *Harrison v. National Coal Board* (1), that the shot-firer's breach of duty was one for which they are not responsible, and that the respondent cannot found on common law negligence of the shot-firer because the regulations have superseded the common law: and, thirdly, they say that the respondent's injury was not caused by the action of the shot-firer: it was wholly caused by his own negligence and breach of duty. If they
- C fail to succeed on any of these grounds the appellants then say that at least the accident was not wholly caused by the action of the shot-firer: it was caused at least in part by the respondent himself.

- The appellants found on the maxim *ex turpi causa non oritur actio*. The respondent was committing an offence under the regulations in connecting up the cable and if he had not done so the accident would not have happened.
- D Therefore, they say that this action arises *ex turpi causa*. I do not find it necessary to determine the precise meaning or the limits of the application of this maxim because the Law Reform (Contributory Negligence) Act, 1945, enacts (s. 1 (1)) that:

- “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person . . .”

- E his claim shall not be defeated by reason of his fault, and s. 4 provides:

“‘fault’ means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence”.

- F Reading the appropriate part of this definition back into s. 1 makes it provide that where a person suffers damage as the result partly of his own breach of statutory duty which would, apart from this Act, give rise to the defence of contributory negligence his claim shall not be defeated. It was argued for the appellants that this does not apply to a breach of statutory duty which is also an offence, because such a breach would not have given rise to the defence of contributory negligence: it would have given rise to the more powerful defence
- G that the action, being *ex turpi causa*, could not be maintained at all. Even if the appellants were right about the former applicability of the maxim I do not see why a defendant could not rely on the defence of contributory negligence if he chose to do so and not to rely on the defence *ex turpi causa*, and, in fact, before 1945, when the plaintiff had been guilty of such a breach of statutory duty, defendants habitually and often successfully relied on the defence of contributory
- H negligence. Moreover, almost all breaches of statutory duties are offences—counsel for the appellants was unable to mention one which was not—and I cannot read the Act as only referring to those breaches of statutory duty (if any) which are not offences. So, whatever the former position may have been, it is now, in my opinion, clear that the appellants cannot rely on this defence.

It was held in *Harrison's* case (1) that the regulations which were broken by Williams in this case were personal to the shot-firer, and, as the defence of

common employment was still available in that case, that was an end of the case. But in that case counsel for the present appellants dealt with an argument that might be submitted in a case where the defence of common employment was not available, and I set out the argument as I understood it ([1951] 1 All E.R. 1130). I understood that the argument was limited to a case where the shot-firer, though in breach of the regulation, had not been guilty of common law negligence. I said (*ibid.*):

"If his argument is right, whenever a workman is in breach of a statutory duty which is purely personal to the workman it will be necessary to determine whether the workman in failing to carry out his statutory duty was also guilty of negligence at common law. If he was, then his master must answer for his negligence to a fellow servant who had been injured by it, but, if he was not and his only fault was breach of his statutory duty, then it is said that his master is not answerable for that."

I said, and I still say, that if such a case should ever arise I would not dismiss the argument summarily as unworthy of consideration. But this is not such a case: I have already said that, in my opinion, Williams was guilty of common law negligence. The argument could only arise in this case if these regulations were held to supersede the common law entirely so as to make it irrelevant to consider whether or not the shot-firer was negligent. This was argued by counsel for the appellants, but I can find no basis for the argument. In the ordinary case it is quite clear that safety regulations do not supersede the common law: it has long been the practice to sue alternatively under regulations and at common law, and I am not aware of any case when this has been held to be incompetent—certainly none was cited; and I see no special feature in these regulations which would require such a novel and improbable construction.

It, therefore, becomes necessary to decide whether the accident was caused wholly by the fault of the respondent, or wholly by the fault of Williams, or whether it was the result of the fault of both. Certainly both were at fault when it occurred and it would not have occurred if either had been doing as he ought to have done. I can see no ground for discarding the fault of Williams as being too remote to be regarded as in law a cause. But the Court of Appeal have held that the fault of the respondent was too remote and that the accident was caused solely by the fault of Williams and, in so holding, they appear to have been greatly influenced by the reasoning of LORD DUNEDIN in *Smith v. Fife Coal Co., Ltd.* (4). So I must examine that case somewhat closely. *Smith's* case (4) was a case under the Workmen's Compensation Act, so negligence of the workman causing or contributing to the accident was not an answer to the claim. But it had been held that compensation was not due if the accident was caused by the man taking on himself duties which he had no right to perform and so putting himself outside the sphere of his employment. The only difference between the circumstances in *Smith's* case (4) and those in the present case was that there the man had just finished connecting the cable to the detonator when the shot was fired, whereas here he was still finishing that operation—a difference too small to form a distinction except, perhaps, in workmen's compensation cases. LORD DUNEDIN said ([1914] A.C. 729):

"In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorised duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial."

We might be bound to follow *Smith's* case (4) if the issue to be determined here were the same. But I do not think it is the same. The question whether the accident arose out of the employment is not the same as whether the accident

was caused wholly or partly or not at all by the workman's own acts. In *Smith's* case (4) I do not think that the issue was raised whether the accident was caused partly by the action of the shot-firer and partly by the action of the miner and I do not think that in this case we are bound by a decision in quite a different field where the present question did not, and, perhaps, could not, arise.

In this case I am satisfied that the respondent's injury did result to a substantial degree from his own fault, and, therefore, he can only succeed by virtue of the provisions of the Law Reform (Contributory Negligence) Act, 1945. His claim is not defeated, but the damages recoverable must be

"reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

It appears to me that Williams' share in the responsibility was much greater than the respondent's share. I do not attach importance to the practice in this mine of disregarding the regulations: if that affords any excuse, the excuse is available to Williams as well as to the respondent. And I do not put much weight on the fact that the duties under the regulations were primarily the personal responsibility of the shot-firer. But I think that firing the shot without making certain that all in the vicinity had taken shelter was much more culpable and more directly connected with the accident than anything which the respondent did, and I would hold that Williams' share in the responsibility for the damage was three times as great as the respondent's share.

CROOM-JOHNSON, J., decided the case in favour of the appellants on an application of *Harrison's* case (1), but he added at the end of his judgment:

"If I were able to hold the defendants responsible for Williams' breach of duty I should not have assessed the plaintiff's damages at more than one-half of the total amount he lost."

It is not right to disturb such a finding lightly, but it appears to me that the difference between holding the parties equally to blame and holding the one's share of responsibility to be three times that of the other is so substantial that we should give effect to it. The damages awarded by the Court of Appeal cannot stand because their award was on the basis that Williams' fault was the sole cause of the accident. I would reduce the damages from £2,400 to £1,800.

LORD TUCKER: My Lords, I agree that, for the reasons which have been stated by your Lordships, this appeal should be allowed to the extent that the damages awarded by the Court of Appeal should be reduced on the ground of the respondent's contributory negligence, and that the maxim "*ex turpi causa non oritur actio*" has no application to a case such as this.

As to the proposed apportionment, however, I can find no grounds for holding that the learned judge at the trial, who provisionally fixed the proportions at fifty per cent., did not give proper consideration to all relevant matters both as regards causation and blameworthiness, and, consequently, having regard to what has so often been said in this House as to the proper functions of appellate courts in such matters, I would have thought that, unless your Lordships' conclusions with regard to liability were based on findings of fact different from those of the trial judge, the proper course would have been to have accepted his apportionment, notwithstanding that your Lordships might consider different proportions more appropriate. I would add that I can see no reason why a provisional assessment or apportionment of damages should be treated differently from one which forms part of an actual judgment.

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree, and have little to add. It seems to me perfectly clear that the board was vicariously liable at common law for their shot-firer's negligence, and that there is no substance in the contention that the shot-firer, in firing the shot as he did, was acting outside the scope of his employment. He was employed to fire shots,

and he fired a shot in a negligent, improper and prohibited manner: he did not do an act of a class which he was not employed to do at all.

The point which exercised some of your Lordships, and certainly myself, was the argument that the respondent and the appellants' shot-firer were parties to an agreement in breach of the regulations whereby they agreed that the respondent should couple the electric leads with the detonators, a function committed by the regulations to the sole province of the shot-firer; and that the damage which followed resulted from that illegal agreement. The appellants relied on the maxim "ex turpi causa non oritur actio" as absolving them of liability. The short answer to this contention has, no doubt, been found by those of your Lordships who pointed out the definition of "fault" in the Law Reform (Contributory Negligence) Act, 1945. But, for myself, I should have decided in the same sense in the absence of any such definition. The vast majority of cases in which the maxim has been applied have been cases where, there being an illegal agreement between A and B, either seeks to sue the other for its enforcement or for damages for its breach. That, of course, is not this case. Cases where an action in tort has been defeated by the maxim are exceedingly rare. Possibly a party to an illegal prize fight who is damaged in the conflict cannot sue for assault: *Boulter v. Clark* (9). But it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The act must, I should have supposed, at least be a step in the execution of the common illegal purpose. If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary. There is, however, a surprising dearth of authority on this point. Certain cases were cited to us decided under the Factory Acts, but none of them was, to my mind, really in point.

My Lords, I agree that the order of the Court of Appeal should be varied in so far as it awards to the respondent the whole of his damages. I would, if the matter had been before me at first instance, have awarded him two-thirds, as the shot-firer was, to my mind, about twice as negligent as the respondent. But I differ from the majority of your Lordships inasmuch as I do not think the disparity between fifty per cent. (the judge's figure) and sixty-six per cent. is sufficient to justify the disturbance of his percentage on the ground that it is wholly inordinate.

Appeal allowed to extent that damages reduced.

Solicitors: *D. H. Haslam*, agent for *W. H. F. Barklam*, Cardiff (for the appellants); *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

WOODWARD v. DUDLEY (EARL).

[CHANCERY DIVISION (Danckwerts, J.), February 10, 1954.]

*Landlord and Tenant—Notice to quit—Validity—Reference to part only of demised property.**Agriculture—Agricultural holding—Notice to quit—Need of Minister's consent—Joint tenants—Death of survivor only within three months before date of notice to quit—Agricultural Holdings Act, 1948 (c. 63), s. 24 (1), s. 24 (2) (g).*

A

By an agreement dated Sept. 24, 1928, a landlord let agricultural property, described in two parcels called respectively Jeffries Farm and Langley Lodge Farm, to A and B as joint tenants for one year and then from year to year. In 1937 C became a partner in the business of A and B which was conducted on the demised property. In 1948 the landlord sold the property to D subject to the lease, and on May 13, 1948, A died. On Dec. 17, 1952, B died and probate of his will was granted to C, his sole executor, who remained in possession of the demised property. On Feb. 5, 1953, D's agents, on behalf of D, gave C a notice to quit which required delivery up of "land known as Jeffries Farm" and contained no reference to Langley Lodge Farm. The notice concluded: "The reason for giving this notice to quit is as follows: The said [A] died some years ago and the said [B] died on Dec. 17, 1952." On Feb. 12, 1953, the tenant gave a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), and the consent of the Minister to the notice to quit was not obtained. On the question of the validity of the notice to quit,

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HELD: as the notice referred to part only of the demised property it was bad; and, furthermore, the operation of s. 24 (1) of the Act of 1948 was not excluded by s. 24 (2) (g) because, for para. (g) to apply, it was necessary that both A and B should have died within three months before the date of the giving of the notice to quit, and, as that had not occurred, the notice to quit could have no operation without the Minister's consent.

Re Bebington's Tenancy ([1921] 1 Ch. 559), followed.

E

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 46.

Cases referred to:

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- (1) *Re Bebington's Tenancy*, [1921] 1 Ch. 559; 90 L.J.Ch. 269; 124 L.T. 661; 31 Digest, Replacement, 500, 6256.
- (2) *Doe d. Rodd v. Archer*, (1811), 14 East, 245; 104 E.R. 595; 31 Digest, Replacement, 498, 6233.
- (3) *Doe d. Cox v. Roe*, (1802), 4 Esp. 185; 170 E.R. 685; 31 Digest, Replacement, 495, 6207.
- (4) *Doe d. Armstrong v. Wilkinson*, (1840), 12 Ad. & El. 743; 5 J.P. 45; 113 E.R. 995; 31 Digest, Replacement, 495, 6210.
- (5) *Hankey v. Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193; 31 Digest, Replacement, 599, 7170.
- (6) *Fairclough (T. M.) & Sons, Ltd. v. Berliner*, [1931] 1 Ch. 60; 100 L.J.Ch. 29; 144 L.T. 175; 31 Digest, Replacement, 545, 6666.
- (7) *McIntyre v. Hardcastle*, [1948] 1 All E.R. 696; [1948] 2 K.B. 82; [1948] L.J.R. 1249; 31 Digest, Replacement, 706, 7950.
- (8) *Wetherall & Co., Ltd. v. Stone*, [1950] 2 All E.R. 1209; 31 Digest, Replacement, 633, 7416.
- (9) *Houson v. Buxton*, (1928), 97 L.J.K.B. 749; 139 L.T. 504; Digest Supp.

ADJOURNED SUMMONS for the determination of the question whether or not on the true construction thereof and of a memorandum of agreement dated Sept. 24, 1928, and having regard to the provisions of the Agricultural Holdings Act, 1948, a notice to quit in writing dated Feb. 5, 1953, served on behalf of the defendant, as landlord, on the plaintiff, as tenant, was valid and effective to

determine a tenancy now vested in the plaintiff and created by the said memorandum of agreement.

By a memorandum of agreement dated Sept. 24, 1928, and made between Edward Henry Loyd (the predecessor in title of the defendant, the present landlord) and Charles Woodward and Ernest Charles Woodward (grandfather and father respectively of the plaintiff) the landlord agreed to let and the tenants agreed to take property described as

“the messuage buildings and enclosures of land known as Jeffries Farm situate in the parishes of Abbots Langley and Kings Langley in the county of Hertford containing eight-seven acres two roods thirteen perches (little more or less) more particularly described in sched. I hereto and the enclosures of land formerly part of the farm known as Langley Lodge Farm situate in the said parish of Kings Langley containing forty-five acres (little more or less) more particularly described in sched. II hereto”

with certain reservations not material.

Schedule I referred to Jeffries Farm, Kings Langley, and contained a list of fifteen fields aggregating eighty-seven acres, two roods, thirteen perches. Schedule II referred to “part of Langley Lodge Farm” and contained a list of two fields aggregating forty-five acres. The tenancy was for one year from Sept. 29, 1928, and thence from year to year determinable at the end of any year by twelve calendar months’ previous notice in writing at a yearly rent of £135, payable half-yearly. The terms of the memorandum of agreement showed that the tenants, Charles Woodward and Ernest Charles Woodward, were joint tenants of the demised property.

In 1937 the plaintiff became a partner in the business of farming the demised property. In 1948 the defendant, the Earl of Dudley, became landlord, by purchase, of the demised property. On May 13, 1948, Ernest Charles Woodward died, and on Dec. 17, 1952, Charles Woodward died. On June 9, 1953, probate of the will of Charles Woodward was granted to the plaintiff as sole executor.

On Feb. 5, 1953, notice to quit was served by the solicitors for the landlord in these terms:

“Notice to Quit. As solicitors for the Right Honourable William Humble Eric Earl of Dudley your landlord we hereby give you notice to quit and deliver up to your landlord on Sept. 29, 1954, or at the expiration of twelve months from the end of the now current year of your tenancy possession of the messuage buildings and enclosures of land known as Jeffries Farm situate in the parishes of Abbots Langley and Kings Langley in the county of Hertford containing eighty-seven acres two roods thirteen perches or thereabouts and more particularly described in the agreement dated Sept. 24, 1928, and made between Edward Henry Loyd of the one part and Charles Woodward and Ernest Charles Woodward of the other part and which said premises are held from year to year. The reason for giving this notice to quit is as follows: The said Ernest Charles Woodward died some years ago and the said Charles Woodward died on Dec. 17, 1952.”

It was signed by the solicitors and was directed to

“The personal representatives of Charles Woodward deceased (the surviving tenant under the above mentioned agreement), the occupiers of Jeffries Farm, the President of the Probate, Divorce and Admiralty Division, High Court of Justice, and to all others whom it may concern.”

The managing clerk in charge of the matter had intended to serve a notice to quit relating to the whole of the land comprised in the agreement dated Sept. 24, 1928. He drafted a notice and gave it to a typist, directing her to copy the parcels from the agreement into the notice. She failed to do this, and, owing to lack of checking, the error was not discovered until the notice had been sent.

On Feb. 12, 1953, the tenant served a counter-notice in writing on the agents of

the landlord pursuant to the Agricultural Holdings Act, 1948, s. 24 (1). The tenant contended that the notice to quit was of no effect in that it only related to part of the lands comprised in the tenancy and that, therefore, s. 24 (2) (g) of the Act of 1948 did not apply.

A. C. Goodall for the tenant.

Teague for the landlord.

A DANCKWERTS, J., stated the facts and continued: On its face, the notice to quit does not refer to the whole of the land comprised in the agreement of Sept. 24, 1928. In fact, if it were desired to give notice as regards part only of the land comprised in the agreement, the part relating to Jeffries Farm, it is difficult to think of a more effective way to call attention to the fact that it was only relating to part of the land.

B The tenant says that, as the notice refers only to part of the land included in the tenancy, the notice to quit is bad on well-established principles. It is plain from *Re Bebington's Tenancy* (1), and other cases, that a notice to quit which refers only to part of the land included in the tenancy is invalid and ineffective. Counsel for the landlord argues on the authority of *Doe d. Rodd v. Archer* (2), that, as it is obvious that the landlord could not have been expected to want to give a notice which was bad, the notice must be construed in such a way as to give it an effect in law, and, therefore, it must be treated as a notice referring to the whole of the land included in the agreement of tenancy. It is further contended that Jeffries Farm has for long been used as a method of describing not only the land originally known as Jeffries Farm, but the part of the farm formerly called Langley Lodge Farm which was included in the tenancy. D In *Doe d. Rodd v. Archer* (2) the notice referred to the mansion house on the property and added the word "etc." In those circumstances it was perfectly possible for the court to reach the conclusion which it did. Counsel for the landlord also referred to *Doe d. Cox v. Roe* (3) and *Doe d. Armstrong v. Wilkinson* (4), but it seems to me those cases have very little to do with the present case because they refer to property which was included in the tenancy, and, though E there was a mistake in the name of the property, it was obvious that the notice was referring to property which was held by the tenant from the landlord, the tenant in fact in those cases holding no other property. It seems to me, therefore, that they do not assist in the present case.

In *Hankey v. Clavering* (5) it was pointed out by LORD GREENE, M.R. ([1942] 2 All E.R. 314), that the matter of giving a notice to quit has always been treated F as one of technicality, and a party cannot get out of his difficulties merely by saying that the mistake made was obviously an error, and so the notice which is defective should be treated as if it were not defective. In that case, the date Dec. 21 was referred to, it being a mistake for Dec. 25, the quarter day, when the tenancy could end. None the less, although it was purely G inadvertent, the court refused to cure the mistake in the notice to quit and held that the notice was ineffective. In the present case, it is plain that the notice is bad, because in the most definite terms possible it refers to part only of the property which was included in the relevant tenancy.

That is sufficient to dispose of the case, but I will also deal with another point which seems to me to be in the landlord's way, and that arises on the Agricultural Holdings Act, 1948, s. 24. That section by sub-s. (1) provides: H

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

The effect of that sub-section is that the landlord cannot get rid of his tenant by notice to quit unless he obtains the concurrence of the Minister. However, sub-s. (2) excepts certain matters from the effect of sub-s. (1):

"The foregoing sub-section shall not apply where . . . (g) the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid."

The reference to the deaths of Ernest Charles Woodward and Charles Woodward inserted in the notice to quit was an attempt to bring the matter within the terms of para. (g). It seems to me, however, quite clear that the terms of the paragraph do not apply in the circumstances of this case. Under the Interpretation Act, 1889, s. 1, words in a statute in the singular are capable of being treated as the plural. There were two tenants in this case, Ernest Charles Woodward and Charles Woodward. The "tenant" with whom the contract of tenancy was made was plainly the two of them, Ernest Charles Woodward and Charles Woodward. They did not both die within three months before the date of giving the notice to quit because Ernest Charles Woodward, the father of the plaintiff, died in 1948. Therefore, para. (g) plainly does not apply to this case. It is possible that the legislature never thought about the matter and would have dealt with it differently if it had been brought to its notice, but I have to consider the words which are contained in the statute. It seems to me that no other construction of those words is possible than that which I have mentioned.

It is argued by counsel for the landlord that that construction of para. (g) does not defeat the landlord in the case of a joint tenancy because joint tenants hold per my et per tout, and their tenancy is regarded as one and the whole. It is true that there is only one tenancy, but still it does not alter the fact that the tenants with whom the contract was made are two persons and not simply one. There is nothing in the terms of the paragraph to bring in the survivor of more than one tenant. It is quite plain that both, or all, tenants, if they were more than one, must have died within three months before the date of the giving of the notice to quit in order that the terms of para. (g) may be applicable. This is supported by a number of cases in which the court has had to construe the reference in statutes to one person where several persons are involved, and it has been decided that where there are several persons involved the singular includes the plural. For instance, see *T. M. Fairclough & Sons, Ltd. v. Berliner* (6), *McIntyre v. Hardcastle* (7) and *Wetherall & Co., Ltd. v. Stone* (8).

In *Howson v. Buxton* (9) a liberal construction was given in the circumstances of that case, or was suggested at any rate as applicable, by SCRUTTON, L.J., but the other members of the court decided the case on somewhat different grounds. That case is very different from the present one. It does not seem to me that it is possible, however liberal one may be in construing para. (g), to give any meaning to it other than that which the words contain and the one which I have already stated.

In the absence, therefore, of the consent of the Minister, the landlord is in difficulties also on this point on the words of the statute. Accordingly, the application by the tenant is successful.

Declaration accordingly.

Solicitors: *Geo. Tilling & Knight*, agents for *Norman E. Kelly*, Watford, Herts (for the tenant); *Taylor & Humbert* (for the landlord).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

V. M. SALGAONCAR E. IRMAOS OF VASCO DE GAMA v.
GOULANDRIS BROTHERS, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), February 8, 12, 1954.]

Shipping—Charterparty—Lay days—Loading—Calculation of lay days.

A follows: "The cargo to be shipped at the rate of 600 tons per day when vessel is in a berth and 350 tons whilst in stream." The vessel, having arrived at the port of loading, spent twelve days in the stream laying idle. She then spent three days loading in the stream after which she moved to a berth where she completed loading. On a dispute as to the correct method of calculating the total lay time permitted by the charterparty for loading, the owners
B contended that the quantity of cargo loaded at each place should be taken and divided by the rate appropriate to that place. The charterers contended that they were entitled first to ascertain the times the vessel was in the stream and in berth respectively and then to multiply those times by the quantities the vessel was obliged to load as a minimum in accordance with cl. 5.

C HELD: clause 5 set a standard by reference to which the lay days could be calculated and was to be construed as if it read: "The cargo to be shipped at the rate of 600 tons when vessel is loading in a berth and 350 tons whilst loading in stream", and, therefore, the owners' method of calculating the lay time allowed was correct.

D AS TO TIME FOR LOADING, see HALSBURY, Hailsham Edn., Vol. 30, pp. 337, 341, paras. 519, 522; and FOR CASES, see DIGEST, Vol. 41, pp. 452, 453, Nos. 2836-2840.

Cases referred to:

- E (1) *Compania de Navigacion Zita, S.A. v. Louis Dreyfus et Compagnie*, [1953] 2 All E.R. 1359.
(2) *Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.*, [1916] 2 A.C. 527; 86 L.J.P.C. 1; 115 L.T. 415; 41 Digest 310, 1712.

SPECIAL CASE stated by an umpire.

F By a charterparty dated Nov. 27, 1952, the claimants chartered the steamship Granford from the respondents, the owners, to load a cargo of iron ore of 9,200 tons ten per cent. more or less at captain's option at Mormugao, Portuguese India, for discharge at Antwerp or Rotterdam. Clause 5 of the charterparty provided:

"The cargo to be shipped at the rate of 600 tons per day when vessel is in a berth and 350 tons whilst in stream".

G The umpire found the following facts in his award. Notice of readiness at Mormugao was given at 4 p.m. on Jan. 30, 1953, and was effective at 8 a.m. on Feb. 2, 1953, whereafter the charterers were allowed a further forty-eight hours in pursuance of cl. 2 of the charterparty. The vessel completed loading at 10 a.m. on Mar. 9, 1953, having loaded 9,600 tons of iron ore, on which freight was calculated at 62s. per ton in accordance with cl. 3 of the charterparty.

H A dispute arose between the parties as to the method of calculating the lay days at the loading port of Mormugao. The charterers contended that they were entitled first to ascertain the times the vessel was in the stream and in berth respectively, and then to multiply those times by the quantities the vessel was obliged to load as a minimum in accordance with cl. 5 of the charterparty. The owners contended that one should take the quantity loaded in berth and in the stream respectively and divide it by the rate appropriate to that place. The question for the decision of the court was whether, on the facts and a true construction of the charterparty, the claimants were entitled to their claim for

dispatch, or whether the owners were entitled to their claim for demurrage. The umpire found for the owners, and awarded that, subject to the approval of the court, the charterers' claim be dismissed and that they pay £674 11s. 8d. in settlement of the owners' claim for demurrage.

Ashton Roskill, Q.C., and *Desmond Neligan* for the charterers.

Sir Robert Aske, Q.C., and *B. B. W. Goodden* for the owners.

Cur. adv. vult. A

Feb. 12. **DEVLIN, J.**, read the following judgment. This is one of those cases like the recent case of *Compania de Navigacion Zita, S.A. v. Louis Dreyfus et Compagnie* (1), in which the parties have introduced a refinement into the ordinary method of calculating lay days. It is now usual, instead of providing for a fixed number of days, to provide for loading at a daily rate. If the exact quantity of cargo to be loaded was known in advance, the number of lay days could be specified exactly in advance by dividing the quantity by the daily rate. But the exact quantity is not usually known; in the present case it may vary between 8,280 tons and 10,120 tons, and, in fact, turned out to be 9,600 tons. It is, therefore, fairer to leave the lay days to be fixed retrospectively instead of trying to estimate the correct number in advance. But it is well settled that the lay days, when they are ascertained in this way, have just the same effect as they would have if they had been inserted in the clause from the beginning. The refinement in this case is that, instead of there being one daily rate, there are two. A daily rate is, of course, an estimate based on what the ship ought with reasonable diligence to be able to do, and must depend to some extent on the facilities afforded at the port of loading. It appears that in Mormugao, the port of loading, the vessel may not get a berth and may have to do the whole or part of her loading in the stream—I suppose from lighters. That will take much longer than in berth; so the charterparty, by a special typewritten addition to cl. 5, provides for two rates—600 tons a day in berth and 350 tons a day in stream.

The owners submit that this presents no difficulty in the calculation of the lay days. When there is one loading place the lay days are fixed by ascertaining the total quantity loaded and dividing it by the daily rate. Where there are two loading places the method is just the same, except that you calculate two figures instead of one and add them together: instead of taking the whole quantity loaded, you take the quantity loaded at each place and divide it by the rate appropriate to that place. The same method would be followed, the owners say, if, for example, the charterparty provided for different loading rates for different cargoes.

The charterers say that you must calculate the lay days day by day as you go along. For each day the ship is in the stream you debit her, so to speak, with 350 tons; then, if she moves to a berth, you debit her for each day with 600 tons, and when the total debit reaches 9,600 tons, the quantity loaded, she has exhausted the lay days.

The reason why the two calculations produce a big difference in this case is that, out of the fifteen working days which the vessel spent in the stream, she was loading only on the last three days; for the first twelve days, or thereabouts, she lay idle. To illustrate the difference simply, let me assume that, after twelve days in the stream doing nothing, the ship had moved to a berth and loaded her whole cargo there. On the owner's calculation the lay days would be sixteen, i.e., 9,600 divided by 600. That would be the charterers' calculation too, if the waiting days in the stream were ignored. But if those days are counted the lay days are twenty-one, arrived at as follows:

12 days in stream at 350	...	...	...	4,200:
9 days in berth at 600	...	...	...	5,400:
21 days	...	...	...	9,600.

The charterers submit that you must count the waiting days because that is what cl. 5 requires:

“ The cargo to be shipped at the rate of 600 tons when vessel is in a berth and 350 tons whilst in stream.”

A The fallacy in the owners' calculation, they submit, is that it counts only the days on which loading takes place and treats the clause as if it read: “ The cargo to be loaded (shipped) at the rate of 600 tons when vessel is *loading* in a berth and 350 tons whilst *loading* in stream ”. In my judgment, the clause is to be construed as if it contained the words I have put in italics, because I think that the sense and object of the charterparty as a whole plainly so requires. When the ship is in the stream, she is there either because for some reason or other she cannot load at all, or because she is using it as a loading place instead of a berth. If she is in the stream waiting to load, it is the intention of the charterparty that, as is usual, she should be at the charterers' expense, that is, that the lay days should run during the waiting period. Clause 6 provides:

“ Time for loading to count from 8 a.m. after the ship is reported and ready, and in free pratique (whether in berth or not) . . . ”

C The reduced loading rate is, I think, intended to apply only when the stream is actually being used as a loading place and is not intended to bring indirectly relief to the charterers in respect of the waiting period. The typewritten addition to cl. 5 must be construed as part of a clause dealing with the calculation of the lay days and the computation of loading time; so construed, it is, I think, plain that the words “ whilst in stream ” do not refer to the mere presence of the vessel in the stream, but mean while she is loading in the stream. The scheme of cl. 5 and cl. 6 is that the lay days are to be calculated on the assumption that loading will begin as soon as the vessel is reported and ready and will proceed at the rate of 600 tons if in berth and 350 tons if in stream.

E If this construction is given to cl. 5, the difference in result between the two calculations must be considerably narrowed, if not eliminated. If the charterers' calculation did not begin until the ship actually started loading, I am not sure whether there would be any difference in the results produced by the two methods. If there is, it is because the charterers' method is affected by the actual movements of the ship, for example, whether she loads first in berth or in stream. In my judgment, the actual movements of the ship are irrelevant to this calculation. Clause 5 is not really prescribing what the ship has actually got to do. It is setting a standard by reference to which the lay days can be calculated. The lay days are not intended to be made more or less according to the directions which may be given to the ship. The only thing in this type of clause that depends on actuality is the exact quantity of the cargo loaded in each place; if that were known in advance, the exact period for loading could be specified in the charterparty. I think that follows from the observations of LORD SUMNER in *Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.* (2) ([1916] 2 A.C. 535): and as I considered the same sort of point recently in *Compania de Navigacion Zita, S.A. v. Louis Dreyfus et Compagnie* (1) ([1953] 2 All E.R. 1363) I need not elaborate it here.

H The point is, however, well illustrated by one aspect of this case. If the loading time is greater than the lay days, the charterers' method, by which the ship, as it were, consumes the lay days until they are eaten up and then goes on demurrage, can, whether it be right or wrong, be made to work. But suppose the loading time is less than the lay days: suppose the ship finishes loading in stream with 700 tons to her credit and then moves into a berth where she keeps pace exactly with the prescribed rate. How is the time saved to be assessed? Before the ship moved into berth she had saved two days. But if she had not saved them she would have used only an additional one day and four hours to complete her loading in berth. Counsel for the charterers argues that the saving should be assessed at the rate appropriate to the place where the ship ends up.

It is true that if the loading of 700 tons had not been accelerated the ship would have been detained for only one day and four hours *if* she remained in her berth; but she might have been moved back into the stream again. Although the umpire was wrong in thinking that this point arose directly on the figures in this case, I think he was right in regarding it as a difficulty in the way of the charterers' argument.

In my judgment, the owners' method of calculating the lay days, which, as counsel for the owners submits, is the simple and obvious way of doing it, cannot be successfully attacked.

Solicitors: *Sinclair, Roche & Temperley* (for the charterers); *Stokes & Mitcalfe* (for the owners).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CALVERT AND ANOTHER v. PICK AND ANOTHER.

[QUEEN'S BENCH DIVISION (Gerrard, J.), February 2, 1954.]

Tort—Joint tortfeasors—Contribution—Jurisdiction to apportion blame without special application—Plaintiffs' claims against both defendants settled in full by second defendant before trial—One plaintiff's name left on record—No evidence offered by plaintiff at trial—Jurisdiction of court to try issue between defendants as to contribution.

In an action arising out of a motor car accident, the plaintiffs, a husband and wife, sued two defendants for damages for negligence. Before the trial the parties agreed a sum which would satisfy the plaintiffs' claims in the action, and the second defendant paid this sum, in full, to the plaintiffs together with an agreed sum for costs. The name of one plaintiff was left on the record, as the defendants were still at issue on the question of the ratio of contribution and wished to obtain the decision of the court on the matter. When the action came on for trial, counsel for the plaintiff said that the action had been settled and offered no evidence. Counsel for each of the defendants then asked for the question of contribution to be determined.

Held: as the plaintiffs had been paid in full their damages and costs, the action was in reality dead notwithstanding that the name of one plaintiff had been kept on the record for the convenience of the defendants, and, therefore, the court had no jurisdiction to determine the issue between the defendants.

Croston v. Vaughan ([1937] 4 All E.R. 249), distinguished.

AS TO CONTRIBUTION BETWEEN TORTFEASORS, see HALSBURY, Hailsham Edn., Vol. 32, p. 190, para. 284.

Case referred to:

- (1) *Croston v. Vaughan*, [1937] 4 All E.R. 249; [1938] 1 K.B. 540; 107 L.J.K.B. 182; 158 L.T. 221; 102 J.P. 11; Digest Supp.

ACTION for damages for negligence.

The plaintiffs, a husband and wife, were injured in a motor car accident and sued Kenneth Pick and Thomas Sanders (the first and second defendants, respectively) for damages for negligence. Some months before the action came on for trial the parties agreed a sum which would satisfy the just claims of the plaintiffs against one or other or both of the defendants, and the second defendant paid this sum to the plaintiffs in full, together with an agreed sum for costs. As the defendants were still at issue as to the proportions which each should contribute to these sums, they wished to have the decision of the court on the matter, and the name of one plaintiff was left on the record merely with the object of keeping the proceedings alive.

At the trial counsel for the remaining plaintiff said that the matter had been settled between the plaintiffs and the second defendant and that he had no

instructions to offer any evidence. Counsel for each of the defendants thereupon contended that, as the name of one of the plaintiffs had been kept on the record, the court could and should decide the issue between the defendants, notwithstanding that the plaintiffs had been paid in full.

M. Gore for the plaintiff.

M. J. Morris for the first defendant.

A *H. H. V. Forbes* for the second defendant.

GERRARD, J., stated the facts and continued: The proceedings opened today by counsel for the plaintiff saying to me:

“I have no instructions in this matter at all. The action has been settled as between the plaintiffs and the second defendant, and I have no instructions to offer any evidence”.

B After that, the contest really began. Counsel for each of the defendants sought to persuade me to determine the respective proportions which the defendants ought to pay of the moneys which the plaintiffs have received on the settlement. They contended that, although the claims had been disposed of between the plaintiffs and the defendants, by keeping one of the plaintiffs on the record the defendants could invite the court to, and the court should, determine the dispute between them. I take a different view. It seems to me that the issue between the parties who are now on the record as defendants might, according to circumstances, have been dealt with in a number of ways: viz. (i) in a separate action; (ii) if only one defendant had been sued, by the machinery of a third-party notice; (iii) by cross-contribution notices in this action; or (iv) if this action had remained a real action, by an application in accordance with the decision in *Croston v. Vaughan* (1). If the proceedings to settle the ratio of contribution between the defendants had been in a separate action, no difficulty could have arisen. If the proceedings had been brought as the result of one of them being the defendant at the suit of the plaintiff and issuing a third-party notice against the other, again no difficulty could have arisen because R.S.C., Ord. 16A, r. 9 (2), is, I think, designed to deal with the situation where there are a plaintiff, a defendant and a third party, and the defendant and plaintiff come to an accommodation. I think that r. 9 (2) is specifically inserted in Ord. 16A to enable the court to lop off the action from the third-party proceedings and to allow the third-party proceedings to go on in their own right as fully constituted proceedings, although, in their ordinary nature, they are dependent on an original action. But that state of affairs does not arise before me. There is no rule corresponding to R.S.C., Ord. 16A, r. 9 (2), which I can use for the purpose of applying *Croston v. Vaughan* (1). There are no cross-contribution notices in this case under R.S.C., Ord. 16A, r. 12, and (as naturally follows) there are no directions. It is purely a question whether *Croston v. Vaughan* (1) can be invoked. I do not think that it can.

G In *Croston v. Vaughan* (1) SCOTT, L.J., said ([1937] 4 All E.R. 261, 262):

“I agree with the judgment delivered by my colleagues on this point, holding that [the judge] had jurisdiction, and that it was the intention of s. 6 (2) of [the Law Reform (Married Women and Tortfeasors) Act, 1935] that the trial judge should deal with the matter, and that he had, as I say, power to dispense with any formal application. I am inclined to think that it was open to the judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. Reading that section as a whole, I think it was the intention of Parliament that the judge who had heard a case of primary liability at the instance of a plaintiff, should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment, not merely of the damage, but also of the blame.”

H That is a general statement of the intention and policy of s. 6 (2) of the Act of

1935 to be derived from a consideration of the section. So far as I am concerned, I do not say that I do not propose to invoke the jurisdiction referred to in *Croston v. Vaughan* (1) merely because I have not heard the question of primary liability at the instance of the plaintiffs. I think that might be taking too narrow a view. But I act on this view of the matter. The action remains in the list merely because a three-cornered arrangement has been made to keep one plaintiff in—a plaintiff whose damages and costs have been paid—in order that the court should try an issue between the two defendants. It seems to me that this action has not followed the ordinary and proper course. Although I would like to oblige the parties and deal with the issue between the two defendants, I do not think that the court ought to be used in this way. I think that the ordinary procedures should be followed. I do not mean to suggest by that that there has been any abuse of the process of the court. The whole matter has been arranged in good faith, but the plaintiff's action is dead in reality. The plaintiff has been paid out under a private arrangement between the two defendants, and he remains merely as a sort of lay figure to enable the defendants to say that the court must now settle the dispute between them, where, for their own convenience, instead of using methods which would have avoided this difficulty, they have followed a method which has created a completely artificial situation. In those circumstances, therefore, I do not propose to try the issue between the two defendants.

Solicitors: *Norman Chinn, Son & Woolley* (for the plaintiff); *Wm. Easton & Sons* (for the first defendant); *Neil Maclean & Co.* (for the second defendant).
[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

SPRINGETT v. HAROLD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 15, 1953].

Public Health—Nuisance—Discomfort to tenant—Walls and ceilings of rooms and landing stained, dirty, and flaking, and in need of decorative repair—Public Health (London) Act, 1936 (c. 50), s. 82 (1) (a)—Public Health Act, 1936 (c. 49), s. 92 (1) (a).

Mere want of internal decorative repair of a dwelling-house does not constitute a nuisance under the Public Health (London) Act, 1936, s. 82 (1) (a), (or, semble, the Public Health Act, 1936, s. 92 (1) (a)), even though it causes discomfort and inconvenience to the tenant.

Betts v. Penge Urban District Council ([1942] 2 All E.R. 61), distinguished.

EDITORIAL NOTE. The provision in the Public Health Act, 1936, which corresponds to s. 82 (1) (a) of the Public Health (London) Act, 1936, is s. 92 (1) (a).

FOR THE PUBLIC HEALTH (LONDON) ACT, 1936, s. 82, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 935.

Case referred to:

(1) *Betts v. Penge Urban District Council*, [1942] 2 All E.R. 61; [1942] 2 K.B. 154; 111 L.J.K.B. 565; 167 L.T. 205; 106 J.P. 203; 2nd Digest Supp.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Tower Bridge Magistrate's Court on May 13, 1953, the appellant, John Louis Springett, a sanitary inspector, preferred a complaint against the respondent, Harold F. Harold, under the Public Health (London) Act, 1936, s. 82, for that he had failed to abate a nuisance at 12, Culling Road, Bermondsey, which was caused by his act, default or sufferance, and of which he had been given notice.

A At the hearing the following facts were found. The appellant was a sanitary inspector to the metropolitan borough of Bermondsey. The respondent was owner of premises known as 12, Culling Road, Bermondsey, which premises were let by him to a tenant. On Mar. 19, 1953, the appellant visited the premises, and on Mar. 20, 1953, notice was served on the respondent, on behalf of the borough of Bermondsey, wherein it was alleged that the premises were in such a state as to be a nuisance by reason of :—First floor rooms, the walls and ceilings were stained and peeling; first floor landing, the walls were dirty and peeling; first floor back addition rooms, the walls and ceilings were stained and peeling. By the notice the respondent was required to abate the alleged nuisance, and on May 15, 1953, a statutory notice to the same effect was served on him. Prior to the hearing of the complaint no work had been done in pursuance of the notices, except that the first floor back addition rooms had been re-decorated. The walls and ceilings of the first floor rooms and the first floor landing were stained and dirty and flaking, and in need of decorative repair. They were not damp or verminous or injurious to health, and the premises were fit for human habitation.

B
C It was contended on behalf of the appellant that the first floor rooms and the first floor landing were in such a condition as to cause discomfort and inconvenience to the tenant (who was not called to give evidence), and that, consequently, there existed in the premises a nuisance within the meaning of s. 82 (1) (a) of the Public Health (London) Act, 1936. The respondent denied the existence of a nuisance and said that he was prepared to supply the tenant with materials with which to re-decorate the first floor rooms and first floor landing.

D The magistrate was of opinion that the mere want of internal decorative repair did not constitute a nuisance within the meaning of the Public Health (London) Act, 1936, s. 82 (1) (a), even if it did cause discomfort and inconvenience to the tenant, and he dismissed the complaint. The appellant appealed.

Leonard Caplan for the appellant.

The respondent in person.

E LORD GODDARD, C.J.: The facts in *Betts v. Penge Urban District Council* (1) were entirely different. We think that the magistrate was perfectly right in the present case. The appeal is dismissed, and I do not propose to deliver any judgment because I think it is too clear for argument.

SELLERS, J.: I agree.

F HAVERS, J.: I agree.

Appeal dismissed.

Solicitors: *F. W. J. Baldwin* (for the appellant).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

YORKSHIRE COPPER WORKS, LTD. v. REGISTRAR OF TRADE MARKS.

[HOUSE OF LORDS (Lord Simonds, L.C., Lord Oaksey, Lord Morton of Henryton, Lord Asquith of Bishopstone and Lord Cohen), February 1, 2, 4, 25, 1954.]

Trade Mark—Application to register—Distinctive word—Geographical name—
“Adapted to distinguish”—*Trade Marks Act, 1938 (c. 22), s. 9 (1) (e), s. 9 (3).*

By the Trade Marks Act, 1938, s. 9: “(1) In order for a trade mark . . . to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars: . . . (d) a word . . . not being according to its ordinary signification a geographical name or a surname; (e) any other distinctive mark, but a name . . . or word . . . other than such as fall within the descriptions in the foregoing paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness . . . (3) In determining whether a trade mark is adapted to distinguish as aforesaid the tribunal may have regard to the extent to which—(a) the trade mark is inherently adapted to distinguish as aforesaid; and (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.”

The appellants, a firm in Leeds, applied for registration of a trade mark consisting of “Yorkshire” in respect of solid drawn tubes and capillary fittings, all being made of copper or non-ferrous copper alloys.

HELD: in considering whether a trade mark was adapted to distinguish goods with which the proprietor of the mark was connected in the course of trade from goods where there was no such connection, the two factors laid down in s. 9 (3) of the Act of 1938 must be taken into account; although in the present appeal there was distinctiveness “in fact”, yet the word “Yorkshire” could not be said to be “inherently” adapted to distinguish the appellants’ goods from those of other manufacturers in the same county; and, therefore, the proposed trade mark did not come within the meaning of s. 9 (1) (e), and the appeal must be dismissed.

Re Liverpool Electric Cable Co., Ltd.’s Applications (1928) (46 R.P.C. 99), approved.

AS TO GEOGRAPHICAL NAMES AS TRADE MARKS, see HALSBURY, Hailsham Edn., Vol. 32, p. 543, para. 851; and FOR CASES, see DIGEST, Vol. 43, pp. 146, 147, Nos. 72-78.

Cases referred to:

- (1) *Trade Marks Registrar v. Du Cros (W. & G.), Ltd.*, [1913] A.C. 624; 83 L.J.Ch. 1; 109 L.T. 687; *sub nom. Re Du Cros’ Application, Registrar of Trade Marks v. Du Cros*, 30 R.P.C. 660; 43 Digest 155, 138.
- (2) *Re Clark, Son & Morland, Ltd.’s Trade Mark*, [1938] 2 All E.R. 377; *sub nom. Bailly & Co., Ltd. v. Clark, Son & Morland*, [1938] A.C. 557; 107 L.J.Ch. 193; 159 L.T. 361; 55 R.P.C. 253; Digest Supp.
- (3) *Re Liverpool Electric Cable Co., Ltd.’s Applications*, (1928), 46 R.P.C. 99; Digest Supp.
- (4) *Re Crosfield (J.) & Sons, Ltd.*, [1910] 1 Ch. 130; 79 L.J.Ch. 211; 101 L.T. 587; 26 R.P.C. 837; 43 Digest 153, 114.

APPEAL by the Yorkshire Copper Works, Ltd., against an order of the Court of Appeal (SIR RAYMOND EVERSHERD, M.R., DENNING and ROMER, L.J.J.), dated Dec. 2, 1952, affirming an order of LLOYD-JACOB, J., dated July 24, 1952, affirming a decision of the Assistant Comptroller (acting for the Registrar of Trade Marks), refusing an application to register a trade mark.

Shelley, Q.C., and *J. B. Shelley* for the appellants.

The Attorney-General (Sir Lionel Heald, Q.C.) and *P. J. S. Beran* for the respondent.

The House took time for consideration.

Feb. 25. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, in my opinion this appeal should be dismissed, and, as the facts are not in dispute and the law applicable to those facts appears to me to be clearly settled by the authority of this House, I shall not detain your Lordships for long.

A In March of 1950 the appellants applied for registration of a trade mark consisting of "Yorkshire", represented in special type and between inverted commas, for goods which were eventually specified as

"Solid drawn tubes and capillary fittings, all being made of copper or non-ferrous copper alloys".

B Nothing turns on the special type or the inverted commas. The appellants supported their application by cogent evidence that, in fact, the mark "Yorkshire" was distinctive of their goods. I am content to accept the statement, reiterated by their learned counsel, that the mark had acquired one hundred per cent. distinctiveness. In spite of this fact the registrar refused registration and has been upheld in his refusal by LLOYD-JACOB, J., and the unanimous
C opinion of the Court of Appeal. It becomes necessary, then, to examine the grounds of this decision, and I will at once refer to the relevant provisions of the Trade Marks Act, 1938.

It is convenient to set out verbatim the terms of s. 9 of the Act, which provides as follows:

D "(1) In order for a trade mark (other than a certification trade mark) to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars:—(a) the name of a company, individual, or firm, represented in a special or particular manner; (b) the signature of the applicant for registration or some predecessor in his business; (c) an invented word or invented words; (d) a word or words having no
E direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness. (2) For the purposes of this section 'distinctive' means adapted, in relation to the goods in
F respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration. (3) In determining whether a trade mark
G is adapted to distinguish as aforesaid the tribunal may have regard to the extent to which—(a) the trade mark is inherently adapted to distinguish as aforesaid; and (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid."

H As we are dealing with a mark, which is beyond question a geographical name, I point out that, under s. 9 (1) (d), a word, even though it has no direct reference to the character or quality of the goods, cannot be registered if it is, according to its ordinary signification, a geographical name. A special warning appears to be given against such a name. But under s. 9 (1) (e) it may yet qualify for registration if it satisfies certain conditions, i.e., if there is such evidence of its distinctiveness as the section by the later sub-sections postulates. These I have set out and I only make this comment, that, though I can think of no other factor relevant to distinctiveness than those set out in sub-s. (3), yet,

if there is such a factor, it would be the right and duty of the registrar to take it into consideration. I do not think it necessary to discuss whether the word "may" means "must", for I cannot conceive that, as a practical matter, the registrar could ignore either of the factors (a) or (b).

The position, then, is this, that the registrar will have to consider both the inherent adaptability and the distinctiveness in fact of a geographical name before he makes his decision. Here I must express my emphatic dissent from the proposition which was strenuously urged by counsel for the appellants that distinctiveness in fact is conclusive—at any rate, if there is what he called one hundred per cent. distinctiveness. In my opinion, the decisions of this House in *Trade Marks Registrar v. W. & G. Du Cros, Ltd.* (the *W. & G.* case) (1), and *Re Clark, Son & Morland, Ltd.'s Trade Mark* (the *Glastonbury* case) (2), are fatal to this proposition and I am content to accept as accurate the clear exposition of those cases given by the learned Master of the Rolls in the present case. He took the view, which I share, that the Court of Appeal had, in *Re Liverpool Electric Cable Co., Ltd.'s Applications* (3), rightly interpreted the opinion of LORD PARKER in the *W. & G.* case (1), and that this House, in its turn, in the *Glastonbury* case (2), indorsed that interpretation. Accepting that view of the law, which, indeed, if the matter were *res integra*, I should not hesitate to commend to your Lordships, I do not see how the registrar could have come to any other conclusion. Unless, having found distinctiveness in fact, he needed to pay no regard to the other factor of inherent adaptability, he was faced by the fact that there could not well be a geographical name less "inherently adapted" than Yorkshire to distinguish the goods of the appellants. I do not propose to try to define this expression. But I would say that, paradoxically, perhaps, the more apt a word is to describe the goods of a manufacturer, the less apt it is to distinguish them, for a word that is apt to describe the goods of A, is likely to be apt to describe the similar goods of B. It is, I think, for this very reason that a geographical name is *prima facie* denied registrability. For, just as a manufacturer is not entitled to a monopoly of a laudatory or descriptive epithet, so he is not to claim for his own a territory, whether country, county or town, which may be in the future, if it is not now, the seat of manufacture of goods similar to his own. I do not ignore that some protection is given by s. 8 of the Act, but I accept the view frequently expressed in regard to this section and to s. 44 of the earlier Act [the Trade Marks Act, 1905] which it replaced—and, in particular, by LORD MAUGHAM, LORD ATKIN and LORD RUSSELL OF KILLOWEN in the *Glastonbury* case (2)—that it should not afford a guide as to whether a name should be registered or not.

I am led to suggest that it is, perhaps, easier to define "inherent adaptability" in negative than in positive terms: in other words, I would say that a geographical name can only be inherently adapted to distinguish the goods of A when you can predicate of it that it is such a name as it would never occur to B to use in respect of his similar goods. Of such names the classic examples are "Monte Rosa" for cigarettes or "Teneriffe" for boiler plates. There will probably be border-line cases, but there is, in my opinion, no doubt on which side of the border lies Yorkshire, a county not only of broad acres but of great manufacturing cities. If the *Liverpool Cable* case (3) was rightly decided, as I think it clearly was, a fortiori the registrar was right in refusing registration to "Yorkshire". And if it were a border-line case, which it is not, I think that a court to which an appeal is brought from the registrar, though, no doubt, it must exercise its own discretion in the matter, should be slow to differ from the experienced official whose constant duty it is to protect the interests of the public not only of today but of tomorrow and the day after. In uttering that warning, I only repeat what has been said more than once in this House. But, as I have already said, the present case is one in which there can be no doubt that the registrar came to a proper conclusion, and I move that the appeal be dismissed with costs.

LORD OAKSEY: My Lords, I had prepared an opinion in this case, but as I entirely agree with the opinion which has just been delivered by the Lord Chancellor, I withdraw it.

LORD MORTON OF HENRYTON: My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, LORD ASQUITH OF BISHOPSTONE. I agree with his views as to the construction and effect of s. 9 of the Trade Marks Act, 1938, and the principles which should be followed in applying that section to any trade mark whereof registration is sought.

If there had been no authority to guide me, I should have found it a difficult task to arrive at a decision by applying these principles to the facts of the present case, but, in my view, the present case cannot be distinguished on its facts or on any other ground from the decision of the Court of Appeal in *Re Liverpool Electric Cable Co., Ltd.'s Applications* (3). The decision in that case, and the reasoning on which it was founded, were clearly approved by this House in *Re Clark, Son & Morland, Ltd.'s Trade Mark* (the *Glastonbury* case) (2), and I entirely agree with the following passages from the judgment of SIR RAYMOND EVERSHED, M.R., in the present case. Dealing with the *Liverpool* case (3) he said:

“As in the present case, the name of the applicant company had, as its first word, the very geographical name which they sought to register. The name was the Liverpool Electric Cable Co., Limited. In that case, as in the present, the applicant company appeared to be the only company making articles of the kind in question within the ambit of the place, the geographical name of which was sought to be registered. There was in the *Liverpool* case (3) no evidence of any other company making electric cables in or around Liverpool, just as here (though there appeared to be other persons making copper tubes) there are no other manufacturers of goods of the somewhat specialised character with which we are concerned. In the *Liverpool* case (3), as in the present, a body of evidence had been submitted so that the learned judge, ROMER, J., could say of it: ‘I arrive at the conclusion that the words “Liverpool cables” do in fact now serve, and have for some time past in fact served, to distinguish the applicants’ goods from those of the rest of the world.’ So in this case I assume (and I am not hinting in any way to the contrary) that the evidence filed in this case establishes that the word ‘Yorkshire’ as applied to these drawn copper tubes, etc., does in fact now serve, and has for some time in fact served, to distinguish the applicants’ goods from those of the rest of the world.”

Later, the Master of the Rolls observed:

“Without attempting any exhaustive exposition, it seems to me that no valid distinction in this case can be drawn between the application of Liverpool to a particular industrial product and the application of Yorkshire to a particular industrial product. If a point of difference could be found, I think the result would be only to introduce into the law refinements which could not advantage either the law or those whom the law serves. Although some reference was naturally made in the *Liverpool* case (3) to the fact that Liverpool is a very large city, the emphasis was upon the circumstance that it is a centre of industry. As I have already indicated, as regards a substantial part of it, so is Yorkshire—certainly the part of Yorkshire which includes Leeds where this company has its main place of business. I therefore think we shall not be justified upon principle or otherwise in drawing a distinction between the use of this county name in the present case and the use of the name of the city of Liverpool in the earlier case.”

These passages exactly express my own view, and I would dismiss this appeal.

LORD ASQUITH OF BISHOPSTONE: My Lords, the decision in the present case turns primarily on s. 9 of the Trade Marks Act, 1938. The mark proposed for the goods in question—in substance solid drawn copper and copper alloy tubes—is simply the word “Yorkshire” in inverted commas, the presence of which last is admitted to be immaterial for purposes of a decision.

It is plain that the mark “Yorkshire” does not fall within s. 9 (1) (a), (b), (c) or (d) of the Act of 1938. Therefore, unless it falls within s. 9 (1) (e), it does not qualify for registration. It only falls within s. 9 (1) (e) if there is what that sub-paragraph calls “evidence of distinctiveness”. “Distinctiveness” is defined in sub-s. (2) as meaning some quality in the trade mark (if I may paraphrase) which earmarks the goods so marked as distinct from those of other producers of such goods. It is not enough that it should earmark the goods as complying with a particular description, or as originating from a particular geographical area, or having claims to a peculiar excellence. Sub-section (3) is designed to help the registrar to determine when the requirements of sub-s. (2) are satisfied. It provides that, in so determining, the registrar “may”—and I think “may” here means “must” or the sub-section is nugatory—have regard to two factors and to their “extent”, the extent, namely, to which

“(a) the trade mark is inherently adapted to distinguish as aforesaid; and (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.”

I think “have regard to” and “extent” are important words. They indicate that (a) and (b) are not cast iron “requirements” each of which must be satisfied to the extent of one hundred per cent.

Touching these two factors (a) “inherent” distinctiveness; (b) distinctiveness “in fact”, there is no doubt that the registrar “had regard to” (b) and has held, rightly or admittedly, that that factor is present “to the extent”—I am using the words of the sub-section—of one hundred per cent. There is equally little doubt, on the authorities, that this does not dispose of the matter: viz., it does not dispense the registrar from considering to what extent factor (a) is present. On the decisions, which I do not need to cite, the contrary is unarguable. As to factor (a), your Lordships have to consider to what extent this factor is present in the particular case in which the mark proposed for registration is a geographical term, e.g., “Yorkshire”. I prefer to envisage this problem in the first instance in abstraction from authority. So considered, a geographical area, unless extremely small, seems to me inherently unadapted to distinguish the products of one producer in that area from those of another in the same area. When the area is as large as Yorkshire, it seems to me fanciful to dispute this proposition. Indeed, when the trade mark is geographical, it follows, paradoxical as it may sound, that it can only satisfy factor (a), where its significance, in the particular context, is non-geographical. For only so can it serve to distinguish the goods of one producer from the goods of others. Good imaginary instances of this paradox are “North Pole Bananas”, “Monte Rosa Cigarettes”, and so on. In these instances, the geographical term is clearly not applied in any geographical sense, and pro tanto may—I will not say must—be a sufficient compliance with s. 9 (3) (a). If it were applied in a purely geographical sense, it could not so comply, because it would simply indicate that the goods in question were supplied within a particular locality, not that they were supplied only by a specific supplier, and the last consideration is the only one which, for this purpose, counts.

I would only add that the primary question posed by s. 9 (1) and (2) is whether there is evidence of “distinctiveness”: and that sub-s. (3), in supplying pointers to the solution of this question, itself raises questions of degree under both limb (a) and limb (b). The question of degree as applied to (b) of sub-s. (3) is assumed to be answered in the sense that that factor is fully present. As regards sub-s. (3) (a), the factor involved, viz., “inherent” adaptedness, may be present

or satisfied to the extent of one per cent., or one hundred per cent.: and the question posed by sub-s. (2)—distinctiveness as a whole vel non—depends on the combined answers to sub-s. (3) (a) and (b). In the present case the answer to sub-s. (3) (a) seems to me almost wholly negative and the addition of (a) to (b) inadequate to justify registration. If, as so many of the cases state or imply, the registrar has a discretion in regard to the summation of these factors, I think he has, on these materials, either exercised it rightly, or has exercised it in a sense which appellate courts cannot properly dispute.

But, apart from these general considerations of principle, the immediately relevant question in the present case seems to me to be concluded in a manner binding on this House by its own decision in the *Glastonbury* case (2) affirming that of the Court of Appeal in the *Liverpool* case (3). I would, accordingly, dismiss the appeal.

LORD COHEN: My Lords, I am of the same opinion. I need not re-read the provisions of the Act or repeat the statement of facts. It is sufficient for my purpose to say that I am prepared to accept that the evidence in this case establishes what counsel for the appellants called one hundred per cent., or universal distinctiveness in fact of the appellant's mark. On this basis counsel for the appellants contended that it was unnecessary to consider whether the trade mark "Yorkshire" was inherently adapted to distinguish the appellants' goods and that the respondent was bound to proceed with their application for registration. This argument is not supported by authority. Indeed, as counsel for the appellants admitted, it is in conflict with the decision of the Court of Appeal in the *Liverpool Cable* case (3). Counsel submitted that that case was wrongly decided and that it was open to your Lordships to overrule it. I am unable to agree. As I read the judgment of LORD RUSSELL OF KILLOWEN in the *Glastonbury* case (2) (a judgment with which all their Lordships expressed their agreement), this House expressly approved the ratio decidendi of and the decision in the *Liverpool* case (3). But even if the matter were open, I should reach the same conclusion. I agree with LORD RUSSELL OF KILLOWEN that the *Liverpool* case (3) laid down no new law, but was correctly applying the observations of LORD PARKER OF WADDINGTON in the *W. & G.* case (1) where he said ([1913] A.C. 637):

"But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable. If the tribunal finds that a mark is anywhere, or among any class of people, in fact, distinctive of the goods of the applicant, it may be influenced by this fact in determining whether it is adapted to distinguish these goods from those of other persons, but distinctiveness in fact is not conclusive . . ."

In my opinion, on the true construction of s. 9 of the Trade Marks Act, 1938 (which for present purposes may be regarded as indistinguishable from s. 9 of the Trade Marks Act, 1905, as amended by the Trade Marks Act, 1919), the tribunal, in considering whether a trade mark is adapted to distinguish goods with which the proprietor of the mark is, or might be, connected in the course of trade from goods in the case of which no such connection exists, should take into account both factors referred to in s. 9 (3). It is the duty of the tribunal to weigh all relevant factors in reaching its conclusion. A geographical word may be inherently "adapted to distinguish as aforesaid", as in the instances given by FLETCHER MOULTON, L.J., in *Re J. Crosfield & Sons, Ltd.* (the *Perfection* case) (4) (26 R.P.C. 856) of "Monte Rosa" cigarettes or "Teneriffe" boiler plates. At the other end of the scale would be such a word as "British". Words such as "Yorkshire" and "Liverpool", associated as they are with large manufacturing centres, are, in my opinion, much nearer the "British" end of the scale than the opposite end. I agree with the Master of the Rolls in the present case where,

after saying that geographical names might in some cases be allowed, he continued:

" . . . there seems to me to be one principle applicable to them all, a principle which is stated in the *Perfection Soap* case (4) by SIR HERBERT COZENS-HARDY then the Master of the Rolls, and by FARWELL, L.J. The principle is thus put by SIR HERBERT COZENS-HARDY (26 R.P.C. 854): 'Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure.' FARWELL, L.J., observes (*ibid.*, 860): 'The court is careful not to interfere with other persons' rights further than is necessary for the protection of the claimant, and not to allow any claimant to obtain a monopoly further than is consistent with reason and fair dealing'."

Applying this principle to the present case, I think the Assistant Comptroller came to the right conclusion, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile & Martin* (for the appellants); *Solicitor, Board of Trade* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

WINGROVE v. PRESTIGE & CO., LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Hodson, L.JJ.), February 18, 19, 1954.]

Building—Building regulations—Safe means of access—Injury to person not employed by building contractor—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 5.

Under reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which provides that: "Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground . . . and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work", a contractor owes a duty only to persons employed by him, and a clerk of works employed by a local authority to supervise the contractor's work on behalf of the authority has no cause of action against the contractor for breach of the regulation.

Decision of HILBERY, J. ([1953] 1 All E.R. 694), affirmed on different grounds.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 5, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 213.

Case referred to:

(1) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

APPEAL by the plaintiff from an order of HILBERY, J., dated Jan. 29, 1953, and reported [1953] 1 All E.R. 694, in an action for damages for personal injuries alleged to arise from the negligence and breach of statutory duty of the defendants.

HILBERY, J., held the defendants not liable. The plaintiff appealed.

Bassett, Q.C., and *W. G. Wingate* for the plaintiff.

Berryman, Q.C., *Marven Everett, Q.C.*, and *B. S. Russell* for the defendants.

LORD GODDARD, C.J.: This is an appeal from an order of HILBERY, J., who, in an action for personal injuries brought by the then plaintiff, who has since died, and whose executor continues this appeal, gave judgment for the

defendants. The plaintiff was a clerk of works employed by Middlesex County Council to supervise the defendants' work on building a school for the county council. Some scaffolding included two scaffold poles five feet seven and a half inches from the ground across a passageway through which people had to walk. The plaintiff knew of these poles and had, apparently, protested to the contractors' general foreman on the ground that someone might be injured by them. He himself was injured by running against a pole as he was coming out to speak to some workmen, and lost both eyes. After the trial of the action he died from the effect of the accident.

HILBERY, J., applying the decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* (1), held that the defendants were not liable at common law, and counsel does not challenge that decision.

Counsel for the plaintiff sought to set up a cause of action for breach of statutory duty under reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which provides that:

"Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

Evidently this accident did not occur by reason of any defect in a scaffold, because the plaintiff was not using a scaffold. The duty owed under the first part of the regulation is clearly confined to the contractor's own workmen. The words "any person" mean "any person employed by the contractor", and as this man was not employed by the contractor, he has no cause of action under the words of that regulation. This appeal, therefore, must be dismissed.

SINGLETON, L.J.: I agree that the appeal should be dismissed. I did feel some difficulty at one time about the two separate provisions in reg. 5, but it appears clear when one examines them more closely that the defect of which complaint is made here, if defect it be, cannot apply to a person who was not in the employment of the contractors at the time.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Philcox, Sons & Edwards* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

DAVIS v. ST. MARY'S DEMOLITION & EXCAVATION CO., LTD.

[QUEEN'S BENCH DIVISION (Ormerod, J.), November 16, 17, 18, December 21, 1953.]

Child—Negligence—Trespasser—Demolition of house—Liability of demolition contractors—Site easily approached from open space—Wall in unsafe condition—Interference with wall by child—Collapse on child.

The defendants were a demolition company who were carrying out the demolition of certain houses under a contract with the owners of the premises. Behind the houses was an open, cleared site where people were allowed to walk and children were accustomed to play. By the end of September, 1950, all the houses had been demolished except one which had been taken down to the level of the first floor ceiling. The rear wall of this house, which was over one hundred years old, had been damaged by bombing. On a Sunday afternoon, when none of the defendants' servants was on the site, the plaintiff, aged twelve, with other boys went on the site, and, having picked up some gas piping, started to pull away loose bricks from a window opening in the rear wall, with the result that the wall fell and the plaintiff was injured. In an action for negligence, HIS LORDSHIP, having found that the plaintiff was a trespasser and that the wall was in an unsafe condition,

HELD: although the plaintiff was a trespasser on the land the presence of children on the site was so likely an occurrence that the plaintiff came within the class of "neighbour" to whom the defendants owed a duty of care, and, therefore, they were liable in negligence to the plaintiff for failing to take precautions to prevent his suffering injury through the unsafe condition of the wall.

Dictum of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 580), applied.

AS TO THE DEGREE OF CARE REQUIRED IN RELATION TO CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 114-122, Nos. 565-619.

Cases referred to:

- (1) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 1929 S.C. (H.L.) 51; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (2) *Excelsior Wire Rope Co., Ltd. v. Callan*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; Digest Supp.
- (3) *Mourton v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; *sub nom. Moulton v. Poulter*, 94 J.P. 190; Digest Supp.
- (4) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (5) *Buckland v. Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.
- (6) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

ACTION for negligence.

The defendants were a demolition company and the corporation of the city of London were the owners of houses, Nos. 36, 38, 40, 42 and 44, Bittern Street, which had suffered bomb damage during the war but had been temporarily repaired. In 1950 it was decided by the corporation that they should be demolished and the defendants entered into a contract with the corporation to do the work. Behind these houses, before demolition began, there was a wall separating the houses from an open, cleared site, where people were allowed to walk and children were accustomed to play. During the course of demolition this wall was taken down so that there was nothing to stop children passing from the open site to the site of the demolition work. By the end of September

all the houses had been demolished except No. 38, and by Friday, Sept. 29, this had been demolished to the level of the ceiling of the first floor. The rear wall of the house, which was over a hundred years old, had been damaged by bombing, but the upper part of it had been repaired with new brickwork. On the afternoon of Sunday, Oct. 1, 1950, the plaintiff, then aged twelve years, came on the site with some other boys of his own age. At first they went round to the front of the half-demolished house; then they came back to the rear of the premises. By this time the plaintiff had picked up a length of gas piping from the premises and the other boys had acquired similar implements. They all commenced to pull away some loose bricks round a window opening in the rear wall. After they had been doing this for some time the wall fell. One boy was killed and the plaintiff sustained a compound fracture of his right leg.

HIS LORDSHIP found that the defendants had not been negligent in not erecting a hoarding around the premises, but that the wall had been left in an unsafe condition in that only a comparatively small amount of interference in removing loose bricks would cause it to fall, and of that the defendants, as experienced demolition contractors, should have been aware. HIS LORDSHIP also found that the plaintiff was a trespasser on the demolition site and that the defendants' workmen drove children away whenever they came on the site.

Platts-Mills and Waldman for the plaintiff.
G. R. F. Morris for the defendants.

Cur. adv. vult.

Dec. 21. The following judgment was delivered.

ORMEROD, J., stated the facts and continued: If the defendants were occupiers and the plaintiff a trespasser, then, in view of the decision in *R. Addie & Sons (Collieries) v. Dumbreck* (1), the plaintiff would have no cause of action unless the case could be brought within the decisions in *Excelsior Wire Rope Co., Ltd. v. Callan* (2) or *Mourton v. Poulter* (3), in each of which cases the defendants were found liable despite the fact that the plaintiff was a trespasser because they had shown a reckless disregard of the presence of trespassing children. But the plaintiff here argues in this way. The defendants not being the occupiers of the site, the duty as between the plaintiff and the defendants was different from what it would have been if the defendants had been occupiers. The plaintiff bases his argument on the decision of the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (4), and submits that the plaintiff, although a trespasser, was somebody to whom the defendants should have had regard when considering whether or not the premises were in a safe condition before leaving them and whether or not the plaintiff was likely to be injured by any act or default on their part.

I was referred to *Buckland v. Guildford Gas Light & Coke Co.* (5) where a girl who was visiting a farm was walking along a footpath through a field when she was moved to climb a tree which was some ninety yards away from the footpath on which she was walking. She climbed the tree, immediately over which some high-power electric cables, the property of the defendants, passed, and when she reached the top of the tree she came into contact with the cables and was electrocuted. In an action against the defendants for negligence MORRIS, J., decided, in the first place, that there was no evidence to show that the girl was a trespasser. She might well have been, but the burden of proof was on the defendants to show that she was, and they had not discharged that burden. But, whether she was a trespasser or not, that, in his opinion, made little or no difference because the deceased girl and other people in her position were people who ought to have been in the contemplation of the defendants when they put their electric wires where they did, and in those circumstances they owed a duty to the girl whether or not she was a trespasser. MORRIS, J., first dealt with the test which has to be applied and cited LORD PORTER in his speech in

Hay (or Bourhill) v. Young (6) who in turn quoted the statement of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (4) as indicating the extent of the duty under which the defendant was. LORD ATKIN in the latter case said ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In a later part of his judgment MORRIS, J., said ([1948] 2 All E.R. 1092):

"Under most conditions the defendants would be entitled to assume that persons would not go unlawfully on land, and the defendants would not be under an obligation to provide against the contingency of persons trespassing. Though not occupiers of the land, the defendants are in a position closely analogous. The group of those who must be regarded as 'neighbours' from the point of view of the defendants is, however, not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land. The test to be applied in considering who is a neighbour is the test indicated by LORD ATKIN in *Donoghue v. Stevenson* (4). As a general rule, a trespasser on land would not be within the group of neighbours, but whether some particular person is a neighbour depends on the circumstances of a particular case."

Applying that test, which appears to me to be the proper test to apply in these circumstances, I have to ask myself: Are the defendants in the same position vis-à-vis the plaintiff as they would be if they were the occupiers of the land in question? Do they owe no other duty to the plaintiff than the occupier of the land would owe to a trespasser, or are they, in the circumstances of the present case, in such a position in relation to the plaintiff that, in spite of the fact that he was a trespasser, they owe to him a duty to take care so far as this building was concerned? I think any decision which puts a defendant who is not in the occupation of land in a different position from the occupier of the land is one which must be considered with very great care and caution, but the position here is that the defendants knew that children were in the habit of coming on to this land. They knew that children were in the habit of playing in the neighbourhood and of using the cleared area which was behind these premises, so much so that the defendant's foreman had complained to the representative of the city corporation of the nuisance that the children were. In those circumstances it appears to me that the foreman, in considering whether the premises were safe and against whom they had to be made safe, ought to have asked himself this question—a question which does not seem to me to call for any great exercise of the imagination: Are children likely to come on this site, and, if they do, are they likely to interfere with the brickwork and the building generally? That they were likely to come on the site, I think, could admit only of an answer in the affirmative. As to whether they would interfere with the building in such a way as small boys might interfere, I think that again is a question which would have to be answered in the affirmative. If boys of twelve years of age go on a building site where there are loose stones and bricks in a wall and pieces of old gas pipe and other implements of that kind about the place, it does seem one of the most likely things that in the course of an afternoon's play there will be interference in some way or other with some part of the building, which must offer a constant allurements and temptation to any child who is within sight of it.

In those circumstances I have come to the conclusion here that, although the plaintiff was a trespasser on this site, yet his presence—the presence of children—on this site was such a likely thing to happen that the defendants

should have taken the necessary precautions to have prevented injury by a happening of this kind. In other words, the presence of small boys on this site was so likely as to put them in the class of "neighbours" as defined by LORD ATKIN in his speech in the case of *Donoghue v. Stevenson* (4). Accordingly, it seems to me that the plaintiff is entitled to succeed.

[HIS LORDSHIP considered the question of damages and awarded the plaintiff the sum of £750.]

Judgment for plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Hair & Co.* (for the defendants).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

B *Re KOETTGEN (deceased). WESTMINSTER BANK, LTD. AND ANOTHER v. FAMILY WELFARE ASSOCIATION TRUSTEES, LTD., AND OTHERS.*

[CHANCERY DIVISION (Upjohn, J.), January 15, 1954.]

Charity—Education—Public character—Initial class of objects of public character—Right of preference to limited class.

C By her will a testatrix directed her trustees to hold a fund for the promotion and furtherance of commercial education and prescribed rules for the administration of the said trust fund. The objects of the trust were defined: "The persons eligible as beneficiaries under the fund shall be persons of either sex who are British born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense; in selecting beneficiaries it is my wish that the charity trustees shall give a preference to any employees of John Batt & Co. (London), Ltd., or any members of the families of such employees; failing a sufficient number of beneficiaries under such description then the persons eligible shall be any persons of British birth as the charity trustees may select. Provided that the total income to be available for benefiting the preferred beneficiaries shall not in any one year be more than seventy-five per cent. of the total available income for such year." It was conceded that the promotion of "commercial education" as defined in the will was a charitable purpose, but it was contended that having regard to the definition of the objects of the trust, the trust (as regards seventy-five per cent. of the fund) lacked the necessary public character to be charitable.

F **G** **H** **HELD:** the question of the public nature of the trust arose when the primary class of eligible persons was ascertained; the primary class of persons eligible to benefit was sufficiently wide to render the trust charitable; and the fact that, in selecting from that class, the trustees were bound to give priority to the persons specified did not destroy the essentially public and charitable nature of the trust.

AS TO GIFT FOR THE EDUCATION OF A PARTICULAR CLASS, see HALSBURY, Simonds Edn., Vol. 4, p. 218, para. 497; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.

Cases referred to:

- H** (1) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
 (2) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
 (3) *Re Scarisbrick*, [1951] 1 All E.R. 822; [1951] Ch. 622; 2nd Digest Supp.
 (4) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.

- (5) *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 2nd Digest Supp.
 (6) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, 28.

ADJOURNED SUMMONS to determine whether the trust fund constituted by the will of the testatrix to be known as the "Gustav Adolph and Ernest Koettgen Memorial Fund" and the trusts declared thereof in cl. 8 of the will constituted a valid and effectual charitable bequest or whether it failed and the residuary trust fund was held on trust for King Edward's Hospital Fund for London.

By her will dated Sept. 20, 1946, Lyra Adolphina Emmy Koettgen appointed the plaintiffs to be her executors and trustees, and, after making certain pecuniary and specific bequests, devised and bequeathed all her real and personal estate to her trustees on the usual trusts for sale and conversion. Subject to the payment of her debts, funeral and testamentary expenses and legacies, by cl. 7 she directed her trustees to invest the proceeds of such sale and conversion and to stand possessed of such investments (defined as her "residuary trust fund") "as a fund for the promotion and furtherance of commercial education according to the scheme hereinafter set out and such fund shall be known as 'the Gustav Adolph and Ernest Koettgen Memorial Fund'".

By cl. 8 of the will rules for the administration of the trust fund were declared as follows:

"In the administration of the said trust fund the following rules shall apply:—(a) The income received in any year after payment of any necessary expenses incurred by my trustees in connection with the fund shall be paid to the Charity Organisation Society Trustees, Ltd. hereinafter called 'the charity trustees' and used by the charity trustees for the purpose of assisting any of the persons of the description hereinafter designated to educate themselves or to obtain tuition or experience to fit them for a higher or more successful commercial career than they might otherwise attain. (b) Any income received by the charity trustees and not used in the year in which it is received shall be repaid to my trustees and by them invested and accumulated but any such accumulations shall be available for the purposes of the trust in future years and by payment to the charity trustees may be treated as income of any such future year. (c) The expression 'commercial education' shall mean the training of any persons for a successful commercial career and shall include education in or for all or any of the following subjects videlicet shorthand typewriting banking stock exchange routine book-keeping the custom and practice of merchants factors and brokers commercial law (both British and foreign) foreign languages with special preference to such languages as are at the time considered of most value to an international commercial career political and commercial economics technical and applied sciences or any other branch of study which may be deemed necessary or beneficial in any of the branches of commerce. (d) The persons eligible as beneficiaries under the fund shall be persons of either sex who are British born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense; in selecting beneficiaries it is my wish that the charity trustees shall give a preference to any employees of John Batt & Co. (London), Ltd., or any members of the families of such employees; failing a sufficient number of beneficiaries under such description then the persons eligible shall be any persons of British birth as the charity trustees may select. Provided that the total income to be available for benefiting the preferred beneficiaries shall not in any one year be more than seventy-five per cent. of the total available income for such year. (e) Assistance may be given in all or any of the following ways videlicet:—By payment of fees in respect of any

A beneficiary to any British university college or school or by payment of expenses of or making grants towards the maintenance and personal support of any beneficiary during the period of education or of or towards the expense of any sojourn abroad in any country on terms of political and commercial peace and friendship with Great Britain in which such sojourn shall be deemed to be advantageous or for any like sojourn in any of the Dominions or colonies of the British Empire or in paying premiums or providing or contributing towards expenses to enable any beneficiary to acquire knowledge and experience with any firm or company or to reside in any town or place in the British Isles which in the opinion of my trustees offers the requisite facilities . . . (h) The charity trustees may at any time if they find it necessary or desirable to do so apply to the Board of Education to settle a scheme for the administration of the trust fund or any modification of the rules above mentioned but in the making of any such scheme it is my desire that the fund shall be always appropriated for education of a commercial nature. (i) If the trusts above set out should wholly fail or it should become impossible to use the income for the purposes hereinbefore indicated my trustees shall stand possessed of my residuary trust fund in trust for the King Edward's Fund for Hospitals in London."

C The testatrix died on Sept. 13, 1952. The defendant, Family Welfare Association Trustees, Ltd., was a company limited by guarantee. At the date of the will it was called Charity Organisation Society Trustees, Ltd., and its name was changed by special resolution passed on Feb. 7, 1952. The firm of John Batt & Co. was established in 1802 and was acquired by John Batt & Co. (London), Ltd., which was incorporated in 1901. The father of the testatrix became life chairman of the company on its incorporation. The testatrix was a director of the company from 1917 to 1934, when on the death of her father in 1924 she became chairman and remained so until 1933. The company carried on business as exporters and importers of general merchandise and the principal part of their business comprised exports to most countries in the world. The company did not manufacture any commodities and its staff at present numbered thirty-six persons of both sexes, all of whom were engaged in clerical activities.

E Having regard to the company's extensive foreign connections a knowledge of foreign languages was considered an advantage to members of the staff as there was always the possibility that suitable members of the staff might be posted abroad for the purpose of the company's activities. No estimate could be made of the numbers of persons who were members of the families of the staff of the company.

F *T. A. C. Burgess* for the plaintiffs, the trustees of the will.

G. D. Johnston for the first defendant, the Family Welfare Association Trustees, Ltd.

G *Hillaby* for the second defendant, King Edward's Hospital Fund for London.
Denys B. Buckley for the Attorney-General.

H UPJOHN, J. (after stating the facts): The whole question which I have to decide is whether or not the trust declared in cl. 8 is a valid charitable trust. The evidence relating to John Batt & Co. (London), Ltd. is inconclusive as to whether there would be sufficient eligible employees of this company and the members of their families to take up to seventy-five per cent. of the annual income from this trust fund. There might be in some years, and in others there might not.

Certain admissions were very properly made by counsel in the course of their argument. Counsel for the first defendant admitted that he could not argue that the gift, by reason of the term in the will which provided that persons eligible must be of insufficient means to obtain such education, was for the relief of poverty; he admitted that the trust, to be charitable, must be for

the advancement of education. On the other hand, counsel for the second defendant admitted that the term "commercial education" in the will was a proper charitable purpose, in the sense that it was a trust for the advancement of education. He confined his attack on the validity of the trust to the contents of sub-cl. (d) of cl. 8, saying that that clause contained a trust for the employees of John Batt & Co. (London), Ltd., and members of their families, and that it would be consistent with recent authorities to hold that this provision as to seventy-five per cent. of the income of the trust fund did not have the requisite degree of public benefit. He did not challenge the validity of the remaining twenty-five per cent. That, which is the whole matter that I have to determine, is a question of construction of the will of the testatrix. A

The argument of counsel for the second defendant was that the trust, as to seventy-five per cent. of the income, was primarily for the benefit of the employees of John Batt & Co. and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust. He contended that the words "in selecting beneficiaries it is my wish that the charity trustees shall give a preference . . ." must be read in an imperative sense (I agree with that contention), and that it was only when that preferred class failed that members of the public could benefit. B C

There is much force in that argument, but on the whole I do not think that it is the true construction of this clause. The matter must be approached by asking the question: Who are eligible under the will? They must be

"persons of either sex who are British born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense . . ."

That is the primary class. If the will concluded there, the trust would clearly be a valid charitable trust, having regard to the admission that a gift for commercial education is for the advancement of education. D

The next task is to make a selection from that primary class of eligible persons. At that stage there is a positive direction to give a preference to the employees of John Batt & Co. and members of their families. In some years there might be sufficient members of that limited class to fill the seventy-five per cent. available for them, and in other years there might not be. The evidence, as I have said, is inconclusive on this point. The time may come when John Batt & Co. (London), Ltd. ceases to carry on business, and in that event the income of the whole trust fund must be applied for the benefit of the primary class which fulfils qualifications contained in sub-cl. (d). E F

It is only when one comes to make a selection from that primary class that the employees of John Batt & Co. and the members of their families come into consideration, and the question is, does that direction as to selection invalidate the primary trust? In my judgment, it does not do so. G

I was referred to *Re Compton* (1), *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (2), and *Re Scarisbrick* (3). I propose to refer only to the summary of the law in the judgment of JENKINS, L.J., in the last-mentioned case, where he said ([1951] 1 All E.R. 837):

"(i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public: see *Re Compton* (1); *Re Hobourn Aero Components. Ltd.'s Air Raid Distress Fund* (4); *Gilmour v. Coats* (5). (ii) An aggregate of individuals ascertained by reference to some personal tie (e.g., of blood or contract) such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof H

for the purposes of the general rule: see *Re Drummond* (6); *Re Compton* (1); *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (4); *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (2). (iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined [that is an important word] to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (e.g., an educational trust confined as in *Re Compton* (1) to the lawful descendants of three named persons, or, as in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (2) to the children of employees or former employees of a particular company)."

In my judgment, it is at the stage when the primary class of eligible persons is ascertained that the question of the public nature of the trust arises to be decided, and it seems to me that the will satisfies that requirement and that the trust is of a sufficiently public nature.

If, when selecting from that primary class, the trustees are directed to give a preference to the employees of the company and members of their families, that cannot affect the validity of the primary trust, it being quite uncertain whether such persons will exhaust in any year seventy-five per cent. of the trust fund. On the true construction of this will, this is not (as to seventy-five per cent.) primarily a trust for persons connected with John Batt & Co. and the class of person to benefit is not "confined" to them, and, in my judgment, the trust contained in cl. 7 and cl. 8 of the will of the testatrix is a valid charitable trust.

Order accordingly.

Solicitors: *Roche, Son & Neale*, agents for *Shepheards & Bingley*, Kensington (for the plaintiffs); *Lovell, Son & Pitfield* (for the first defendant); *E. F. Turner & Sons* (for the second defendant); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re TOWN INVESTMENTS, LTD. UNDERLEASE. McLAUGHLIN v. TOWN INVESTMENTS, LTD.

[CHANCERY DIVISION (Danckwerts, J.), February 5, 8, 15, 1954.]

Landlord and Tenant—Under-lease—Consent of landlord—Refusal—Reasonableness—Low rent in consideration of substantial premium—Lack of security—Depreciation in future value of property.

By a lease, dated Apr. 4, 1933, premises were demised to the defendants' predecessor in title for a term of sixty-three years from Dec. 25, 1932. By an under-lease, dated Oct. 23, 1951, the defendants (referred to hereinafter as "the landlords") demised the premises to the plaintiff (referred to hereinafter as "the tenant") for a term of twenty-one years from Sept. 29, 1951, at a rent of £2,500 a year for the first three years and £3,750 a year thereafter. The under-lease contained a covenant by the tenant not to assign, transfer, under-let or part with the possession of the demised premises or any part thereof without the previous written consent of the landlords, which consent was not to be unreasonably withheld. The premises were demised subject to tenancies of the first, second, and third floors. These tenancies had only short periods to run, and the increased rent payable by the tenant from Sept. 29, 1954, was based on the anticipation that, on the expiration of the tenancies, the tenant would be able to let these floors at enhanced rents. The ground floor, part of the basement, and one room on the mezzanine floor were used as a luncheon and dining club, this user being permitted by a licence from the head landlord. In September, 1953,

the tenant agreed, subject to the landlords' consent, to under-let this part of the premises to R. from June 24, 1953, until Sept. 26, 1972, at a rent of £800 a year, in consideration of a premium of £11,500. In addition R. undertook to maintain certain cleaning and heating services, the value of which was about £400 a year, and which would otherwise have to be provided by the tenant. The rent obtainable in the open market for this part of the premises, at the time, would have been over £1,500 a year. In view of the low rent to be paid by R., the landlords refused to give their consent to the proposed under-letting on the grounds (a) of the lack of security in the event of the tenant failing to carry out the obligations of his under-lease, and (b) of the depreciation in the value of the property should they wish to sell or mortgage their interest in it. The tenant claimed that their refusal to consent was unreasonable.

HELD: the dangers to the landlords by reason of the low rent to be paid by R. might be negligible in the event of their having to forfeit the tenant's under-lease owing to his failure to perform its obligations or in the event of his bankruptcy; but, if the tenant took a premium from R. as consideration for a reduction in the rent which he could otherwise obtain in the open market, he subtracted something, which might be substantial, from the future earnings of the property; and, therefore, as the landlords were not required to assist in and approve a transaction which, in their opinion (which was held reasonably), was calculated to depreciate the value of their property in the future, the tenant had failed to show that they were unreasonable in refusing their consent to the proposed under-letting.

AS TO UNREASONABLE WITHHOLDING OF CONSENT TO ASSIGN OR UNDER-LET, see HALSBURY, Hailsham Edn., Vol. 20, pp. 349-352, paras. 421, 422; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 424-426, Nos. 5515-5536.

Cases referred to:

- (1) *Ewart v. Fryer*, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; *affd.* H.L., *sub nom.* *Fryer v. Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; 86 L.T. 676; 31 Digest, Replacement, 552, 6724.
- (2) *Cholmeley School, Highgate (Wardens, etc.) v. Sewell*, [1894] 2 Q.B. 906; 71 L.T. 88; 58 J.P. 591; *sub nom.* *Cholmeley School (Wardens) v. Sewell*, 63 L.J.Q.B. 820; 31 Digest, Replacement, 553, 6734.
- (3) *Re Thompson & Cottrell's Contract*, [1943] 1 All E.R. 169; [1943] Ch. 97; 112 L.J.Ch. 109; 168 L.T. 155; 2nd Digest Supp.
- (4) *Ex p. Walton, Re Levy*, (1881), 17 Ch.D. 746; 50 L.J.Ch. 657; 45 L.T. 1; 4 Digest 261, 2467.
- (5) *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 31 Digest, Replacement, 425, 5523.
- (6) *Tredegar v. Harwood*, [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642; 31 Digest, Replacement, 400, 5297.
- (7) *Balfour v. Kensington Gardens Mansions, Ltd.*, (1932), 49 T.L.R. 29; 31 Digest, Replacement, 427, 5535.
- (8) *Lee v. Carter (K.), Ltd.*, [1948] 2 All E.R. 690; [1949] 1 K.B. 85; [1949] L.J.R. 7; 31 Digest, Replacement, 426, 5529.
- (9) *Premier Confectionery (London) Co., Ltd. v. London Commercial Sale Rooms, Ltd.*, [1933] Ch. 904; 102 L.J.Ch. 353; 149 L.T. 479; 31 Digest, Replacement, 425, 5525.
- (10) *Shanly v. Ward*, (1913), 29 T.L.R. 714; 31 Digest, Replacement, 423, 5512.

ADJOURNED SUMMONS.

The plaintiff, John Charles McLaughlin, was the tenant under an under-lease, dated Oct. 23, 1951, of premises known as 28, Berkeley Square, London, the landlords being the defendants, Town Investments, Ltd. The under-lease contained, inter alia, a covenant by the tenant not to under-let any part of the demised premises without the previous written consent of the landlords, which

was not to be unreasonably withheld. The plaintiff proposed to under-let the ground floor, part of the basement, and a room on the mezzanine floor to Leslie Romain at a rent of £800 a year in consideration of a premium of £11,500. The rent which could be obtained in the open market for this part of the premises was over £1,500. The landlords refused to give their consent to the proposed under-letting on the ground that their interests would be seriously affected by the inadequate rental. By his summons the plaintiff asked for a declaration that, on the true construction of the under-lease, and in the events which had happened, the refusal of the defendants to grant a licence to under-let was unreasonable, and that, notwithstanding the refusal, the plaintiff, without any licence, was entitled to under-let the part of the premises in question to Leslie Romain.

Milner Holland, Q.C., and *Eastham* for the plaintiff.

L. A. Blundell for the defendants.

Curr. adv. vult.

Feb. 15. **DANCKWERTS, J.**, read the following judgment. This is an application by originating summons by a tenant for a declaration that the refusal of his landlords to consent to a proposed under-letting was unreasonable. The property in question is 28, Berkeley Square, London, W.1. The defendants (the landlords) are the present owners of a term of sixty-three years from Dec. 25, 1932, at a rent of £800 per annum created by a lease dated Apr. 4, 1933, and made between the Duke of Westminster, of the one part, and Harry Parker, of the other part. By an under-lease dated Oct. 23, 1951, the defendants demised the property to the plaintiff for a term of twenty-one years from Sept. 29, 1951, at a rent of £2,500 per annum until Sept. 29, 1954 (the first three years), and thereafter at a rent of £3,750 per annum. This under-lease contains full repairing covenants and a covenant not to assign, transfer, under-let or part with the possession of the demised premises or any part thereof without the previous written consent of the landlords, viz., the defendants, which consent is not to be unreasonably withheld. At the date of the under-lease, there were in existence certain tenancies of parts of the building, and the under-lease was made subject to them. These were a tenancy of the first floor until Mar. 25, 1954, at a rent of £450 per annum inclusive of rates, a tenancy of the second floor until June 24, 1954, at a rent of £425 inclusive of rates, and a tenancy of the third floor until Sept. 29, 1955, at a rent of £400 inclusive of rates. These tenancies had comparatively short periods to run, and the increased rent to be paid by the plaintiff from Sept. 29, 1954, is explained by the anticipation that the respective floors of the premises could be let at enhanced rents as the tenancies expired. The plaintiff has, in fact, agreed (subject to the defendants' consent) to let the fourth floor of the premises to a company for a term of seven years from June 24, 1953, at a rent of £650 per annum inclusive of rates, and the defendants have intimated their willingness to consent, though no formal consent has yet been granted.

The present application is concerned with the ground floor, part of the basement, and one room on the mezzanine floor of the premises, which are used for the purpose of a luncheon and dining club known as the Mayfair Club. Such user is the subject of a licence, dated Oct. 19, 1951, and made between the Duke of Westminster, of the one part, and the defendants, of the other part. In September, 1953, the plaintiff agreed to let this part of the premises (subject to the defendants' consent) to Leslie Romain from June 24, 1953, until Sept. 26, 1972 (that is, three days short of the expiration of the plaintiff's term) at a rent of £800 per annum, exclusive of rates and in consideration of a premium of £11,500. It is said by the plaintiff in evidence that this premium does not wholly represent a capitalisation of rent and includes elements representing the desire of Mr. Romain to succeed the plaintiff as secretary of the Mayfair Club at a substantial salary and the waiving by the plaintiff of a claim to arrears of salary as secretary of the club. In addition to the rent of £800 per annum, Mr. Romain is to undertake certain cleaning and heating services in respect of the building, which

would otherwise have to be provided by the plaintiff and which are estimated to be of the value of £400 per annum. Satisfactory references have been provided by Mr. Romain, but it should be mentioned that these have been obtained on the footing that the rent payable by him will be £800 per annum. The objection taken by the defendants to the proposed under-letting is based on the provision for a rent which is, admittedly, well below the rent currently obtainable on the open market for this part of the premises (which is said, on behalf of the defendants, to be £2,000 per annum, and, on behalf of the plaintiff, to be £1,565 per annum, in each case exclusive of rates and without the obligation to provide cleaning and heating services) and the taking of a substantial premium from the proposed under-lessee. It was suggested that Mr. Romain might be prepared to increase the rent payable by him to £1,200 per annum if the cleaning and heating services were undertaken by the plaintiff instead, but, as Mr. Romain's obligations would be left substantially unchanged, this would appear to leave the proposal in much the same position. On the basis that £650 per annum would be obtainable as rent of the fourth floor and that the remaining part of the basement could be let for £250 per annum, it is estimated by the plaintiff that, after the letting to Mr. Romain, the rents obtainable in the near future for the whole building would amount to £2,975 per annum, less the rates payable by the plaintiff in respect of the first and fourth floors, estimated at £248 per annum, thus leaving an annual total of £2,727. The plaintiff's expert estimated, on the basis of Mr. Romain paying an annual rent of £1,200, the probable future total rental of the property (after expiration of the existing tenancies) at £4,575 exclusive of rates. Neither of these totals includes any figure in respect of the cleaning and heating services which the plaintiff would have to provide and the cost of the repairs and insurance for which the plaintiff is responsible under the terms of his under-lease, or any expenses of management. If allowance is made of the sum of £400 in respect of cleaning and heating and of the sum of £325 in respect of the other obligations of the plaintiff under his under-lease, it would appear that the rents obtainable by the plaintiff in each of the two situations contemplated will fall short of the total obligations of the plaintiff under the terms of his under-lease, though not by a very large sum.

On this basis, the objections of the defendants to the proposed under-letting are based (i) on the lack of security which, it is contended, would be created by the rents from the under-tenants in the event of the plaintiff or his assigns failing to carry out the obligations of the under-lease, and (ii) the depreciatory effect which, it is claimed, the under-letting at an unduly low rent would have in the event of the defendants wishing to dispose of the property by sale or mortgage. It is necessary, therefore, to examine the situations which might arise in case of default by the under-lessee (who might, of course, be some assignee with less financial resources than the plaintiff is said to possess). First of all, however, it should be stated that, while a lessee in the plaintiff's position will normally seek to exploit the investment represented by his lease by letting at increased rents, the landlords cannot compel him to let at all, and the lessee is perfectly entitled to retain all the floors of the building in his hands. If, on the other hand, the lessee desires to let, the terms of his lease compel him to obtain his landlords' written consent. If they refuse consent to a proposed letting, the onus is on the lessee—that is the plaintiff—to show that such consent has been unreasonably withheld. Secondly, when property is under-let, the landlords of the under-lessor do not become either in privity of contract or in privity of estate with the under-lessees, and, so long as the under-lessor fulfils the terms of his lease as to payment of rent and otherwise, and the terms of the under-leases and the operation of the under-lessees do not conflict with the provisions of the lease, the landlords have no right of action against the under-lessees. It is only when default is made by the under-lessor or his assigns

that the question arises as to the remedies which the landlords may have against the under-lessees.

A On default by the under-lessor, the landlords will, normally, be entitled to exercise their right of re-entry under the lease so as to cause a forfeiture and to give them a right to possession against not only the under-lessor but also his under-tenants whose terms are brought to an end. The under-tenants are then entitled to apply for relief by the Law of Property Act, 1925, s. 146 (4), which replaces s. 4 of the Conveyancing and Law of Property Act, 1892. But under s. 146 (4), on the application of an under-tenant, the court does not preserve or restore the under-tenancy; it creates a new estate, in either the whole of the property subject to the lease or a part, as may be required. The court does not allow the landlord to be prejudiced by the relief given, and will have regard to the need to do justice to the landlord as well as to the under-tenant, and the rent payable by the under-tenant may be increased to the amount of the lessee's rent, as a term of relief from the forfeiture: see *Ewart v. Fryer* (1) and *Cholmeley School, Highgate (Wardens, etc.) v. Sewell* (2). In the last-mentioned case, the court specifically rejected the contention that the payment of a premium by the under-tenant to the lessee would justify relief on terms of paying a lower rent than that payable by the lessee under his lease. Normally, it would appear that on granting relief the court will require the under-tenant to assume the obligations of the lessee as to rent and otherwise relative to the part of the property included in the under-lease. It would appear, therefore, that the lowness of the rent payable by the under-tenant is not likely to injure the landlords in the event of an under-tenant having to apply for relief from forfeiture. The fact that the under-tenant had paid a premium, indeed, might make the under-tenant anxious to obtain such relief, so as not to lose wholly the benefit of the sum which he had paid. If the under-tenant does not apply for relief from forfeiture, the landlord is free to re-let the property. On a falling market the under-tenant may be less willing to apply for relief, and the rent payable by the lessee may not be obtainable on a re-letting, but this is a risk which the landlord has to face in any case.

E Another situation which may arise is that the lessee suffers adjudication in bankruptcy, and the trustee in bankruptcy may disclaim the lease under the Bankruptcy Act, 1914, s. 54. The disclaimer determines the liabilities of the bankrupt lessee, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person (s. 54 (2)). Consequently, the interest in the property of an under-tenant is not determined: see *Re Thompson & Cottrell's Contract* (3). Though contractually only liable to pay the rent reserved on by the landlord for the higher rent payable by the bankrupt lessee, and has only a right of proof in the bankrupt's bankruptcy for the amount of the difference between the two rents: see *Ex p. Walton. Re Levy* (4). The result will usually be that the under-tenant will apply for a vesting order under the power conferred upon the court by s. 54 (6) of the Act of 1914. But the court has no power under this provision to make a vesting order in favour of an under-lessee except on the terms of making him (a) subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, or (b) if the court thinks fit, subject to the same liabilities and obligations as if the lease had been assigned to that person at that date, and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order. It was contended on behalf of the defendants that in the present case the ability of Mr. Romain to pay the higher rent payable by the plaintiff might be affected adversely by the large premium payable by him, and it was pointed out that his references had been directed to a rent of £800 per annum only. But these points

did not impress me, and I do not think that the proposed transaction can materially injure the defendants in the event of their tenant becoming bankrupt.

The third matter which might arise in the event of the defendants' tenant making default in performance of his obligations under the lease is in regard to the landlord's rights under the Law of Distress Amendment Act, 1908. Under s. 6 of that Act, when the tenant's rent is in arrear, the landlord may serve on an under-tenant a notice by registered post stating the amount of the arrears and requiring all future payments of rent, whether the same has accrued due or not, by the under-tenant to be made direct to him, the superior landlord, until such arrears have been duly paid. If the rent payable by the under-tenant for his portion of the property is less than the proportion of the rent payable by the tenant and attributable to that portion, the landlord's remedy under this section may not be wholly effective to cover the arrears of rent, unless the under-tenants of other parts of the property are liable to pay rents of a comparatively higher amount, so that, in the aggregate, the rents payable by the under-tenants are more than sufficient to secure to the landlord the discharge of the arrears of rent which the tenant has failed to pay. On the figures put in evidence in the present case, it would seem that there might be a deficiency in this respect, and that the proposed rent to be paid by Mr. Romain in the present case might endanger the recovery by the defendants under s. 6 of the Law of Distress Amendment Act, 1908, of the full amount of any arrears of rent owing by the tenant, though, possibly, not to any great extent.

I now turn to the question of the depreciatory effect which, it is alleged, the proposed transaction will produce in the event of the defendants wishing to sell or mortgage the term of years which they have in the property. The evidence on which the defendants rely is contained in the affidavits of Mr. Alfred John Southern and Mr. Albert Leslie Walton. It is claimed on behalf of the defendants that this evidence represents expert advice which they have received as to the risks which the proposed transaction involves for them, to which it is reasonable for them to pay heed, and which it would be unreasonable for them to disregard. The defendants are a limited company and, therefore, are necessarily managed and controlled by individual persons. Mr. Southern is a surveyor, but he is also the managing director of the defendant company, and his views, therefore, must, I think, be treated as the views of the defendants, rather than advice obtained from an independent expert. If does not follow, however, that his views are not entitled to consideration. Mr. Walton is a chartered surveyor and a partner in the firm of chartered surveyors who are the managing agents for the defendants' property. He says that he has nothing to do with the management of the property and claims to have considered the present problem objectively on the basis of his experience of the valuation of London properties for sale, purchase and mortgage. In my view, it is right to treat the views expressed by these two persons as the views reached by persons concerned with the conduct and management of the defendants' business as property owners, based on their professional experience, and honestly held with regard to the interests of the defendants. In para. 11 of his first affidavit, Mr. Southern says that the proposed letting at a rent so much below the full value of the part of the premises concerned will tend to depreciate the value of that part of the premises on any future letting, sale or mortgage, the tendency being to overlook or discount a premium after the lapse of some time or to attribute it wholly or partially to other factors such as goodwill, furniture and fittings, and other similar matters. Mr. Walton, in para. 4 of his affidavit, says that a prospective purchaser would require, in addition to the lessee's covenants, the security of the property itself, and that knowledge that an under-tenant was paying a rent less than that payable by the lessee or obtainable in the open market would create an adverse impression. In para. 5, Mr. Walton elaborates this somewhat and inaccurately refers to sub-tenants having established rights to occupation in the

event of forfeiture. What Mr. Walton really means is, I think, that a prospective purchaser would inquire as to the terms on which the property was let to under-tenants, and, on hearing that their aggregate rents exceeded the rent payable by the lessee, would say to himself : " Well, the rent payable by the lessee is fully secure, because in the event of his default, obviously the property can be let for a greater sum per annum ", whereas, if he found out that the under-tenants' rents in the aggregate were less than the rent payable by the lessee, he might conclude, or, at any rate, fear, that the rent payable by the lessee represented an over-valuation of property, and he might think it prudent not to pursue the transaction any further.

The question which I have to decide now is whether the possible deficiency of under-tenants' rents in case of distress and the fears which might be entertained by a prospective purchaser or mortgagee from the defendants are a sufficient justification for the defendants' refusal of consent to the proposed under-letting. In the numerous cases which have been decided on the reasonableness of refusals by a landlord of consent to an assignment or under-letting, the grounds have usually been concerned with the financial stability of the proposed assignee or tenant or the use to which he proposed to put the property. In the present case no real objection is raised in regard to the financial reliability of the proposed under-tenant and no objection is raised in regard to the proposed use of the portions of the property, which is a continuation of the existing use. It is somewhat surprising that occasion appears not to have arisen hitherto to consider the case where a reduced rent is to be taken in consideration of the payment of a substantial premium. No case cited to me deals at all directly with this problem, though I was referred to a number of cases supposed to lay down the principles applicable to the withholding of the landlord's consent.

In *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease* (5) the lessor refused to consent to an assignment because the proposed assignee was already tenant of adjoining premises belonging to the lessor, and the lessor feared that he would lose a good tenant of the latter premises. The refusal was held [by the Court of Appeal, affirming TOMLIN, J.] to be unreasonable because it had no reference either to the personality of the proposed assignee or to the subject-matter of the lease. SARGANT, L.J., expressed this view by saying ([1925] 1 Ch. 588) that the reason for refusing had nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the demise. That decision of the Court of Appeal, however, did not escape criticism in the House of Lords in *Tredegar v. Harwood* (6). In that case the question of reasonableness did not necessarily arise, as the House held that the landlord had an absolute right to refuse approval of the insurance of the property in an alternative fire insurance office without entering on reasons. It was, however, said that, if approval could not be unreasonably withheld, it was reasonable to withhold approval on the ground that the proper management of the landlord's estate required that all houses on his estate should be insured in the same office. Referring to *Gibbs & Houlder Brothers* (5), VISCOUNT DUNEDIN observed ([1929] A.C. 78) that he was not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. He said (*ibid.*) that he would " read reasonableness in the general sense ". In *Balfour v. Kensington Gardens Mansions, Ltd.* (7) the tenant, who had rented a flat at a rent of £700 per annum, wishing to join her husband in Peru in a hurry, could only find a willing sub-tenant of her flat at an annual rent of £450. The landlords were only willing to agree to this sub-letting on the terms that the sub-tenant entered into a direct covenant with them to pay the rent of £700 reserved by the lease, and it was held that their consent had been unreasonably withheld. This case bears a superficial resemblance to the present case, but the landlords' demand for a direct covenant by the sub-tenant to pay a higher rent to the landlords than would be payable by the sub-tenant under his tenancy was something which the

landlords had no right to demand, and was considered by MACNAGHTEN, J., to be in effect a refusal to consent to under-letting at all, having regard to the fact that £450 was the best rent that it was possible to obtain. In *Lee v. K. Carter, Ltd.* (8) a refusal of consent to an assignment on the ground that it would enable the assignee to claim a right to remain in occupation under the Rent Restrictions Acts was held by the Court of Appeal to be justified. This case, at any rate, shows that the effect of the transfer on the future rights of the landlord is admissible as a ground for refusal of consent. A

The two cases which seem to me to be of most assistance in regard to the present problem are *Premier Confectionery (London) Co., Ltd. v. London Commercial Sale Rooms, Ltd.* (9) and *Shanly v. Ward* (10). In the first of these cases a tobacconist's shop and a kiosk used for the same trade were in the hands of one tenant, and it was desired to assign the tenancy of the kiosk to a separate tenant. The landlords refused consent to the assignment on the ground that the trade from the kiosk competed with the trade from the shop and that it would be detrimental to their interests that the two properties should be in different hands. Their refusal was held by BENNETT, J., to be justified. BENNETT, J., said ([1933] Ch. 910): B

" But it is clear from the evidence (a) that the rent of the shop is high, whilst the rent of the kiosk is low, and (b) that the kiosk takes a substantial part of the trade which before it was opened as a tobacconist's shop was done at the shop. It is beyond question, in my judgment, that anyone trading in tobacco and cigarettes at the kiosk will always be a formidable competitor of anyone carrying on the same trade at the shop. It is clear, in my judgment, that it is very unlikely that anyone can be found who will take an assignment of the agreement for a lease of the shop if the kiosk is separately occupied by a tobacconist. Mr. Singer may, of course, be able to pay the rent of the shop for the residue of the term for which the defendants have agreed to grant him a lease ; but, on the other hand, he may not, and I have no doubt, after hearing all the evidence, in concluding that if the shop were to come into the possession of the defendants during the continuance of the agreement relating to the kiosk the defendants would have the greatest difficulty in finding a tenant for it at anything approaching the rent which is now reserved. If the defendants have in law the right to consider the possible effect upon their property of the shop and the kiosk being in the occupation of different tenants, I have no doubt that in withholding their consent to the assignment of the kiosk to Mrs. Kramer they did not act unreasonably. They acted as a reasonable man might have acted in the circumstances. The real question is whether as a matter of law the defendants, for the purpose of determining whether or not they would give their consent to the assignment, had the right to consider the effect upon their property, and in particular upon the shop which is a part of it, of the kiosk being occupied separately from the shop, and by a tenant bound to carry on there a trade which will compete with the trade for which the shop is best suited. In my judgment they have." C D E F G

It is, of course, true, as pointed out by counsel for the plaintiff, that in that case BENNETT, J., found on the evidence that the landlords' apprehension of injury to their interests as owners of the properties was well founded. But the case is authority for the proposition that, in considering whether to give or withhold consent, the landlords were entitled to consider the effect which the transactions might have on their ability in the future to let satisfactorily the different parts of their property, particularly in case of default on the part of their tenant in performing his obligations. H

In *Shanly v. Ward* (10) the lessors had originally refused consent, but later had modified their attitude. The case is of interest because SIR H. H. COZENS-HARDY, M.R., said (29 T.L.R. 715) that it was not for the defendants to prove

that they were justified in withholding their consent, but for the plaintiff to prove that it was unreasonably withheld. He went on to say (*ibid.*):

“What did unreasonableness mean? It was not enough to show that other lessors might have accepted the proposed assignees: the lessors were not to be held to have withheld the licence unreasonably if in the action they took they acted as a reasonable man might have done in the circumstances.”

A Counsel for the defendants relied on this case as showing that it was sufficient for his case if a reasonable man in the defendants' position might have regarded the proposed transaction as damaging to his property interests, even though some persons might take a different view.

I can apply these decisions to the present case. The dangers to the defendants from their having to forfeit the plaintiff's lease, owing to failure to perform its obligations by the plaintiff or his assigns, may be negligible. The situation in the event of bankruptcy of the plaintiff or an assign may present no real difficulty. But those who manage the defendant company think that notice under s. 6 of the Law of Distress Amendment Act, 1908, might not produce sufficient rent to discharge the sums payable in respect of the rent under the plaintiff's lease. They are apprehensive also that, if they wished to realise their investment in the lease of No. 28, Berkeley Square by sale or to raise money on it by mortgage, the reduced rent payable by Mr. Romain might prove an embarrassment in their dealings. I cannot say that such a view is unfounded. When a lessor takes a premium from a tenant as consideration for a reduction in the rent which he could otherwise obtain on the open market, the lessor subtracts something, which may be substantial, from the future earnings of the property in question. It is true that the superior landlords cannot compel him to sub-let at all, but, if he does wish to sub-let, why should they assist in and approve a transaction which they consider is calculated to depreciate the value of their property in the future? I am unable to say that the defendants have acted unreasonably in refusing their consent to the proposed under-letting in the present case. Accordingly, the application fails and must be dismissed. The costs must follow the event.

Order accordingly.

Solicitors: *Isadore Goldman & Son* (for the plaintiff); *Burton & Ramsden* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

FRIEDMANN *v.* AUSTAY (LONDON), LTD.

[CHANCERY DIVISION (Roxburgh, J.), February 2, 9, 1954.]

Legal Aid—Costs—Security for costs—Plaintiff assisted person resident out of the jurisdiction.

The plaintiff, a German national resident in Germany, obtained a civil aid certificate to claim an account and payment of sums found to be due to him as an agent of the defendant. His contribution was assessed at nil. The defendant applied for an order that the plaintiff give security for costs. There was no evidence, apart from the civil aid certificate, of the plaintiff's means.

HELD: the civil aid certificate was not conclusive evidence that the plaintiff was without means, and security for costs would be ordered; on the question of quantum, the fact that the plaintiff was an assisted person was relevant, but, bearing in mind that the plaintiff had put his case as high as he could, and was not content with relief which, on the facts, he could have obtained forthwith without trial of an issue, the security would be rather higher than might otherwise be ordered.

Jackson v. John Dickinson & Co. (Bolton) Ltd. ([1952] 1 All E.R. 104), applied.

AS TO SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 64-68, paras. 108, 109; and FOR CASES, see DIGEST, Practice, pp. 903-916, Nos. 4428-4603.

Case referred to:

- (1) *Jackson v. John Dickinson & Co. (Bolton) Ltd.*, [1952] 1 All E.R. 104; 3rd Digest Supp.

PROCEDURE SUMMONSES.

(i) Summons by the plaintiff for an order pursuant to R.S.C., Ord. 15, r. 1, for an account to be taken of all goods bought and sold by the defendant company as the result of introductions made by the plaintiff and of the amount of commission due to the plaintiff and for the necessary inquiries and directions.

(ii) Summons by the defendant for an order that the plaintiff give security for the defendant's costs in the action on the ground that the plaintiff resided out of the jurisdiction and for a stay of all further proceedings in the meantime.

I. Goldsmith for the plaintiff.

N. Lawson for the defendant.

ROXBURGH, J.: The plaintiff in this action is a German national resident in Hamburg, and he claims an account

"of all goods bought and of all goods sold by the defendant company as the result of introductions made by the plaintiff and of the amount of commission due to the plaintiff in respect thereof; payment of the amount found due with interest; further or in the alternative damages for breach of contract."

Two interlocutory applications were made before the master. The first in date, made on Oct. 27, 1953, was by the plaintiff, who asked for an order pursuant to R.S.C., Ord. 15, r. 1,

"that an account may be taken of all goods bought and of all goods sold by the defendant company as the result of introductions made by the plaintiff . . ."

The defendant countered that by taking out a summons on Nov. 2, 1953, asking for

"an order that the plaintiff give security for the defendant's costs in this action to the satisfaction of the master on the ground that the plaintiff

resides at 75, Brennerstrasse, Hamburg, Germany, out of the jurisdiction of the court, and that in the meantime all further proceedings be stayed."

- A The plaintiff—who, as I have said, is a German national resident in Germany—has obtained a civil aid certificate to take the proceedings which I have mentioned. The National Assistance Board have determined that his disposable income for the purposes of the civil aid certificate is under £156, that his disposable capital is nil, and that his maximum contribution is nil. Quite how the National Assistance Board make determinations of the disposable income and disposable capital of foreigners resident abroad, I do not know. I am not questioning that what they have done is adequate for the purpose of the certificate, but I am wondering how far it is adequate for any other purpose.

- B There exists a written agreement under which the plaintiff is entitled to commission from the defendants, and the terms of that agreement are, indeed, by no means simple. The agreement is contained in a letter from the defendant to the plaintiff dated Sept. 20, 1950, and it is there stated:

- C "For all deals or transactions negotiated and successfully concluded through your co-operation in finding buyers for goods offered through our company [the defendant] we are prepared to give you a share in the net profits of fifty per cent. after deduction of necessary expenses during negotiations and/or any charges for sub-commissions, etc., that might be payable to agents on both sides. Statements of accounts of transactions will be open for your inspection after each transaction."

- D Not only was this contract unstamped (that, perhaps, is not curious), but it seems that nobody has paid very much attention to the letter hitherto. That the letter is somewhat difficult to translate into an account is, I think, undeniable, and difficulties would arise in taking an account on the footing of that letter, but I am not prepared to say that I think that it is so obscure as to be incapable of interpretation.

- E [His LORDSHIP said that an account was, in the present application, which was made under R.S.C., Ord. 15, r. 1, asked for in the terms of the writ. In the circumstances of the case, he was satisfied that a preliminary point within r. 1 fell to be tried and he would not, therefore, order an account forthwith. His LORDSHIP continued:] I come now to the summons for security for costs. I think I can fairly say that if the plaintiff had not been legally aided I should have had no hesitation in ordering security for costs. The plaintiff is a foreign national resident out of the jurisdiction, and there is no evidence that he has any assets in this country apart from what he may recover in this action. I may add that, if the Court of Appeal had not already decided the major part of the question before me, I should have been doubtful what I ought to do with regard to a legally aided plaintiff, even though he is a foreigner resident out of the jurisdiction, but I have, fortunately, authoritative guidance on this matter from the Court of Appeal in *Jackson v. John Dickinson & Co. (Bolton) Ltd.* (1). G In that case the headnote reads ([1952] 1 All E.R. 104):

"The plaintiff, who was ordinarily resident abroad, claimed as an assisted person damages for personal injuries. The defendants having applied for an order for security for costs, Held: the plaintiff being resident out of the jurisdiction, the fact that he was an assisted person did not disentitle the defendants to an order for security."

- H Of course, that case binds me (and I am, indeed, happy to be bound by it), and, therefore, it follows that the defendant is not disentitled to an order for security, but that is not the same thing as saying that he is always entitled to it. I still have to consider what bearing, if any, the fact that the plaintiff is a legally assisted person has on the problem. I have no doubt that it has some bearing, though I am not prepared to do what the Court of Appeal has not done and to say precisely what bearing it has. In that case *SOMERVELL, L.J.*, delivered the

judgment, in which JENKINS, L.J., concurred. I may say at once that I think that it is plain that the passage I am about to read is not the ratio decidendi of the whole case. In passing, SOMERVELL, L.J., said (*ibid.*, 106):

"The fact that he is an assisted person may well be relied on as some indication that a full order for costs will probably not be made against him, but we have had the advantage of having read to us the certificate under which he became an assisted person, and, having regard to the figures therein, it is plain that it may well be that some order for costs may be made against him should he lose the action."

Naturally enough, counsel for the plaintiff, laying very proper hold on those words, says: "There is a nil certificate and, therefore, no security should be ordered." First of all, I do not think that SOMERVELL, L.J., said quite that, though, undoubtedly, the passage does raise difficulties. In the second place, I do not think that the lord justice made it the basis of his judgment. In the third place, it appears to me to raise procedural difficulties of great complication. It is true that the National Assistance Board figures are always looked at when the question of ordering a legally aided person to pay costs is under consideration, and it is proper to look at them, but nobody has ever suggested that they are conclusive even for that purpose. Indeed, it is quite plain that they are not conclusive for that purpose, though it is true that, as a matter of practical application, it is often difficult or impossible to get away from those figures. That is the position when one is dealing with somebody resident in this country. How the National Assistance Board carry out the means test with regard to a foreigner resident abroad, I have no idea. I should think it was extremely difficult. I am by no means satisfied, notwithstanding the certificate, that the plaintiff is without assets or is a person who could not properly be ordered to pay some costs if he failed in the action, even though he has obtained a certificate which says that his income is under £156 a year and that he has no disposable capital.

In order to raise this procedural difficulty, I invited counsel for the plaintiff to put in an affidavit as to his means, warning him that his client might have to attend this country to be cross-examined as to his means before the question of security for costs could be determined. I did that in order to indicate the procedural difficulties which would result if counsel's submissions were accepted, and counsel—and, if I may say so, for good reason—said he did not want to, and there that matter ends. I mention it to show that I do not think it is feasible to apply a means test to a foreign plaintiff resident abroad before deciding whether or not he should give security for costs. I do not think that that is practicable from a business point of view, although theoretically it is quite practicable. Nor do I think that it would be just to persons resident in this country if in every case a certificate of the National Assistance Board should be accepted as sufficient evidence of the means of a foreigner resident outside the jurisdiction. Therefore, I think that this is a case in which I ought to order some security for costs.

Then comes the question of amount, for I have no intention of sending the summons back to the master on that point. That is a difficult question. I think, in connection with the quantum, that the fact that the plaintiff has legal aid is relevant. I think one must be careful in dealing with such a case as this not to exact a sum by way of security which might have penal consequences, although they were unintended, but, of course, one must hold the balance even. One must not allow the legally aided foreign plaintiff resident abroad to get an advantage over the British resident not legally aided by the method of operating the Legal Aid and Advice Act, 1949, and, therefore, it must come down to a rather nice balance of considerations.

There is another point in this case. I think it is, perhaps, special to this case, though it may arise in some other cases. If this plaintiff had been content to rely on the written contract of agency and to ask only for relief founded on that

written contract, he would appear to me to have so strong a case *prima facie*—I am not, of course, deciding the merits—that I should be inclined to put the figure as low as possible in order that he should not, perhaps, be penalised, but he has chosen to open his mouth, as I think, very wide. He may succeed. I am not saying he will not, but everybody knows that it is not easy to vary the terms of a written contract and thereby get something more than the written contract purports to give. This legally aided and foreign plaintiff resident abroad

- A has elected, when he could have had now, without trial, an account on the footing of the written instrument, to put his case as high as it possibly could be placed. I think that should incline me to make the figure rather larger than I should otherwise have done, because I feel that he may well win what I originally offered to him and yet find that, on balance, he has more to pay than to gain, and, if he goes to trial on this issue of what form the account ought to take
- B and fails, the costs of that issue may well swamp anything that might come to him under the account which he would not accept. I do not know whether that will be so or not, but it is a possibility.

Taking everything into consideration, I think £40 is the proper security to order. I have endeavoured to give my reasons, because I must confess that I think this question is one of some general public importance.

- C *Order accordingly.*
Solicitors: *Cardew-Smith & Ross* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

D

R. v. WARREN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Slade, JJ.),
February 22, 1954.]

- E *Criminal Law—Appeal—Court of Criminal Appeal—Sentence—Offender convicted by court of summary jurisdiction of indictable offence—Committal to quarter sessions for sentence—Right of appellant to question validity of committal—Criminal Justice Act, 1948 (c. 58), s. 29 (1), s. 29 (3) (d).*

The appellant who had not been previously convicted, was convicted before a metropolitan magistrate on four charges of indecently assaulting boys. Having regard to the gravity of the offences and the fact that he could pass a sentence of only twelve months' imprisonment, the magistrate committed the appellant to quarter sessions for sentence, under the Criminal Justice Act, 1948, s. 29 (1), and the Magistrates' Courts Act, 1952, s. 29. The appeal committee of the London Sessions sentenced the appellant to five years' imprisonment. On appeal against sentence,

- G **HELD:** the appeal committee having passed a sentence which a court of summary jurisdiction had no power to pass, the appellant could appeal to the Court of Criminal Appeal against that sentence under s. 29 (3) (d) of the Criminal Justice Act, 1948, "as if he had been convicted on indictment", but it was not open to him to take the point before the Court of Criminal Appeal that the magistrate had no power to commit him to quarter sessions for sentence on the ground that, the appellant not having been previously convicted, there could be no "information as to his character and antecedents."
- H

Per curiam: The remedy of a convicted person who wished to question the validity of the commitment to quarter sessions was to apply for an order of prohibition directed to quarter sessions to prohibit them from dealing with the case or for an order of certiorari directed to the court of summary jurisdiction to bring up the order of commitment to be quashed.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29 (1) and (3) (d), see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 1013, 1014.

Cases referred to:

- (1) *R. v. Vallett*, [1951] 1 All E.R. 231; 115 J.P. 103; 2nd Digest Supp.
- (2) *R. v. Middlesex Quarter Sessions. Ex p. Public Prosecutions Director*, [1950] 1 All E.R. 916; [1950] 2 K.B. 589; 114 J.P. 276; 2nd Digest Supp.

APPEAL against sentence.

The appellant, Vincent Roy Warren, was convicted before a metropolitan magistrate on four charges of indecently assaulting boys. The magistrate committed the appellant to the appeal committee of London Sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1), and the Magistrates' Courts Act, 1952, s. 29, and the appellant was sentenced by the committee to five years' imprisonment.

M. Waters for the appellant.

Buzzard for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before a metropolitan magistrate on four charges of indecent assault on boys. He was what is known as a house "father" or house master at a London County Council reception home, that is to say, a place where boys in need of care and attention or for some other reason are taken under the care of the local authority. I am not going to describe the offences of which this man was convicted. It is enough to say that they were of a shocking description. All the members of the court are surprised that when these charges were made at the magistrate's court the prosecution asked the magistrate to deal with the cases summarily under s. 19 (2) of the Magistrates' Courts Act, 1952. How anybody could be of opinion that this was not a serious case or that the punishment that a court of summary jurisdiction had power to inflict would be adequate, I confess I cannot understand. I should have thought that this was about as grave a case of indecent assault on young male persons as could well be imagined. Here was a man put in charge of these boys, and the evidence that was given showed a horrible state of affairs. The case ought to have been sent for trial—there is no question about that—but the magistrate was asked to deal with it, and I am not surprised that when he heard all the facts he said that, in his opinion, it was too serious a case for him to deal with because the utmost sentence he could impose would be twelve months, and so he said he would use the powers given him partly by the Criminal Justice Act, 1948, and partly by the Magistrates' Courts Act, 1952, to send the appellant, after he had convicted him, to quarter sessions for sentence. The appeal committee at London Sessions passed a sentence of five years' imprisonment.

It is said that the magistrate ought not to have sent the appellant for sentence because he could only do so (under the Criminal Justice Act, 1948, s. 29 (1)) if he had regard to his "character and antecedents", and I understand that counsel for the appellant wanted to argue that, as the appellant had never been previously convicted, he had no "character or antecedents" within the meaning of the statute which would have justified the magistrate in sending him for sentence. I am not going to attempt, especially as we have not heard argument on the subject, to define the meaning of the words "character and antecedents" although I see that this case in some respects is different from *R. v. Vallett* (1) which does deal with the meaning of those words. I am only going to see what are the powers of this court, which is the Court of Criminal Appeal and is not the High Court of Justice, Queen's Bench Division. The fact that the judges are the same is quite fortuitous. We exercise a different jurisdiction and our jurisdiction is a purely statutory jurisdiction. I say at once that, if a man desires to take the point that he was wrongly committed for sentence, in my

view, the right course for him to take is to apply to the Queen's Bench Division for an order of prohibition directed to the quarter sessions to prevent them proceeding, which he must issue before he is before the sessions, or, possibly, at a later stage, for an order of certiorari to bring up the order of committal to be quashed. The Criminal Justice Act, 1948, s. 29 (3), provides:

A "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect . . . (d) if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment and the provisions of the Criminal Appeal Act, 1907, shall apply accordingly."

B Section 29 (3) is intended to put the appeal committee into the same position as if they had before them a prisoner who had pleaded Guilty at quarter sessions. That is quite clear if one reads the whole of the sub-section. Section 29 (3) (a) provides:

C "The appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment."

D Therefore, when the offender is before quarter sessions, the conviction has been proved and the order of the magistrate sending him for sentence not been challenged, the court of quarter sessions are to deal with him as though he has just been convicted before them on indictment. It is only indictable offences that can be sent for sentence.

E In our opinion, it is clear that once the offender comes to this court we cannot consider the validity of the conviction in the court of summary jurisdiction. We can only consider the sentence which has been passed, and if we find that it is a more severe sentence than the court of summary jurisdiction could have passed, we can consider the sentence under the powers given to us by s. 4 of the Criminal Appeal Act, 1907. Section 4 (3) provides:

F "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

So we can quash the sentence passed at the trial and pass any other sentence, more or less severe, which we think ought to have been passed.

G Our attention has been called to certain cases under the Vagrancy Act, 1824. The procedure under s. 5 of the Vagrancy Act has some likeness to the procedure under the Criminal Justice Act. Quarter sessions can pass sentence on a person who has been convicted by a court of summary jurisdiction of being an incorrigible rogue, and certain cases have been before this court in which the court quashed the sentence because they found that the man had not been convicted before the magistrates of being an incorrigible rogue. The section under which the court proceeds in that case is the Criminal Appeal Act, 1907, s. 20 (2) which provides:

H "This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments . . ."

Being an incorrigible rogue is not an offence of which the offender could be convicted of indictment, and that sub-section gives power to this court to deal with the sentence on a person who has been convicted of being an incorrigible

rogue. But the words in s. 29 (3) (d) of the Act of 1948 are "may appeal against the sentence as if he had been convicted on indictment."

We have, therefore, a man before us who comes and says: "I have been sentenced to more than the magistrate could have sentenced me, and, therefore, I appeal to you, but I have to appeal to you as if I had been convicted on indictment." We think we can only go into the question whether or not, if this man had been convicted on indictment, it was a proper sentence. If he had wanted to challenge the magistrate's power to commit him for sentence, it must have been done by another procedure. Therefore, the only question we have to consider is whether the sentence of five years is one which we would allow to stand. I say at once that appeals made to the court on the ground of ill health do not find very much favour with the court. This man had undertaken to put himself in the position of being a house master of these small boys, and he committed shocking offences with them. It is a serious offence, but we are willing to take into account that the man had previously been of good character, as far as is known, and may not have been subject to these tendencies for very long. With some hesitation, because we can well understand why the appeal committee passed this sentence—and we do not lightly interfere with a sentence an appeal committee passes—and after taking all the circumstances into consideration, the court has come to the conclusion that they can reduce this sentence and substitute for it one of three years. *Sentence reduced.*

Solicitors: *Sylvester, Amiel & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

PUGH v. MANCHESTER DRY DOCKS CO., LTD.

[LIVERPOOL AUTUMN ASSIZES (Donovan, J.), November 10, 11, 12, 1953.]

Factory—Dangerous machinery—Grinding machine—Fencing rendering machine unusable—Employers' liability for not fencing—Factories Act, 1937 (c. 67), s. 14 (1).

The workman operated a grinding machine. He was grinding a spanner towards the left of the face of the grinding wheel, the spanner, in consequence, not being supported by the metal rest. The grinding wheel, which was revolving at a thousand revolutions a minute, carried the spanner with it, the workman's hand came into contact with the wheel, and he was injured.

HELD: the grinding wheel was a dangerous part of the machinery and so was required by the Factories Act, 1937, s. 14 (1), to be securely fenced; the fact that to provide fencing which would prevent any workman from making contact with the wheel would render the machine practically unusable did not absolve the employers from their duty so to fence; and, therefore, they were in breach of their duty under s. 14 (1).

Davies v. Thomas Owen & Co. ([1919] 2 K.B. 39), followed.

Miller v. Boothman (William) & Sons, Ltd. ([1944] 1 All E.R. 333), distinguished.

AS TO DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 594, para. 1130; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.

Cases referred to:

- (1) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (2) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.
- (3) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 908, 68.
- (4) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

ACTION by a workman against his employers for damages for breach of statutory duty and negligence.

The workman was injured through his left index finger coming into contact with the revolving grinding wheel of a grinding machine which he was operating to grind the "rag" end (i.e., the rough edges) off a box spanner by holding it against the wheel. He alleged that the defendants were negligent and/or in breach of statutory duty in that they (i) failed to cause the grinding wheel to be securely fenced; (ii) failed to provide safe plant; (iii) failed to provide a safe system of work under which proper inspection and/or maintenance of the machine would have been provided so as to ensure that the space between the tool rest of the machine and the grinding wheel was not more than one-sixteenth of an inch; and (iv) required the workman to work at the machine which they knew or ought to have known was dangerous and/or unsafe. The plant was alleged to be unsafe in that (a) the grinding wheel was not fenced and/or guarded sufficiently or at all; (b) it should have been, and was not, provided with any, or any adequate, means whereby the grinding wheel could be stopped instantly; (c) the tool rest fitted to the machine was loose; (d) the grinding wheel was so badly worn that with the tool rest fully adjusted there was a space of about one inch between the tool rest and the wheel; (e) when the tool rest was fully adjusted there should have been, and was not, a space between it and the grinding wheel of not more than one-sixteenth of an inch. The employers alleged, inter alia, that the workman was engaged in work for his own purposes, and, if the grinding wheel was unfenced, the workman had himself removed the fence. They further said that, if the workman had suffered injury, he had done so solely as a result of his own negligence and breach of statutory duty.

D *Andrew Rankin* for the plaintiff.

Nelson, Q.C., and Forrest, Q.C., for the employers.

Curr. adv. vult.

DONOVAN, J. (having found that the workman was not engaged in work for his own purposes): The next question is whether there was a breach of the Factories Act, 1937, s. 14 (1), on the part of the employers. The grinding machine was obviously machinery. Equally obviously, to my mind, the grinding wheel, revolving at over a thousand revolutions per minute, was a dangerous part of that machinery. To adopt the words of DU PARCQ, J. in *Walker v. Bletchley Flettons, Ltd.* (1) ([1937] 1 All E.R. 175) it was a possible cause of injury to anyone acting in the way a human being might be reasonably expected to act in circumstances which might reasonably be expected to occur. The workman was grinding the spanner towards the left of the face of the grinding stone, and it appears that this was frequently done by persons from the blacksmith's shop. That being so, the tool being ground would not be supported by the metal rest, and the downward pull of the fast revolving stone might well be expected to carry the tool with it and cause some part of the hand of the operator to come into contact with the moving stone. That is what happened here. On that view, the machine had to be securely fenced. That means that some barrier had to be erected which would prevent any employee from making contact with the dangerous part of the machine, i.e., the wheel: see *Carroll v. Andrew Barclay & Sons, Ltd.* (2) ([1948] 2 All E.R. 386), per LORD PORTER. In the present case the machine clearly was not so fenced. To comply with s. 14, I think it is true that the fence would have to be such that the grinding machine would become quite unusable except for quite a few minor jobs, but that does not absolve the defendants from their duty to fence: see *Davies v. Thomas Owen & Co.* (3), and *Miller v. William Boothman & Sons, Ltd.* (4). In the latter case, the Court of Appeal held that the Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10, had modified the requirements of s. 14 of the Act of 1937 as regards the machine there in question because the regulations specified what the fencing should be. Here, there are no comparable regulations. The Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations,

1950 (S.I., 1950, No. 688) assume that grinding machines will be usable, but they contain no provisions as to fencing.

It is said that, if the effect of s. 14 (1) is virtually to prohibit the use of grinders like these, it is very odd to find the Secretary of State legislating on the basis that they are usable. I agree that it is, but I am bound by the authorities I have mentioned, and no comparable escape from the impasse is provided for me such as the Court of Appeal found in the Woodworking Machinery Regulations, 1922, reg. 10, in *Miller v. William Boothman & Sons, Ltd.* (4). As the authorities stand, the deadlock can be resolved, in my opinion, only by the House of Lords or by Parliament. I arrive, therefore, at the conclusion here that there was a breach of s. 14 (1) and that the injury to the plaintiff was one of the consequences. A

[HIS LORDSHIP considered the position at common law, found that the grinding stone was unduly worn, but that he could not, on the facts, attribute the accident to the negligence of the employers in not providing a stone in a more safely usable state, and continued:] I decide in favour of the plaintiff on the ground that the defendants were in breach of their statutory duty. If the machine had been securely fenced, the workman would not have been doing any grinding on it at all for the reason that he could not. I think, therefore, that I must attribute the whole blame for the accident to the defendants. B

Judgment for the plaintiff. C

Solicitors; *John Whittle, Robinson & Bailey*, Manchester (for the plaintiff); *Laces & Co.*, Liverpool (for the employers).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

R. v. DAVENPORT. D

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Slade, JJ.), February 22, 1954.]

Criminal Law — Larceny — Embezzlement — Fraudulent conversion — Cheques drawn on employer's account paid by servant to his own creditors—Other cheques cashed by creditor and money handed to servant. E

The appellant, who was the secretary of a company, received cheques signed by two directors which it was his duty to fill up with the payees' names, counter-sign, and pay to the company's creditors. He used a number of the cheques to pay his own creditors, and he did this by making a cheque payable to the creditor's bankers and handing it to the creditor. With regard to four cheques he obtained cash from one, S., by making out the cheques to S.'s bank and getting S. to cash them and give him the money. He was convicted of the larceny of moneys (the proceeds of the cheques), the property of the company, as a clerk or servant. F

HELD: the money which the appellant was charged with stealing was not the money of the company, but that of the company's bankers; there was no asportation of the money by the appellant; and, therefore, he was wrongly convicted of the larceny of the money representing the cheques paid into his creditors' accounts, but, with regard to the cheques cashed by S., the money was received by the appellant for and on behalf of the company, and, when he applied it for his own use, that amounted to embezzlement, and a verdict that the appellant was guilty of that offence would be substituted under s. 5 (2) of the Criminal Appeal Act, 1907. G

Per curiam: If the appellant had been charged with the fraudulent conversion of the cheques paid into the creditors' accounts, he would have had no answer. H

AS TO THE POWER OF THE COURT OF CRIMINAL APPEAL TO ALTER THE VERDICT OF A JURY, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 277, para. 405; and FOR CASES, see DIGEST, Vol. 14, pp. 548, 549, Nos. 6216-6232.

Cases referred to:

- (1) *Foley v. Hill*, (1848), 2 H.L. Cas. 28; 9 E.R. 1002; 3 Digest 168, 272.
 (2) *R. v. Gale*, (1876), 2 Q.B.D. 141; 46 L.J.M.C. 134; 35 L.T. 526; 41 J.P. 119; 15 Digest 928, 10,235.

APPEAL against conviction.

A The appellant, Lawrence Henry Christopher Davenport, was convicted at the Central Criminal Court on Oct. 23, 1953, of larceny and sentenced to eighteen months' imprisonment.

Eric Myers for the appellant.

M. J. H. Turner for the Crown.

B LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: For some reason or another the indictment charged the appellant with stealing all this money. That could only have been done, I think, because throughout this case there was a misapprehension, under which everyone seems to have been, with regard to the more or less elementary principles of the law of banking and the law of larceny. There was no larceny here because in larceny there must be an asportation. I think the fallacy that led to this charge of stealing money was this. It was thought that, because the master's account became debited, that was enough to make a theft, but, although we talk about people having money in a bank, the only person who has money in a bank is the banker. If I pay money into my bank, either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee. The leading case of *Foley v. Hill* (1) exploded that idea. When the banker is paying out, whether in cash over the counter or whether by crediting the bank account of somebody else, he is paying out his own money, not my money, but he is debiting me in my account with him. I have a chose in action, that is to say, I have a right to expect that the banker will honour my cheque, but he does it out of his own money. Therefore, this money paid on these cheques was the banker's money, though it led to the customer's account being debited. If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer at all, but he was charged with larceny, and it is quite obvious that he could not be convicted of larceny because he did not steal the company's money. He caused their account to be debited, but that is not the stealing of money.

F The question is, therefore, whether we have to quash the whole of this indictment. I think we ought to quash all the counts except counts 10, 12 and 13, which relate to the transactions with Mr. Samuel because there, having dealt with his master's cheque, he got Mr. Samuel to cash his master's cheque and he got cash in his hands. It follows that that money, as it was the proceeds of his master's cheque, was received for and on behalf of his master, and, therefore, he embezzled that money because he applied it to his own use instead of handing it over. On that part of the case it is only necessary to refer to *R. v. Gale* (2), where the facts were (2 Q.B.D. 141):

G

H "The prisoner was the clerk and servant of an insurance company, and head manager at their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier and handed it over to him, saying he wished it to go against his salary, which was overdrawn to a like amount; and he got back from the cashier I.O.U.'s, which he had previously given for the amount of the overdraft".

In other words, what he did was to use cheques for the purpose of reducing his own overdraft. The court held that he could have been convicted of the embezzlement of the proceeds of the cheques, and, in principle, I cannot see any difference between that case and the present. In that case the cheques were made out payable to the prisoner's master. In the present case the appellant, as a clerk or servant, received the cheques drawn by his master. He used those cheques to obtain cash, and he applied that cash for his own use, and, therefore, he was guilty of embezzlement. The Larceny Act, 1916, s. 44 (2), provides that a person who is charged with larceny may be convicted of embezzlement if the facts show that he was guilty of embezzlement, and the Criminal Appeal Act, 1907, provides by s. 5 (2):

"Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence . . ."

The jury here must have been satisfied that there was a fraudulent act of the appellant, because they convicted him of stealing, and that Mr. Samuel did hand this money to the appellant. Therefore, we can apply the provisions of the Criminal Appeal Act, 1907, and say that what the appellant ought to have been convicted of on those counts was, not larceny, but embezzlement.

The consequence is that the convictions on all the counts except 10, 12 and 13 will be quashed. The appellant only received a sentence of eighteen months on each count, but the court would certainly not interfere with such a sentence in a case where the appellant has been guilty of the most atrociously dishonest conduct and has received thousands of pounds. Why the learned recorder only passed a sentence of eighteen months for frauds of this magnitude, I do not know, but that is all he gave. As there is no appeal against sentence, we cannot increase the sentence, but we should certainly not lessen it.

Appeal allowed in part.

Solicitors: *Beach & Beach* (for the appellant); *Director of Public Prosecutions.*

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

CHANCERY DIVISION (COMPANIES COURT)

PRACTICE DIRECTION.

Company—Application for investigation by Board of Trade—Companies Act, 1948 (c. 38), s. 165—R.S.C., Ord. 53B, r. 7 (c).

In the case of an application by originating motion under Ord. 53B, r. 7 (c), of the Rules of the Supreme Court for a declaration that the affairs of a company ought to be investigated under s. 165 of the Companies Act, 1948, the notice of motion need not be served on the Board of Trade, but notice of the intended application should be sent to the Solicitor of the Board of Trade together with copies of any affidavits intended to be used at the hearing. Evidence should be filed proving that this direction has been complied with.

J. T. WILSON,
Registrar.

By direction of the judges.

12th March, 1954.

[FOR THE COMPANIES ACT, 1948, s. 165, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 590; and FOR PRACTICE AND PROCEDURE ON APPLICATIONS BY ORIGINATING MOTION, see Vol. 6A ENCYCLOPAEDIA OF COURT FORMS AND PRECEDENTS (COMPANIES), p. 172.]

Re BRANSBURY'S WILL TRUSTS. GRECE AND OTHERS v.
BRANSBURY AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), February 18, 1954.]

Trust and Trustee—Powers of trustee—Power of advancement—Trusts arising on exercise of general power of appointment—Power of appointment conferred by testamentary instrument—Death of testator before Jan. 1, 1926—Power exercised after Jan. 1, 1926—Trustee Act, 1925 (c. 19), s. 32 (3).

A By a codicil dated June 6, 1919, to his will a testator who died on Mar. 6, 1921, conferred on his wife a general power of appointment over a fund of personally exercisable by will or codicil. By her will dated Aug. 26, 1926, the wife, who died on Sept. 14, 1934, directed the trustees of her will to hold the property over which she had the said general power of appointment on the trusts therein declared of and concerning her residuary estate. B Under the trusts declared in respect of her residuary estate infants became entitled contingently on their surviving their parents. On the question whether the power of advancement conferred by the Trustee Act, 1925, s. 32 (1), was exercisable in favour of the infant beneficiaries by the trustees of the will of the wife in respect of the appointed fund,

C HELD: the trusts in favour of the infants were not constituted before the commencement of the Act of 1925 within s. 32 (3) thereof, and, therefore, the power was so exercisable.

Re Batty ([1952] 1 All E.R. 425), explained and distinguished.

D FOR THE TRUSTEE ACT, 1925, s. 32, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 99.

Cases referred to:

- (1) *Re Batty*, [1952] 1 All E.R. 425; [1952] Ch. 280; 3rd Digest Supp.
- (2) *Re Gordon & Adams' Contract, Re Pritchard's Settled Estate*, [1914] 1 Ch. 110; 83 L.J.Ch. 172; 109 L.T. 725; 40 Digest 774, 3050.
- (3) *Muir (or Williams) v. Muir*, [1943] A.C. 468; 1943 S.C. (H.L.) 47; 112 L.J.P.C. 39.
- E (4) *Venables v. Morris*, (1797), 7 Term Rep. 342; 101 E.R. 1009; 38 Digest 707, 513.

ADJOURNED SUMMONS to determine whether, in the events which had happened, the power of advancement conferred by the Trustee Act, 1925, s. 32 (1), was exercisable by the plaintiffs as the trustees of the will and codicil of Henry Bransbury, deceased, in respect of the capital of the trust funds representing the residuary estate of the said Henry Bransbury, deceased, in favour of the infant beneficiaries, contingently interested in the said capital.

F By his will dated Sept. 22, 1915, Henry Bransbury ("the testator") devised and bequeathed all his real and personal estate subject to the payment of funeral and testamentary expenses and debts to his trustees on the usual trusts for sale and conversion and directed them to hold the trust premises on trust for his wife during her life. By a codicil dated June 6, 1919, to his said will the testator directed that after the death of his wife his trustees should stand possessed of the trust premises "in trust for such person or persons and in such manner as my said wife shall from time to time by will or codicil appoint". On Mar. 6, 1921, the testator died.

H By her will dated Aug. 26, 1926, the testator's wife, Fanny Maria Bransbury ("the testatrix") in exercise of the power of appointment conferred on her by the said codicil directed her trustees to hold the residuary estate of the testator "upon and subject to the same trusts powers and provisions for the same persons and purposes and in the same manner in all respects" as were thereafter declared concerning her residuary estate. By her said will (as amended by codicils dated respectively Mar. 5, 1928, and Jan. 22, 1931), the testatrix devised

and bequeathed her real and residuary personal estate to her trustees on trust to sell the same and to hold the net proceeds ("her residuary estate") subject to certain payments on trust to divide the same into two equal parts. As to one equal part of her residuary estate, she directed her trustees to hold the same on trust to pay the income thereof to her grandson, the first defendant, Stuart Ponsonby Bramsdon Bransbury, during his life and after his death as to both capital and income for all his children living at his death with substitutional trusts in favour of the children then living of any child then dead. The second equal part was given on similar trusts in favour of a second grandson, John Brian Bransbury, the second defendant, and his issue. The testatrix declared cross-remainders in the event of a grandson not having issue him surviving, and provided that, if neither grandson left issue him surviving, her residuary estate should be held on trust for St. George's Hospital, London. On Sept. 14, 1934, the testatrix died. Both grandsons had infant children.

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H. E. Francis for the plaintiffs, the trustees of both wills.

Belsham for the first and second defendants, Stuart Ponsonby Bramsdon Bransbury and John Brian Bransbury.

Myles for the third and fourth defendants, infant beneficiaries.

P. W. E. Taylor for the fifth defendant, the Board of Governors of St. George's Hospital.

C

VAISEY, J. (having stated the facts): The Trustee Act, 1925, s. 32 (1), gives trustees certain powers of advancement out of capital for the benefit (inter alios) of infants contingently entitled, and provides that the section is not to apply to trusts constituted or created before the commencement of the Act. When the testatrix executed her will, she purported to exercise the power of appointment given to her by the will of the testator (her late husband) by declaring that the trustees of her will were to hold the appointed property

D

"upon and subject to the same trusts powers and provisions for the same persons and purposes and in the same manner in all respects as are herein-after declared of and concerning"

the testatrix's own residuary estate, and it suffices to say that her own residuary estate was so settled that infants are contingently entitled to shares in it, contingent, that is to say, on surviving their parents. There is no doubt that, so far as the testatrix's own private estate is concerned, s. 32 (1) of the Trustee Act, 1925, is clearly applicable, so that the powers of advancement can, without any fetter or doubt, be exercised for the benefit of the children entitled in remainder. But a doubt has arisen whether that applies also to the funds which were handed to the trustees of the testatrix's will by virtue of the appointment to them under the will of her late husband. I am asked to determine whether or not, in the events which have happened, the power of advancement conferred by the Trustee Act, 1925, s. 32 (1), is exercisable by the plaintiffs as the trustees of the will and codicil of the testatrix in respect of the capital of the trust funds representing the residuary estate in favour of the infant beneficiaries.

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In my judgment, that question is not aptly framed, because, the appointment having been made in terms by the testatrix unto the trustees of her own will, I think that the trusts of the husband's will have long since come to an end. She might have said and declared "that the trustees of my husband's will shall hold the same upon and subject to the same trusts as I have declared in respect of my own residuary estate", but she did not. She appointed out and out, and the effect of the appointment was equivalent to a direction to the trustees of the husband's will to hand these funds over to the trustees of the will of the testatrix. It so happens, however, in this case that the same persons are trustees of both wills. I think the proper answer to this question—I will anticipate my conclusion—is a declaration that the power of advancement conferred by the section is exercisable by the plaintiffs as trustees of the will of the testatrix both in respect

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of the capital of the trust funds which originally represented the residuary estate of her husband as well as in respect of the other property which formed the residuary estate of the testatrix.

I very much regret that this summons seems to have been due in some measure to a decision of my own in *Re Batty* (1). The headnote of the report of that decision in the LAW REPORTS is ([1952] Ch. 280):

- A "Where a will, which confers a power of appointment, takes effect before Jan. 1, 1926, and that power is exercised by an instrument executed after that date, the trusts set up by the later instrument are, for the purposes of s. 32 (3) of the Trustee Act, 1925, 'constituted' before the commencement of that Act; and the trustees have no statutory power to make advancements under the provisions of that section".
- B That headnote does not indicate, as the headnote to the case in the ALL ENGLAND LAW REPORTS does ([1952] 1 All E.R. 425), that I was dealing with a special power. I say at the outset of my judgment in *Re Batty* (1) (ibid.) that I was dealing with a special power. I did not go out of my way to say: "This decision has nothing to do with a general power, and nothing I say must be considered as expressing any view that a special power and a general power stand in any relevant respects on the same footing". I will not refer to my judgment, from which I see no ground to depart.

- C I think, as regards a special power, that the ordinary rule applies, which is this. Where a special power is exercised—and it must always be remembered that a special power is a fiduciary power—the document exercising the power is read back into the original document. The document creating the power indicates an area within which the fund has to be allocated, and the document exercising the power fills in what still remains in doubt as to how, among those objects in that limited range, the fund appointed is to go. I should like to make it perfectly clear, if it was not clear before, that my own decision in *Re Batty* (1) was intended to apply, and, I think, does apply, exclusively to the powers which are called either special powers or—a term which is used of them in what I can rightly call the classic text-book, FARWELL ON POWERS—limited powers.
- D Does that rule, that the provisions by which a special power is exercised have to be read into the document creating the power, apply in any way to a general power? I should have thought that it was a matter of clear principle. So far as personal estate is concerned, at any rate, there is no shadow of doubt at all that that principle does not apply in any respect to a general power. The nature of a general power has been stated many times. I should like, in this connection, to refer to *Re Gordon & Adams' Contract. Re Pritchard's Settled Estate* (2), the facts of which are not relevant, but which contains some very valuable statements about the law in this respect. It was held there that, the general power of appointment having been fully exercised by the widow, there was a re-settlement of the estate, and, there being no outstanding interests or charges having priority over that re-settlement, the original settlement created was at an end. The following observations were made by SIR HERBERT COZENS-HARDY, M.R. ([1914] 1 Ch. 113):

- E "Then it is said that the appointment has to be read into the instrument creating the power, and therefore [certain consequences followed]. I am quite unable to assent to that view. The law has made a clear distinction between general and special powers. A special power must be read into the instrument creating it, but that cannot be treated as applicable to general powers".

He then quotes a passage from FARWELL ON POWERS, 2nd ed., p. 286, in these words:

"There is an important distinction between general and particular powers in this respect. The donee of a general power is virtually absolute

owner of the property over which his power extends; and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him' ”.

In my judgment, he is equally to be considered as absolute owner of the property for the purpose of creating trusts which give rise to consequences, whether under statute or otherwise, in just the same way and in the same manner and with the same consequences as the donee of the power can do with his own property. SWINFEN EADY, L.J., in the same case, said (*ibid.*, 114): A

“ This is a case in which there is a general power of appointment which has been fully exercised. The whole estate has been re-settled, and there are no interests or charges having priority to the re-settlement. The original settlement is entirely at an end.”

The conclusion was reached which I have already indicated. That decision seems to me to be, with due respect to everybody concerned, almost a platitude or an axiom. B

I referred in *Re Batty* (1) to *Muir (or Williams) v. Muir* (3). In that case there is a passage from the speech of LORD ROMER which puts the point with force and a conciseness with which we are familiar in the judgments and speeches of that very learned judge. He said ([1943] A.C. 483): C

“ . . . if a person be given a general power of appointment over certain property he is virtually the owner of that property. If and when he exercises the power the interests of his appointees come to them by virtue of and are created by the deed of appointment. In the case of a special power it is very different.”

That difference is the difference which I desired to emphasise, and which I now again reiterate, in *Re Batty* (1). I think the exercise of a general power, and in this case particularly, is such as to destroy altogether the limitations, qualifications and provisions of the document creating the power, and to bring into operation the new trusts which derive their force and originate in the later of the two documents exclusively. D

Re Batty (1) has no application at all to a general power of appointment, and I so hold on the authority of the cases to which I have referred. E

Order accordingly.

Solicitors: *Loxley & Preston*, agents for *G. Lewis F. Grece*, Redhill (for all parties except the fifth defendant); *Eland, Nettleship & Butt* (for the fifth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re IVEAGH TRUSTS. IVEAGH (EARL) AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), February 3, 4, 5, 8, 9, 1954.]

Conflict of Laws—Settlement—Proper law of settlement—Draft in English form for benefit of family in Ireland—English and Irish law the same at date of settlement.

A By a voluntary settlement dated July 1, 1907, a settlor settled securities on his son for life, and subject thereto the settlement provided for the usual power of appointment in favour of the issue of the life tenant with a gift over to his children in default of appointment. The funds settled comprised a holding of registered shares in an English company (which carried on its business wholly in Southern Ireland), and large holdings of bearer securities in American railway companies, a German imperial loan, and a Canadian railway company. The bearer securities were kept in England. The settlement was drafted by English solicitors and its form was that which was common in England and Ireland. All parties executed the settlement in England. The investment clause permitted (inter alia) investment in freehold, copyhold, leasehold or chattel real securities in England or Wales or any British colony or the United States of America, but did not expressly permit such investment in Ireland (although such investment was, in fact, permissible by virtue of the Trustee Act, 1893, s. 1). Investment was also permitted in stocks or securities of or guaranteed by the Bank of England or the Bank of Ireland. The settlor's domicile of origin was Irish, but he maintained substantial estates both in Ireland and in England and spent his time preponderantly in England. It was not established that he ever acquired a domicile of choice in England. The life tenant was at all times domiciled and ordinarily resident in Ireland. Of the three trustees appointed by the settlement, the first was the life tenant, and the remaining two were also sons of the settlor, who divided their time between England and Ireland, having large business interests in both countries. Their domicils of origin were Irish and there was no evidence that they had acquired English domicils. The trust was administered and managed from Ireland.

HELD: having regard especially to the fact that the settlement was made to benefit a family in Ireland, all the parties having at the date of the settlement Irish domicils, the proper law of the settlement was the law of the Republic of Ireland.

F *Re Cloncurry's Estate* ([1932] I.R. 687), considered.

Estate Duty—Determination of life interest—Property to be included in property passing—Finance Act, 1940 (c. 29), s. 43 (1).

G By a settlement dated July 1, 1907, a settlor settled a fund on A for life, and subject thereto gave A a power of appointment over the fund in favour of A's issue, with a gift over to A's children in default of appointment. By a deed dated Sept. 14, 1946, A appointed part of the trust fund as to one half to his three daughters absolutely, and as to the remaining half to their issue on attaining the age of twenty-five years or females marrying, within the perpetuity period, and released his life interest therein. By a deed dated Feb. 19, 1948, A appointed that the remainder of the trust fund be held for his three daughters in equal shares absolutely, and released his life interest therein. On Mar. 22, 1949, A died, and it was agreed that whatever property was liable to estate duty by virtue of the Finance Act, 1940, s. 43 (1), ought to be valued as at that date. On the question what property was liable to duty in view of the releases in favour of A's daughters,

H HELED: the property liable was the actual constituents of the fund in which the life interest was released at the date of the respective releases.

Sneddon v. Lord Advocate (ante, p. 255), considered.

Quaere whether, in a case in which, notwithstanding the release of a life interest, the settlement continues to subsist, the property liable under the Finance Act, 1940, s. 43 (1), in connection with the death of the former life tenant, would be the property constituting the trust fund at the time of the release.

AS TO PROPER LAW OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-270, paras. 321-323; and FOR CASES, see DIGEST, Replacement Vol. 11, pp. 494-496, Nos. 1158-1174.

Cases referred to:

- (1) *Marlborough (Duke) v. A.-G. (No. 1)*, [1945] 1 All E.R. 165; [1945] Ch. 78; 114 L.J.Ch. 83; 172 L.T. 21; 2nd Digest Supp.
- (2) *Wallace v. A.-G., Jeves v. Shadwell*, (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 21 Digest 63, 413.
- (3) *Iveagh v. Revenue Comrs. & Revenue Comrs. v. Iveagh*, [1930] I.R. 386; Digest Supp.
- (4) *Re Cloncurry's Estate*, [1932] I.R. 687.
- (5) *Sneddon v. Lord Advocate*, ante, p. 255.
- (6) *Re Payne*, [1939] 3 All E.R. 875; 108 L.J.Ch. 339; *sub nom., Re Payne's Declaration*, [1939] Ch. 865; 161 L.T. 254; *affd.* C.A., [1940] 2 All E.R. 115; [1940] Ch. 576; 109 L.J.Ch. 369; 163 L.T. 100; 2nd Digest Supp.

ADJOURNED SUMMONS to determine, inter alia, (i) what law was the proper law of a settlement dated July 1, 1907, and made between the then Viscount Iveagh, of the first part, Arthur Ernest Guinness, of the second part, and the said Arthur Ernest Guinness, Rupert Edward Cecil Lee Guinness, and Walter Edward Guinness, of the third part; and (ii) having regard to deeds of appointment and release dated respectively Sept. 14, 1946, and Feb. 19, 1948, what property was liable to estate duty under and by virtue of the Finance Act, 1940, s. 43 (1), in connection with the death on Mar. 22, 1949, of the said Arthur Ernest Guinness.

Russell, Q.C., and *R. O. Wilberforce* for the trustees of the settlement of 1907. *Cross, Q.C.*, *J. H. Stamp* and *Brunyate* for the Inland Revenue Commissioners. *V. G. H. Hallett* for the three daughters of the deceased life tenant, Arthur Ernest Guinness.

Feb. 5. **UPJOHN, J.:** This is a summons by the trustees of a settlement dated July 1, 1907, taken out under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933, against the Inland Revenue Commissioners for the determination of a number of questions relating to the liability, if any, of the trust property to estate duty on the death of the tenant for life under the settlement. Part of the trust property consists of £75,000 ordinary shares in an English company known as Arthur Guinness, Son & Co., Ltd., which I will refer to as Guinness, but those shares are registered on the register kept by the company in Dublin, and are, therefore, locally situated out of the jurisdiction. In order to ascertain whether estate duty is exigible on those shares, the first question to be ascertained is what is the proper law applicable to the settlement. The judgment is directed to that question and to that question only.

As I have said, the settlement is dated July 1, 1907, and was made between the then Viscount Iveagh, who was afterwards the first earl, whom I will call the settlor, of the first part, and Arthur Ernest Guinness, whom I will call Mr. Ernest Guinness, of the second part. He was the second son of the settlor. The parties of the third part were the trustees, and they were Mr. Ernest Guinness and his two brothers, Rupert Edward Cecil Lee Guinness, the present Lord Iveagh, and Walter Edward Guinness, who later became Lord Moyne. The settlor, no doubt because of his position, was not expressed to be of any address. Mr. Ernest Guinness was expressed to be of Dublin, the present Lord Iveagh and Lord Moyne were expressed to be of addresses in London. As appears from the

recital, the settlement was a voluntary settlement. It provides (and I can take the trusts very shortly because nothing turns on their exact construction) for the trust premises to be settled during the life of Mr. Ernest Guinness on protective trusts for him, but he had power to surrender his life interest in the trust property, or in any part thereof, in favour of a wife or issue without creating a forfeiture. After the death of Mr. Ernest Guinness there were the usual trusts to appoint amongst his issue, and, subject to that power of appointment, a trust for his children. If there should be no children, or persons taking under the power of appointment, then the trust property was to be held on the trusts of certain settlements executed on the same day in favour of Mr. Ernest Guinness's two brothers, Lord Moyne and the present Lord Iveagh. The investment clause, cl. 9, is of some importance, and provides:

“The trustees shall have power exercisable from time to time in their uncontrolled discretion: (1) To retain the trust premises or any part thereof in their existing state of investment for the time being without responsibility for any loss arising thereby or to sell the same or any part thereof and to invest all moneys from time to time requiring investment in or upon: (a) Any of the stocks funds or securities of or guaranteed as regards principal or interest or a minimum rate of interest and either permanently or for a limited period by the government of the United Kingdom India any colony dependency or possession of the United Kingdom the United States of America Egypt France the German Empire Prussia or Holland or any municipal corporation or public body or authority in any of those countries having power to levy rates tolls dues or taxes. (b) Freehold copyhold leasehold or chattel real securities in England or Wales or any British colony or the United States of America such leasehold securities having not less than fifty years unexpired at the time of investment. (c) Stocks or securities of or guaranteed as aforesaid by the Bank of England or the Bank of Ireland. (d) Debentures and debenture or rent charge or guaranteed stocks or securities of any railway dock canal gas water or lighting or power company in the United Kingdom or any British colony or dependency or of any commercial industrial financial or other company incorporated in the United Kingdom. (e) Preference stock or preference shares of any railway or tramway company in the United Kingdom which shall have paid dividends on its ordinary capital at the rate of at least three per cent. per annum during each of the five years immediately preceding the investment or the ordinary stock or shares of any railway or tramway company in the United Kingdom which is leased to or worked by any other company at a fixed rent or a rent varying only with gross receipts. (f) First mortgage gold bonds of any railway company in the United States of America. (g) Any of the stocks or securities specified in the schedule hereto and (h) Securities to bearer or passing by endorsement and delivery of any of the specified classes and to transpose all or any such investments for others and it shall not be obligatory to make any reservation or allowance out of the income to replace capital invested in any security which is wasting or redeemable at a price below that at which the same may have been acquired . . . (3) To deposit any deeds bonds shares and securities to bearer with any bankers or company for safe custody or receipt of interest or dividends and to pay out of the income of the trust premises for such custody.”

The investments that were settled are set out in the schedule, and they consisted of, first, £60,000 nominal of Guinness six per cent. cumulative preference stock. That was the well-known brewing company. It was an English company it having been incorporated in England in the latter part of last century, but in 1907, was carrying on its business wholly in and about Dublin on the banks of the Liffey. There were also settled \$250,000 of general mortgage four per cent. gold bonds in an American railway, 1,000,000 marks

in a German imperial loan, £42,000 of first mortgage bonds in a Canadian railway company, and some £40,000 of sterling 3½ per cent. bonds in another American railway. I understand that all the investments, except the Guinness investment, were in bearer bonds, and they were in fact kept in England. As appears from the witnesses to the various signatures, all the parties appear to have executed the settlement in England.

On Dec. 15, 1908, certain investments were added to the settlement funds, and there was a short declaration to that effect signed by the settlor and by the trustees. Those seem to have consisted of certain colonial stocks and some English and American railway stocks. On Mar. 5, 1910, a sum of £100,000 Guinness ordinary stock was added to the settlement fund, and a short declaration was signed by the settlor and by the trustees. A

The sole question I have to consider is what is the proper law of the settlement? That is a question which is not easily answered. I think I need only refer to a very short passage in the judgment of LORD GREENE, M.R., in *Duke of Marlborough v. A.-G.* (No. 1) (1). LORD GREENE, M.R., had considered the statement of LORD CRANWORTH, L.C., in *Wallace v. A.-G.* (2), and he said ([1945] 1 All E.R. 168): B

“If the principle laid down by LORD CRANWORTH in the case of wills is applied to the case of a marriage settlement the result does not appear to us to admit of doubt. In the case of a will the law under which title is claimed is the law of the domicile. In the case of a marriage settlement the law under which title is claimed is the law which governs the settlement. This law can only be the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities. There is, as it seems to us, a precise analogy between the law of the domicile in the case of wills and what is conveniently called ‘the proper law’ of the settlement in the case of marriage settlements. What is the proper law of the settlement may, of course, give rise to controversy as it has done in the present case, and the question what weight ought to be given to the various factors which may properly be taken into consideration may not always admit of a ready answer. But the principle that the matter to be ascertained is the proper law of the settlement appears to us to flow inevitably from LORD CRANWORTH’S original decision.” C D E

The same principles apply in my judgment to a voluntary settlement.

I do not propose to trace the history of changes of investments referred to in the accounts of the trustees, nor to changes of trustees, for, as LORD GREENE, M.R., points out in the *Duke of Marlborough* case (1) (*ibid.*, 169), subsequent changes of trustees and subsequent changes of investments cannot alter the proper law of the settlement, at any rate unless all the beneficiaries agree to the change of the proper law and virtually make a new settlement. That is not suggested here. Therefore, I need only say that Mr. Ernest Guinness, the life tenant, died on Mar. 22, 1949, having made a number of appointments pursuant to the powers conferred on him, and he released his life interest in the appointed properties but, unfortunately for the Guinness family, within five years of his death. F G

I have to consider what are the relevant circumstances at the date on which the settlement was made in 1907. First of all, what was the nature and situation of the property settled by the settlement? I do not think that really throws any light on the matter which I have to consider. They were investments in all parts of the world—in America, in Canada, in Germany, and, of course, largely in Guinness. In this case, there is no question of matrimonial domicile but, in my judgment, it is relevant to consider what was the domicile of the settlor and of the parties who were to be benefited by the settlement. With regard to the settlor that is a matter of much difficulty. The facts relating to the domicile of H

- the settlor were very fully investigated and are set out in *Iveagh v. Revenue Comrs. & Revenue Comrs. v. Iveagh* (3). There claims were being made for very large sums by way of income tax and supertax or surtax by the Irish authorities, and the question arose as to the domicile of the settlor at that time. I have been referred to the statement of facts. As they are set out in the report, I do not think it is necessary for me to refer to those facts at any great length, but there are one or two facts on which reliance was placed by the Crown, and I must,
- A therefore, give a brief, and, I hope, sufficiently accurate, summary for my purpose. The settlor's domicile of origin, undoubtedly, was Irish. He managed the business of Guinness, which was his own property, until about 1886 when the company was formed in England and he became its first chairman. He resigned from the board in 1890, but rejoined it in 1897, and again became chairman in 1902, and remained chairman for many years. He had a large establishment at St. Stephen's
- B Green in Dublin which he occupied throughout his life. He had, for many years and at all material times, a house and property called Farmleigh, a country property just outside Dublin. In 1915—i.e., after the date of the settlement—he acquired under the will of his brother, Lord Ardilaun, a large property in Galway known as the Ashford estate. However, he spent much time in England. He had a house in Berkeley Square from 1871. Then, in 1877, he acquired No. 5,
- C Grosvenor Place. Subsequently, in 1890 he purchased another house next to it and had them reconstructed as one. At the end of last century he acquired a very large estate in Suffolk, at Elveden. It would appear that at that time the preponderance of his life was in England, but he frequently visited Ireland. He kept up the properties I have mentioned in Ireland throughout his life, and, indeed, he held public appointments there, being appointed deputy lieutenant
- D for the county of Galway in 1915. The question of his domicile was never solved for the purposes of estate duty when he died in 1927, the matter being compromised. But there is no doubt that in 1890 he transferred all his business papers, certificates and financial papers in the custody of his Irish bank to his London bank. Subsequently to 1890 there is no doubt that the settlor, his wife and his children—those are the three brothers who are the trustees of the
- E settlement—while they were growing up resided habitually in England, but they paid frequent visits to Ireland. Those facts do not, however, determine the question of the settlor's domicile. In 1907 the position seems to me to have been this. Having a domicile of origin which was, undoubtedly, Irish, it has never yet been established that he changed or abandoned that domicile of origin and acquired a domicile of choice in England. I think I must deal with this matter
- F on the footing that the settlor was at the time of the settlement a domiciled Irishman though spending most of his time, and having many business and social interests, in England.

- Mr. Ernest Guinness was, if I may put it colloquially, the most Irish of the brothers. He was born in 1876, and had married in 1903. At the time of the settlement of 1907 he had two children, Mrs. Plunket, as she now is, and Lady
- G Dufferin, as she now is, the first being born in 1904 and the second in 1907. Later, there was a third child, who is now Lady Oranmore and Browne, who was born in 1910. Mr. Ernest Guinness's domicile of origin was, undoubtedly, Irish, and it is accepted by the Crown that he never acquired another domicile, he remained of Irish domicile all his life. At the time of the settlement, he was living entirely in Ireland, and he had no house in England, although in 1910 he acquired
- H a large house, No. 17, Grosvenor Place, in London. With regard to the two brothers, all that I know about them is that, in 1907, Lord Moyne and the present Lord Iveagh had large business interests both in England and in Ireland, and used Dublin and London indiscriminately as their headquarters for social and business purposes, but both of them, so far as the evidence goes, had domiciles of origin in Ireland, and both of them had, so far as I know, not acquired at that time a domicile of choice in any other place, although it is admitted that Lord

Moynes, who died many years later in 1944, had then acquired a domicile of choice in England. That seems to me the situation with regard to the parties to this settlement.

There is a further relevant matter to be borne in mind. The form and contents of a settlement have always been matters of great importance in determining the proper law of the settlement. They are frequently decisive, as they were in the *Duke of Marlborough* case (1). In that case, the contest was between English law and the law of the United States, of the city of New York, as to which was the proper law. It was found that the settlement was appropriate to English law, and the phraseology used was quite inappropriate to the law of New York. That is almost decisive in these cases, but, unfortunately, in this particular case in 1907 the law of England and of Ireland was identical. There was only one government, i.e. of the United Kingdom, one revenue authority, and one statute-making body. Therefore, it is conceded in this case that the form of the settlement is equally appropriate to England or Ireland. But it is pointed out that in cl. 9 (1) (b) there is what I may call some measure of discrimination against Ireland, because express power is given to invest in

“freehold copyhold leasehold or chattel real securities in England or Wales or any British colony or the United States of America”,

but not in Ireland. However, counsel for the trustees makes the point that, there being no express exclusion of Ireland, there would in fact be power to invest in such securities in Ireland under the Trustee Act, 1893, s. 1, giving power to trustees to invest. Apart from that investment clause there is little light thrown on the matter except that in sub-cl. (c) power is given to invest “in stocks or securities of or guaranteed as aforesaid by the Bank of England or the Bank of Ireland”. Perhaps, if this were a wholly English settlement, you would not expect mention of the Bank of Ireland. Further than that I do not think the contents of the settlement throw any light on the matter.

There are three other matters strongly relied on by the respective sides as being of importance. The first one is that it is admitted that the settlement was drafted and prepared by Messrs. Travers Smith, Braithwaite & Co., solicitors, carrying on business in London. Secondly, it is admitted that at all material times all the bearer shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland had that been desired. On the other hand, it is admitted that the day to day management of the trust and the keeping of the accounts was in Ireland. Mr. Baker, who was secretary to Mr. Ernest Guinness for many years, said in his affidavit:

“Soon after the execution of the settlement I took over the accounts of the settlement. The accounts were kept by me at Mr. Ernest Guinness’ residence Glenmaroon, Chapelizod, co. Dublin. Mr. H. T. Bliss joined me as assistant secretary in 1929 and I gradually handed over to him the accountancy of the trust which he has handled ever since. He did this work partly at Glenmaroon aforesaid and partly at 17, Grosvenor Place, London.”

In that state of affairs, what is the proper law of the settlement? It is, indeed, a difficult matter. It is in a sense a hypothetical question because in 1907, as I have already pointed out, it was all one country, and the question whether the law of Ireland or the law of England governed the matter was not a real question. Nor do I think it would be right to allow the matter of forum for the administration of the estate trust to enter into the matter, for this reason. It is quite plain that if any beneficiary had desired to sue the trustees for some breach of trust, he could, in the circumstances of this case, have sued according to his choice either in Ireland or in England, because two of the trustees at all times and all the trustees from 1910 onwards had residences both in Ireland and in England, and could have been sued at will in either place. Counsel for the

trustees submits that what is decisive in this case is that the domicile of all parties, so far as can be ascertained, was at the time Irish, but he says that what is more important is that the principal beneficiary—i.e., Mr. Ernest Guinness—and his family were then not only domiciled but resident wholly in Ireland. He submits that as in a marriage settlement the matrimonial domicile is of importance, so here the domicile of a family to be benefited by the settlement must be a matter of great importance. He points out that the accounts were kept in Dublin, and he submits that the fact that the settlement was drawn in England is really a matter of no importance, for he says it is quite unlike a marriage settlement—and he seeks to distinguish *Re Cloncurry's Estate* (4) to which I must refer—where customarily the lady's solicitors draw the settlement and they put in provisions in the settlement which show it is to be an English settlement. The very fact, he says, that they draw the settlement shows that they desire the settlement to be English. Counsel submits that the same principle cannot be applied to the present case where it was a matter of pure chance whether Lord Iveagh went to his Irish or to his English solicitors. Again, he submits the fact that the indicia of title are kept in London is quite irrelevant in this case. London has a larger stock exchange than Dublin, and, in a big trust of this sort where changes of investment are made from time to time, it would be obviously convenient that the securities should be kept in London, because deals would be more likely to take place on the London Stock Exchange rather than on the Dublin Stock Exchange.

On the other hand, counsel for the Crown submits that the preponderance of evidence is that the settlor intended that the settlement was to be governed by English law, and he relies strongly on the fact that the indicia of title were kept in this country, and on the fact that the settlor instructed an English solicitor and not an Irish solicitor, and that at this time the preponderance of his life was in England rather than in Ireland. He points out and stresses that, if the settlor had wanted Irish law to govern this matter, he surely would have had the settlement "vetted" by his Irish solicitors. He points out, too, that there is no express power to invest in securities of Irish land, and he relies on that as showing that it was intended that English law should govern this settlement. He naturally referred me to the *Cloncurry* case (4). That is not a case which, apart altogether from the fact that it was an Irish case, governs this case, because each case in matters of this sort is governed particularly by its own facts. However, it was, undoubtedly, a strong case, and does, I think, lend substantial support to the view submitted by the Crown. The facts, very shortly, were that Lord Cloncurry was domiciled and had his seat in what afterwards became Eire. He was engaged to be married to an English lady, Miss Winn, and her solicitors prepared the settlement. Lord Cloncurry was bringing £14,000 into the settlement, whereas Miss Winn's father, Lord St. Oswald, was only bringing £10,000 into the settlement. On the other hand, the settlement provided that investments might be made in real or leasehold securities in England or Wales, but not elsewhere. So the argument which counsel for the trustees presented to me on the provisions of the Trustee Act, 1893, s. 1, was not available in that case. Furthermore, there was express power to purchase messuages, lands, or hereditaments situated in England or Wales being freehold or copyhold, and so on, but there was no power to purchase land in Ireland. The bonds and certificates relating to the trust funds were kept in London. On the other hand, it is clear that the matrimonial domicile there was to be Irish. But the court, consisting of SULLIVAN, P., HANNA and O'BYRNE, JJ., held that the proper law of the settlement was English, and they held that the investment clause prohibiting investments in Irish real and leasehold securities or the purchase of land in Ireland overrode the other indication which one would have thought was of great importance, namely, that the matrimonial domicile was to be Irish. There is no doubt that in those judgments in the High Court, and in the Supreme Court

judgment (*ibid.*, 709), which was delivered by MURNAGHAN, J., that fact and the fact that the settlement had been drawn up by English solicitors were treated as of decisive importance. They also relied on the fact that one of the trustees resided partly in what afterwards became Northern Ireland and in England, the second in England, while the other one, being in the army, had no particular residence. That helped to some extent. On the whole, it is clear that they felt that the drawing of the settlement by English solicitors was of great importance. I think that appears from the judgment of MURNAGHAN, J. (*ibid.*, 712). In the court below it is fair to say that they relied more on the investment clause, and an intention to keep the trust funds away from Ireland.

I think that case lends a good deal of support to the Crown's argument, but it comes down to the balance of evidence on the whole matter as to what is to be presumed to have been the intention of the parties as to the law which was to govern their rights and liabilities. I think that the question is very difficult, but, on the whole, I cannot give any real weight to the investment clause here. I cannot ascribe any real weight to the fact that the settlor instructed his English solicitors. The decisive matter here, in my judgment, is that this was a settlement to benefit a family in Ireland, all the parties, so far as I know, then having Irish domicils, though with many, perhaps overriding, interests in England. On the whole, I think that the proper law of this settlement is Irish, and I propose to declare accordingly.

[His LORDSHIP heard argument on the second question specified above.]

Feb. 9. UPJOHN, J.: In 1946 and 1948 Mr. Ernest Guinness executed releases of his life interest in part of the property subject to the settlement. As to part of that property he made appointments to his three daughters under powers conferred on him by the settlement, with the result that on the release of his life interest those three daughters took a certain part of the trust property absolutely. Mr. Guinness died within five years of those releases, and, therefore, having regard to the terms of the Finance Act, 1940, s. 43, estate duty became exigible in respect thereof. It is common ground that whatever property falls to be taxed must be ascertained and valued as on the date of the death of Mr. Guinness. The whole question I now have to determine is what is to be taxed.

That depends on the true construction of s. 43, sub-s. (1) of which is in these terms:

"Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—(a) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death . . ."

The rest of s. 43 was referred to in argument, but I do not think that it throws any light on the matter which I have to consider.

By s. 65 (5) of the Finance Act, 1940, Part IV of the Act (and s. 43 is in Part IV of the Act) is to be construed as one with Part I of the Finance Act, 1894. That brings into play s. 22 (1) of the Finance Act, 1894, the relevant provision of which is in these terms:

"In this Part of this Act, unless the context otherwise requires . . . (f) the expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale."

The rival contentions of the parties are these. For the Crown it is said that the property to be taxed is the actual property at the moment of release — i.e., the actual constituent investments in the settlement at that moment. The remainderman took those properties, and it may be that the remainderman in the interval between the release and the date of death has sold or otherwise disposed of the property which she took. That, the Crown says, does not matter. One must find the situation of the property at the date of death and value it at that moment. It might be useful to give one or two examples as to how the Crown says that works in practice. Supposing the property handed to the remainderman consists of a debenture which is redeemed before the date of death. In that case, the Crown concedes that there is no property at the date of death and, therefore, no charge of estate duty. Then consider the case of a settlement, the proper law of which is outside the jurisdiction (as, indeed, is the case of this settlement), in that case, the property taken by the remainderman—let us assume it to be a bearer bond—may have been disposed of; the remainderman herself may have taken the property out of the jurisdiction, or a purchaser, whether immediate or mediate from the remainderman, may have done so. In any of those cases, again, the Crown concedes that the property escapes taxation. On the other hand, one may have a case where an investment is sold by the remainderman, and after the date of sale, but before the death, the property sold vastly increases in value. In that case, says the Crown, the greatly increased value is subject-matter to be taxed. Curious anomalies arise from that way of looking at the section.

The subject's contention is this. Section 22 (1) (f) of the Act of 1894 must be read into the word "property" in s. 43 of the Act of 1940 so that the property in which the interest subsisted is the original property given by the transfer to the remainderman and the proceeds of sale thereof, and any money or investments in the hands of the remainderman for the time being representing the property transferred. Curious anomalies also arise from that construction, although, perhaps, they are not quite so startling as those which arise from the Crown's contention. In the circumstances, however, I do not think that any guidance is to be obtained from a consideration of the anomalies and hardships that may arise in any given set of circumstances as a result of either construction. It is my duty to give effect to the words of the section as best I can.

During the course of the argument both sides rightly canvassed the construction of s. 43 in a case, which does not directly arise for my decision, where the release did not result in the remainderman taking absolute interests, but where the trusts of the settlement remained in existence up to, and, possibly, beyond, the death of the life tenant, the interests of the remainderman merely being accelerated by the release of the life interest. I shall refer to those arguments later.

I must now return to s. 43, which is a "deeming" section. Deeming sections are notoriously difficult to construe, and I think it is fair to say that this particular section has had its fair share of notoriety. It poses a hypothetical state of affairs because "the property" mentioned in the section is property in which the interest would have passed on the death. Therefore, the section appears to contemplate the continuance of a hypothetical state of affairs, i.e., a continuance of the trusts of the settlement until the death. No one can tell what property would in fact have passed on the death, for the trustees might have made changes of investment. Each side says that that circumstance places the other in a dilemma. Apart altogether from authority, it seems to me that "the property" in s. 43 must satisfy the test that it would have passed hypothetically on the death of the tenant for life. What property is that? It might be the property in the actual state of investment that was in fact transferred to the remainderman, for the trustees might never have made any changes of investment. It might have consisted of property which was the result of sale, transposition and re-investment

by the trustees of the settlement. I do not see how any other property would have passed on the death. The subject's contention involves that the property which is deemed to pass on the death includes the property which is or may be the result of a sale and re-investment, and other possible dispositions by, not the trustees, but the remainderman, who is solely entitled. So it is said that the property that would have passed on the death is the property in the hands of the remainderman as a result of the remainderman exercising over that property all her absolute rights as owner. That consideration leads me to the view that it is not possible to read into s. 43 the wider inclusion of property to be found in s. 22 (1) (f) of the Act of 1894. For, if that section be read into s. 43, it seems to me necessarily to follow that it must give a meaning to "property" which goes far beyond the property which would or could have passed on the death. Therefore, I reach the conclusion that the context does not admit of the application of s. 22 to s. 43.

What, then, does "the property" mean in s. 43? I have already pointed out that, in my judgment, it must mean either the actual property at the date of release or property which has been transposed by the trustees and no one else. In my judgment, in order to make any sense of the section, that latter class of property must necessarily be rejected. I think there is some support for that view to be found in the opinion of LORD REID in the recent case of *Sneddon v. Lord Advocate* (5). LORD REID said (ante, p. 267):

"A gift is taxed on the footing that if the property given away had not been given the donor would still have had it at his death. Of course, he might have sold the property and spent the proceeds; but no one suggests that that can be considered. Or he might have sold the property and re-invested the proceeds: where the gift is to an individual donee no one has suggested that that can be considered. The re-investment cannot be deemed to have been in the donor's possession and to have passed on his death."

That speech was dealing with the true construction of the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), incorporated with amendments into the Finance Act, 1894, s. 2 (1) (c), the particular question under consideration being what was the meaning of the words "property taken". Nevertheless, I draw some support from the words which I have read from LORD REID's opinion, and, in my judgment, in considering s. 43 of the Act of 1940, one must deal with it on the hypothesis that the property in that section which would have passed is the property that was the actual property that was transferred to the remainderman, and one must assume that it would have remained in the settlement down to the date of death.

As I have already said, in the course of the argument the position where the release to the remainderman does not give the remainderman an absolute interest but the trusts of the settlement remain in effect was much canvassed before me. Both sides agree that, if in that last mentioned case one takes the property in trust at the actual date of the release and tax that and not the property which is in the trustees' hands at the date of death, absurd results would ensue. That was naturally relied on by the subject as a support for his contention that in such a case s. 22 (1) (f) must apply to s. 43. If it applies in that case, so the argument runs, it must also apply to the case where the remainderman takes absolutely. Speaking for myself, if the matter were *res integra*, I should have felt little difficulty, in a case where the trusts continue until the death of the tenant for life, without any resort to s. 22 in thinking that the property mentioned in s. 43 was "the trust property", i.e., the property originally constituting the settled funds subject to and with the benefit of the duties and powers vested in the trustees by the trust including the power of investing money and varying investments so that the property is the settled fund as it exists at the date of death. Again, speaking for myself, I see nothing inconsistent between that interpretation of the word "property" where the trust continues and the

interpretation I have already given to that word where on the release the trust does not continue, for the simple reason that the conception of the trust property must necessarily come to an end when the property ceases to be trust property, and becomes the absolute property of the remainderman. This conception of property meaning the trust property is, however, a matter which is not free from authority. SIMONDS, J. (as he then was), adopted that conception in *Re Payne* (6). That decision was overruled on the meaning of the words "property taken" by the *Sneddon* case (5), but LORD MORTON OF HENRYTON in his speech in the last-mentioned case appears to have approved the concept which SIMONDS, J., found acceptable, although he denied its relevance to the facts before him. LORD MORTON OF HENRYTON said (ante, p. 258):

"I agree also that a trust fund, once constituted, retains its identity as the trust fund held on certain trusts, notwithstanding any changes which may be made in the investments constituting it, but that fact seems to have no relevance in the present case".

On the other hand, LORD MACDERMOTT (ante, p. 261), after a very full analysis of the earlier judgments, found himself quite unable to accept the concept of property meaning the trust property as constituted from time to time. In that state of high judicial conflict, it seems to me undesirable that I should say more than that that case must be determined as and when it arises.

Declaration accordingly.

Solicitors: *Travers Smith, Braithwaite & Co.* (for all parties other than the Crown); *Solicitor of Inland Revenue.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re YATES' SETTLEMENT TRUSTS. YATES AND ANOTHER v. PATERSON AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
March 1, 1954.]

Practice—Adjournment of proceedings—Appeal in similar case being heard in superior court—Special circumstances—Variation of trusts of settlement—Settlor in poor health.

Persons interested under a settlement reached a compromise in regard to their respective rights under the settlement, and, if the scheme evolved took effect during the lifetime of the settlor, a considerable amount of estate duty would be saved. The settlor was eighty years of age and in delicate health. On an application to the court to approve the scheme it was submitted that the compromise fell within the scope of *Re Downshire's Settled Estates* ([1953] 1 All E.R. 103) and that the court had jurisdiction to approve the scheme if it thought fit. At the date of the hearing of the application an appeal from the decision of the Court of Appeal in *Re Chapman's Settlement Trusts* ([1953] 1 All E.R. 103), which was decided by the Court of Appeal at the same time as was *Re Downshire* (supra), was before the House of Lords, and the decision of the House might affect *Re Downshire* (supra). The judge adjourned the hearing of the application until the decision of the House in *Re Chapman* (supra) was given. On appeal,

Held: the Court of Appeal had jurisdiction to entertain an appeal from an order of a judge adjourning a case, but, as such an order was prima facie entirely within the discretion of the judge, the Court of Appeal would be reluctant to interfere with it: *Maxwell v. Keun* ([1928] 1 K.B. 645), applied, and dicta of FARWELL, J., in *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman* ([1940] 4 All E.R. 216),

approved; where an important case was under appeal, a judge might reasonably adjourn a similar case until the result of the appeal was known; but, as the circumstances of the present application were special in that the settlor might not have long to live and an adjournment might result in an injustice to the parties if the settlor died before the application was heard, and as *Re Downshire* (supra) was not under appeal, the judge should hear and determine it.

AS TO ADJOURNMENT OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 26, p. 93, para. 176; and FOR CASES, see DIGEST, Practice, pp. 556-558, Nos. 2156-2171. A

Cases referred to:

- (1) *Re Downshire's Settled Estates. Re Chapman's Settlement Trusts. Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218. B
- (2) *Re Chapman's Settlement Trusts. Re Downshire's Settled Estates. Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218.
- (3) *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman*, [1940] 4 All E.R. 212; [1941] Ch. 32; 110 L.J.Ch. 36; 164 L.T. 399; 2nd Digest Supp.
- (4) *Maxwell v. Keun*, [1928] 1 K.B. 645; 97 L.J.K.B. 305; 138 L.T. 310; Digest Supp. C

APPEAL by the plaintiffs, the tenants for life under a settlement, from an order of HARMAN, J., dated Feb. 8, 1954, whereby he adjourned the hearing of their application for the sanction of the court to a proposed scheme of compromise in regard to the trusts of the settlement. The plaintiffs claimed that the scheme was within the scope of *Re Downshire's Settled Estates* (1). When their application came before the learned judge, an appeal from the decision of the Court of Appeal in *Re Chapman's Settlement Trusts* (2) was before the House of Lords. As *Re Chapman* (2) raised points similar to those in *Re Downshire's Settled Estates* (1), the learned judge adjourned the hearing of the application until the decision of the House in *Re Chapman* (2) had been given. D

Raymond Jennings, Q.C., and *J. A. Brightman* for the plaintiffs, the tenants for life. E

Harold Lightman for the first, second, third and fourth defendants, children of the tenants for life (three of them being infants).

Plowman for the fifth, sixth, seventh and eighth defendants (cousins of the settlor).

J. A. Wolfe for the ninth, tenth, eleventh and twelfth defendants, the trustees of the settlement. F

SIR RAYMOND EVERSHED, M.R.: This is a curious and unusual appeal, arising out of a matter entitled *Re Yates' Settlement Trusts*, which came before HARMAN, J., on Feb. 8, 1954. It was an application to obtain the approval of the court to a proposed scheme of compromise or scheme of family arrangement dealing with the subject-matter of the settlement which formed the title of the summons. Counsel for the two plaintiffs, who are the sons of the settlor, has contended and contends that the particular type of arrangement or compromise falls within the scope of the decision of this court in *Re Downshire's Settled Estates* (1), which was decided in December, 1952. He recalls that this court delivered at the same time judgment in two other cases, one of which is *Re Chapman's Settlement Trusts* (2), and that on Feb. 8, when the present matter came before HARMAN, J., the decision in *Re Chapman* (2) was before the House of Lords on appeal. That appeal has now been heard, but the decision of the House has not yet been given. It will be noted that only *Re Chapman* (2), and not *Re Downshire* (1), was the subject of appeal, but I think it must be taken that the decision of the House in *Re Chapman* (2) might well have a bearing on the grounds on which this court based its decision in *Re Downshire* (1). However, subject. G
H

of course, to any such pronouncement, the law has been stated by this court in *Re Downshire* (1), which case is not subject to appeal. The result is that, as things now are, prima facie any case falling completely within the scope of *Re Downshire* (1) would, by the authority of that case, be held to be within the jurisdiction of the Chancery judge to determine. But, whether for the reasons which I have indicated (namely, the uncertainty which, until the House has delivered its opinion, necessarily in some measure surrounds this class of application), or whether because the hearing of *Re Chapman* (2) had begun on the very day when this matter came before HARMAN, J., the learned judge came to the conclusion that he would adjourn the hearing of the present case until after the result of the appeal in *Re Chapman* (2). The order drawn up was, accordingly, one which simply ordered that "the said application do stand over", and thereafter it is stated in the order that the judge did not require further argument, but gave leave to appeal.

There is, I think, no doubt that, if a judge adjourns a case, just as if he refuses an adjournment of a case, he has performed a judicial act which can be reviewed by this court, though I need not say that an adjournment, or a refusal of an adjournment, is a matter prima facie entirely within the discretion of the judge. This court would, therefore, be very slow to interfere with any such order, but, in my judgment, there is no doubt of the jurisdiction of this court to entertain appeals in such matters. Counsel for the plaintiffs referred us to *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman* (3) and *Macwell v. Keun* (4) as authority for what I have said. It may well be that, if a case, and an important case, is known to be subject to appeal to the House of Lords, or from a judge of first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the general public interest not to decide another case on the same lines until the result of the case under appeal has become known. I say that it may be so. It depends very much on all the circumstances of the particular case, and, if the judges of the Chancery Division have reached the conclusion that in the public interest it would be better generally to postpone dealing with applications of this kind until the decision in *Re Chapman* (2) is known, then I should feel that it was, prima facie at any rate, a matter for the Chancery judges to decide. Whether any such decision by the judges has been come to I do not, of course, know. I have said what I have because I desire to confine my judgment to the particular case which we have before us.

The point which counsel for the plaintiffs stressed most strongly before us is this. It is essential, in order that the proposed compromise should be effective at all, that the settlor should live until the date when the court approves, if it does approve, of the present scheme. There is evidence before us to show that the settlor, who is of the ripe age of eighty years, is also in a very delicate, not to say precarious, state of health. Indeed, it is said by the deponent to the affidavit, Dr. Ritchie, that, although it is impossible to say how long he is likely to live, his health is such that he might die within a very short space of time. Whatever be the right answer to a case not affected by a consideration of that kind, it does seem to me that it might do a real injustice if this case were adjourned, perhaps for some months, and during that period the settlor were to die, and, therefore, I have come to the conclusion that we ought to intervene in this case, and that the fact that *Re Chapman* (2) is pending before the House of Lords is not a sufficient justification for the judge's decision to adjourn the present case. It may be that the judge will wish to have further elaboration of the medical evidence. The affidavit seems to show that what I have stated about the settlor's health is a fact, and in those circumstances I think that the judge should not have adjourned the hearing, but should have heard and determined this case. He may, of course, decide that it is not within the scope of *Re Downshire* (1); he may decide that it is, but that in the exercise of his discretion

he will not affirm it; or, on the other hand, he may think that it is within *Re Downshire* (1) and that he should sanction the scheme. These are matters which are exclusively, at this stage at any rate, matters for the judge. The result, in my judgment, is that we should allow this appeal, and order, accordingly, that the judge should hear and determine the summons. I am the less discouraged from making the order in this case by the circumstance that the judge expressly gave leave to appeal, and obviously felt, therefore, some doubt whether in all the circumstances it was right to adjourn it. For the reasons which I have stated, I think that this appeal should be allowed, and that we should make the order which I have indicated. A

DENNING, L.J.: The law has been stated by this court in *Re Downshire* (1), and the judge should have applied the law as there laid down without any misgivings as to what the House of Lords may hereafter say. I do not think that the plaintiffs should be sent away for an indefinite period, especially when it is not known whether the settlor will live so long. I agree with the order proposed by **SIR RAYMOND EVERSHED, M.R.** B

ROMER, L.J.: I also agree, and I should like to make it clear that, so far as I am concerned, and, I think, so far as the court as a whole is concerned, we are not casting any doubt on the general principles laid down by **FARWELL, J.**, in the *Hinckley* case (3). **FARWELL, J.**, said ([1940] 4 All E.R. 216): C

"The proposition that this court has not power to adjourn any matter on any proper ground is new to me. No doubt the court cannot postpone the hearing of a matter indefinitely, because, if a court did so, it might thereby lead to defeating justice altogether, and a mere arbitrary refusal to hear a particular case is not a matter which, when dealing with litigation, would ever become a recognised thing. I cannot conceive any judge taking a course of that sort. However, to say that the court has not always an inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that that is the proper way to deal with the matter is a proposition entirely new to me". D

FARWELL, J., went on to point out that, if the judge took the course of adjourning a particular case, his decision to do so would be subject to appeal in the Court of Appeal. I think that that is a correct statement of procedural law, and I do not think anything has been said to cast any doubt on it. But this is a special case, for the reasons which the Master of the Rolls has indicated, because it is a case where the settlor, whose life is of considerable importance in the proposed scheme, is some eighty years of age. An affidavit was put in before us which was not in evidence before **HARMAN, J.**, and which shows that his state of health is somewhat serious. The result is that he may not live very long, and in those circumstances, which are rather special, I quite agree that this is a matter which might properly be dealt with by the learned judge, having regard to the fact that *Re Downshire* (1), which was before this court and has not been appealed from, may apply to the present case (a point on which I express no opinion), and, if it does, there seems to me to be no reason why the present case should not be decided and dealt with in the light of the decision in *Re Downshire* (1). I agree with the order proposed. E

Appeal allowed.

Solicitors: *Bulcraig & Davis* (for all parties).

[Reported by **F. GUTTMAN, ESQ.**, Barrister-at-law.] F

R. v. FALLOWS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Pilcher and Slade, JJ.),
March 1, 1954.]

Criminal Law—Sentence—Preventive detention—Prisoner aged under thirty when offence committed, but aged thirty when sentenced—Criminal Justice Act, 1948 (c. 58), s. 21 (2).

A The applicant was convicted of attempting to break into a warehouse and was sentenced to eight years' preventive detention. At the time he committed the offence he was twenty-nine years old, but he had attained the age of thirty at the time he was tried and sentenced.

B HELD: the appellant's age at the time of trial and sentence was the governing factor, and, therefore, there was no reason why he should not be sentenced to preventive detention.

APPLICATION for leave to appeal against sentence.

The applicant, Patrick Lawrence Fallows, was convicted at Lancashire County Sessions on Jan. 12, 1954, of attempting to break into a warehouse, and was sentenced to eight years' preventive detention.

C By s. 21 (2) of the Criminal Justice Act, 1948, it is provided that where "a person who is not less than thirty years of age" is convicted on indictment of an offence punishable with imprisonment for two years or more and has the previous convictions mentioned in para. (b) of the sub-section he may be sentenced to preventive detention.

No counsel appeared.

D LORD GODDARD, C.J., delivered the following judgment of the court. The only point which arises is whether, considering that the offence for which the applicant was sentenced was committed a few days before he attained the age of thirty, the applicant was liable to be sentenced to preventive detention. He had passed his thirtieth birthday when he was tried and sentenced, and, in the opinion of the court, his age at the time of trial is the governing factor. In view of his shocking record a sentence of preventive detention was necessary for the protection of the public, and the application for leave to appeal is refused.

Application refused.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

JUDSON v. BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Hodson, L.J.J.), February 17, 18, 1954.]

Railway—Look-out—Statutory duty of railway to appoint look-out—Work “for the purpose of re-laying or repairing the permanent way”—Re-layer inspecting line to determine lengths of metals later required for re-laying—Railway Employment (Prevention of Accidents) Act, 1900 (c. 27), s. 1 (1), schedule, cl. 12—Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), r. 9.

Negligence—Breach of statutory duty—Foreman and workman disregarding regulations—Workman taking first step—Liability of employer for negligence.

The plaintiff, a re-layer employed on the defendants' railway undertaking, accompanied a ganger along a stretch of railway line on an inspection to determine what lengths of new metals would be required for re-laying it the following day. In order to avoid an oncoming train he stepped off the line on to the adjoining line, the ganger following, and was injured by an engine coming from behind him. In doing this he acted in breach of instructions requiring him to “move clear of all lines unless” able to “distinctly see that [he was] in a position of safety” in r. 234 (a) of the British Railways Rules, 1950, of which he knew.

HELD: (i) on the true construction of r. 9 of the Prevention of Accidents Rules, 1902, at the material time the plaintiff was not “working for the purpose of re-laying or repairing the permanent way” within the meaning of that rule; therefore, the requirement in the rule for the provision of a look-out did not apply; and so the defendants were not in breach of their statutory duty in not providing one.

(ii) the ganger, though a foreman, was not under any duty to see that the plaintiff obeyed the rules, and had not led him to go the wrong way, since the plaintiff had moved across the lines first; the plaintiff, therefore, was the author of his own misfortune, and the defendants were not guilty of any negligence contributing thereto.

Stapley v. Gypsum Mines, Ltd. ([1953] 2 All E.R. 478), distinguished.

AS TO THE EFFECTIVE CAUSE OF INJURY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-595, paras. 843-845; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 33, 34, Nos. 150-157.

FOR THE RAILWAY EMPLOYMENT (PREVENTION OF ACCIDENTS) ACT, 1900, s. 1 (1) and schedule, cl. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 885 and 891.

FOR THE PREVENTION OF ACCIDENTS RULES, 1902, r. 9, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 22, p. 239.

Case referred to:

(1) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663.

APPEAL by the plaintiff from an order of DONOVAN, J., dated Oct. 22, 1953, at Newcastle-on-Tyne Assizes, dismissing an action for damages for negligence and breach of statutory duty.

The plaintiff, a re-layer on the defendants' railway undertaking, had been injured by a railway engine through stepping from one railway line on to the adjoining line to avoid an oncoming train while making an inspection of the line with a ganger to determine what lengths of new metals would be required for re-laying the line the following day. He contended that the defendants were in breach of their statutory duty to provide a look-out under r. 9 of the Prevention of Accidents Rules, 1902, and r. 234 (d) of the London and North-Eastern Railway Rules, 1933*, and were guilty of negligence contributing to the accident in that their ganger, a foreman, did not see that he stepped clear of the lines

*See now British Railways Rules, 1950.

altogether as required by the London and North-Eastern Railway Rules, 1933, r. 234 (a). The defendants denied that the rules required them to provide a look-out or that they were negligent. DONOVAN, J., held that the defendants were in breach of their statutory duty, but that the plaintiff was the author of his own wrong, and he gave judgment for the defendants. The plaintiff appealed.

Beney, Q.C., and *W. R. Steer* for the plaintiff.

A *Marven Everett, Q.C.*, and *Tudor Evans* for the defendants.

LORD GODDARD, C.J.: I am of opinion that this appeal fails. It is an appeal from an order of DONOVAN, J., who entered judgment for the defendants in an action brought at the Newcastle-on-Tyne Assizes. The plaintiff was a re-layer in the service of the Railway Executive, North Eastern Region, now the British Transport Commission. His duties were to take part in the re-laying of metals in need of attention. On the day before work of re-laying was to be undertaken on a particular stretch of line between Newcastle and Low Fell, he and Varty, a ganger, were walking along the part of the line which was to be re-layed, for the purpose of making notes of the lengths of new metals which would be required. Greater lengths of metal for the outer line of the curve and shorter lengths for the inner line would be needed, and the practice was for the ganger and a man to walk along the track shortly beforehand to decide how many pieces of new metals would be required. The ganger was walking in the four-foot way and the plaintiff on the left-hand side of the four-foot way, on the ends of the sleepers. A mineral train came out of a tunnel from the direction of Newcastle very slowly. Both men saw it and had ample time to get out of the way.

D The common sense course laid down in the rules when a train is seen approaching is that men at work should step to the off-side—I think that is the easiest way of putting it—because that takes them clear of both tracks. But instead of stepping off to the right-hand side of the up metals, these men stepped into the six-foot way, the space between the up and down metals. Their excuse was that some bushes or trees were growing on the off-side, but I think it is very difficult to believe that that was the real reason. I think the reason was that they thought it was simpler to step on to the six-foot way instead of stepping over a single wire which ran along the other side. The plaintiff, who was rather in front of the ganger, then stepped into the four-foot way of the down line, the ganger remaining in the six-foot way. Both of them were struck by an engine which came up, the ganger in the face and the plaintiff, who had either been knocked down or had thrown himself down, being caught by the foot by something underneath the engine, with the result that his leg had to be amputated above the knee. DONOVAN, J., held that there had been breaches of statutory duty, but that the plaintiff was entirely the author of his own wrong, and, therefore, he could not award any damages. This court takes a different view.

G Counsel for the plaintiff relies on r. 9 of the Prevention of Accidents Rules, 1902, made pursuant to s. 1 (1) of, and the schedule to, the Railway Employment (Prevention of Accidents) Act, 1900. The rule reads:

H “With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of re-laying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . .”

The learned judge took the view that this inspection was for the purpose of re-laying, because it was to see what pieces of line required re-laying, in order to save time when the work was put in hand next day. Was it work for the purpose of re-laying or repairing the permanent way? If the rule is read without

reference to the statute, there is much to be said for that view, because the men were walking along the line inspecting it as a preliminary to the actual work of re-laying contemplated, and, therefore, for the purpose of re-laying. But the Act shows that that cannot be the true construction. Under the Act the Board of Trade may make such rules as they think fit with respect to any of the subjects mentioned in the schedule thereto, cl. 12 of which is:

“Protection to permanent way men when re-laying or repairing permanent way.”

I do not think that, by any canon of construction, I could hold that two men, walking along a line and seeing what they will require when they come to re-lay or repair it, can be said to be re-laying or repairing the permanent way. It is just what they are not doing. They are preparing themselves for repairing or re-laying it in the future by finding out what parts require to be re-laid or repaired. Once either singly or in a gang they begin to do the actual work, they are engaged in re-laying or repairing the permanent way, whether they already have their hands on the pieces of rail to be re-laid or not. I am certainly not prepared to hold that these men were then re-laying or repairing the permanent way. The Railway Executive were, therefore, not in breach of the rules, because they must be read together with the section, and the words “for the purpose of re-laying or repairing” must mean “when repairing or re-laying.” That is a perfectly possible, and it seems to me the obvious, construction.

Moreover, looking at the whole of the rules, I do not think that the operation that the men were engaged on was one to which the rule applies, because under it a look-out man has to be appointed, whose duty it is to look out, and who would have to be given some instrument, such as a horn or a whistle, to call the men's attention. Where would such a man stand? These men were walking along the track the whole way, and it would be odd for the look-out man to be following them up behind. They can see what is coming, and it would not be possible for the look-out man, moving the whole time, to be in a better position than they themselves are for the purpose of a look-out. It is abundantly clear that this rule does not apply to the work which these men were doing on that day.

For the same reason I am prepared to hold that r. 234 (d) of the London and North-Eastern Railway Rules, 1933, made by the Railway Executive, must be construed in the same way. Rule 234 (d) provides:

“When work is about to be undertaken on or near lines in use for traffic and danger is likely to arise, the ganger or man in charge must, except as shown in cl. (i), appoint one or more persons, as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching. He must also satisfy himself that the look-out man appointed is stationed in a suitable position, is wearing a ‘look-out’ armlet, and is equipped with a whistle or horn, not less than six detonators, red and green flags during daylight, and a hand signal lamp after sunset or during fog or falling snow. This man must on no account leave his post whilst the men he is protecting continue at work unless he is properly relieved, when he must transfer the ‘look-out’ armlet to the relief man.”

I emphasise the word “stationed” in that rule. That means that, when a gang of men is at work actually taking up and putting down new lines or doing work on the ballast on the permanent way, a look-out man must be stationed and must stay where he is put. But he cannot stay where he is put if he has to move with the workmen behind him. The rules do not contemplate a look-out man being stationed for peripatetic workmen walking along the permanent way, perhaps half a mile or more, because, obviously, he cannot be “stationed” if he has to walk along with the workmen behind him. For this reason I am clearly

of opinion that there was no breach here by the British Transport Commission of either the statutory rules or of the domestic rules.

A It has been argued further that the ganger, being the foreman, was negligent in not seeing that the plaintiff stepped off to the right instead of stepping off to the left on to the down line. I cannot bring myself to say that the ganger was appointed for the purpose of seeing that the plaintiff was safe. The plaintiff knew the rules, he knew and was accustomed to this class of work, and, when the ganger was behind him, he stepped off the up rail into the six-foot way, the ganger also doing the same thing. He was not directed by the ganger to do that. He broke the rule of his own volition, and he put himself into a dangerous position without taking any notice of where he went. The most that can be said, it seems to me, is that a situation arose somewhat similar to that in *Stapley v. Gypsum Mines, Ltd.* (1). If I may say so with all respect, I find that case very difficult to understand. There was a great division of judicial opinion on the matter, with a unanimous judgment in this court, and the judgment of the Court of Appeal being reversed by a majority of one in the House of Lords. Two men had agreed to do what the House of Lords considered to be negligent in remaining at work under a dangerous roof. One man went to work elsewhere, but the other stayed under the dangerous roof, and the House of Lords decided that the negligence of the man who went away contributed to the misfortune of the man who stayed under the roof, and their negligence was so inextricably mixed up that that of the man who went away could be said to have contributed to the accident, so that the employers were vicariously liable.

D I decline to come to any such decision in this case, which differs in one material respect. Varty was the ganger, but he was not a ganger for the purpose of seeing that the plaintiff walked in one place rather than in another, he did not give him orders to step out into the four-foot way, and it is not suggested that the plaintiff stepped out into that way because the ganger did. It was not a case of following him, because the plaintiff stepped out first, without looking what he was doing. The plaintiff, therefore, was the author of his own misfortune entirely, and the employers cannot be made vicariously liable because the ganger did not call to him to come back. No doubt, if the ganger had seen the danger he would have called out, but neither of these men looked where he was going. They both neglected the rules made for their safety, but I cannot see that anything that the ganger did contributed to the plaintiff's accident. Therefore, though for different reasons, I agree that the judgment below in favour of the defendants was right.

F SINGLETON, L.J.: There are three matters for consideration on this appeal: (i) Has it been shown that the defendants were guilty of breach of their statutory duty which brought about, or contributed to, the plaintiff's accident? (ii) Has it been shown that the defendants were guilty of a breach of the duty which they owed to their employee at common law; and (iii) Was the plaintiff himself wholly to blame for the accident which befell him?

G On the first of those questions I think one should look at the terms of the statute under which the relevant rule, r. 9, was made. By the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1), the Board of Trade were given power,

H "... subject to the provisions of this Act, [to] make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service."

The twelfth heading of the schedule is:

"Protection to permanent way men when re-laying or repairing permanent way."

Under those powers the Prevention of Accidents Rules, 1902, were made, r. 9 of which appears to go a little further than the terms of the statute, for it reads:

"With the object of protecting men working singly or in gangs on or near

lines of railway in use for traffic for the purpose of re-laying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . . ”

It was said by the judge that the two men, the ganger and the plaintiff, were working on or near lines or rails used for traffic for the purpose of re-laying or repairing the permanent way on such lines, and there was danger. These two men were on a journey of inspection, walking along a piece of line in order to form a view as to what number of portions of rail would be necessary for the work to be done at a future time, commencing next day, or some time afterwards. They were not doing the work of re-laying or repairing, but it is said that, because they were inspecting, they were doing work for the purpose of re-laying or repairing. The terms of the rule itself seem to me to contemplate that, where one man or a gang of men is working on the line, they must be given, in the circumstances laid down, the protection provided for. I do not think this case falls within it. Rule 234 (d) of the London and North-Eastern Railway Rules, 1933, appears to me to be the railways' means of performing their duty specified under r. 9. They set out what must be done: A B C

“ When work is about to be undertaken on or near lines in use for traffic and danger is likely to arise, the ganger or man in charge must, except as shown in cl. (i), appoint one or more persons, as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching . . . ” D

That appears to me, again, to contemplate men working in a particular place on a line and not an inspection by one man or by two men walking along it in order to find out what may be necessary for the work of re-laying or repairing to be done at another time. For these reasons I do not think it can be held that the rule applies to the circumstances of this case. It does not mean that a look-out man must be provided whenever one man is going along to inspect the line. E

The second point is this. It is the duty of an employer to take reasonable care to prevent his men from meeting with unnecessary risks, and it is submitted by counsel for the plaintiff that, when a train was seen coming from the direction of Newcastle, the senior man, the ganger, ought to have seen that the plaintiff stepped off the railway line altogether, i.e., to the right-hand side rather than across on to the other rail. The difficulty I have felt arises from the decision of the House of Lords in *Stapley v. Gypsum Mines, Ltd.* (1). The ganger was the senior man and he and the plaintiff both stepped in the wrong direction. They ought to have gone off the railway line altogether, and because they stepped in the wrong direction they were caught, and one of them was seriously injured, by a train coming from the opposite direction. It is submitted in this court that, in those circumstances, the defendants are responsible. There is no doubt from the evidence that the rules were read to the men from time to time, so that they might know what they ought to do, and the plaintiff's own answers show that he knew he ought to have gone off the railway line altogether. Moreover, r. 234 (a) of the rules of 1933 provides: F G H

“ When a train is approaching, men working on or near to the line must not remain on any running lines, nor between them if the space is less than eight feet, but must at once move clear of all lines unless they can distinctly see that they are in a position of safety, and in no danger from another train approaching them unobserved ; the men must stop in the positions they have taken up until the train, including any detached portion thereof which may be following, has cleared a sufficient distance to enable them to

see that no train is approaching on the other lines before they re-cross the rails."

A The plaintiff admitted that he knew of that rule, but he and the ganger both remained on or near the running line. They were both in breach of r. 234 (a). I do not think that the negligence of one is mixed up with the negligence of the other, as was said to be the case in *Stapley v. Gypsum Mines, Ltd.* (1). Each, it is true, disregarded the provisions made for his own safety, and that was the cause of the accident. I do not think it would be right to say that employers who have made rules of that kind, and who have brought them to the notice of the plaintiff and the other men, have failed in the duty which they owe to their workmen under the common law.

B The third point arises on the plaintiff's own position. He knew what he ought to do and the risk to which he subjected himself if he stepped on to another running line without knowing that that line was safe. He ought to have gone off the railway line altogether when the train from Newcastle was approaching, but he did not do so. On that the judge said:

C "We are dealing with two men each of whom disobeyed a rule well known to him, and it was that disobedience which, in my view, was the real cause of this distressing accident."

I am afraid I have been forced to the same conclusion. This man was forty-two at the date of the trial, and a man of experience on the railway, and he knew he was exposing himself to a risk which the rule book said he must avoid. In that sense he was the author of his own wrong, and I agree with my Lord that his appeal must be dismissed.

D HODSON, L.J.: I am of the same opinion. The learned judge came to the conclusion that the plaintiff was injured because he disobeyed a domestic rule of the defendants which was well known to him, in moving across the other line when a train was approaching on one line instead of moving clear of both sets of metals. If I had agreed with the learned judge that the defendants were in breach of r. 9 of the Prevention of Accidents Rules, 1902, made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900, I should have found it very difficult to resist the conclusion that the defendants would have been partly to blame, but, in my judgment, the learned judge did not construe r. 9 correctly. I have very little to add to what has already been said. I think, taking r. 9 by itself, there was great force in the argument that the words

F "for the purpose of re-laying or repairing the permanent way "

G were wide enough to include the occupation in which the plaintiff and the ganger were engaged on the day in question. They were walking along the line, a decision having been taken to take up the rails, with a view to deciding where long and short lengths of rail were required, so that it might well be said that what they were doing was something for the purpose of re-laying or repairing the permanent way. When one looks at the Act under which the rule was made, and the schedule to that Act, it appears that the words in cl. 12 of the schedule

"Protection to permanent way men when re-laying or repairing permanent way "

H are used to limit the regulations which the Board of Trade may make. One, I think, is driven to this conclusion, that the words "for the purpose of " in r. 9 are to be treated as equivalent to "when", because, if they are not so treated, the rule in question would be in part ultra vires. The learned judge did not have his attention drawn to the statute, and, no doubt, he reached his conclusion without considering the limits it imposed.

I have nothing to add as to the common law position. I think the plaintiff failed to establish the breach of the statutory regulations which the learned judge found in his favour, and that he is left in the position that he has to accept the

learned judge's finding at common law that the accident was caused by his own fault.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Thomas Magnay*, Gateshead (for the plaintiff); *M. H. B. Gilmour*, chief solicitor, British Transport Commission (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

STOCKLOSER v. JOHNSON.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), December 9, 10, 11, 1953, February 12, 1954.]

B

Contract—Penalty—Forfeiture clause—Purchase price payable by instalments—Clause enabling vendor, on default by purchaser, to rescind and retain instalments paid—Default in payment—Rescission of contract by vendor—Right of purchaser to recover instalments.

The defendant, who was the lessee of the P. quarry and the former lessee of the W. quarry, had installed plant and machinery in the two quarries. In 1948 he granted a licence to a company which was working the P. quarry to use the plant and machinery in that quarry for the period of his lease in consideration of the payment of royalties, and in March, 1950, he let the plant and machinery in the W. quarry to the lessee of the quarry in consideration of the payment of royalties and an undertaking by the lessee to operate the plant and to keep it in good order. By an agreement, dated Apr. 6, 1950, the defendant agreed to sell to the plaintiff the plant and machinery in the W. quarry with the benefit of the hiring agreement for the sum of £11,000, to be paid by instalments as therein specified. The agreement provided, inter alia, (a) that, if the plaintiff made default in payment of an instalment for a period exceeding twenty-eight days, the defendant was entitled, on giving fourteen days' notice to rescind, "to re-take possession of the plant, machinery and appliances . . . and again to enter into enjoyment of the [hiring] agreement and the fruits thereof as though this agreement had never been executed. And in such event all payments made hereunder by the [plaintiff] to the [defendant] shall be forfeited to the [defendant] who shall retain the same"; and (b) that the plaintiff was to be entitled to the benefit of the hiring agreement and the plant and machinery as from Jan. 1, 1950, but that he was not to become the owner of the plant and machinery until the completion of the purchase and the payment of the whole of the instalments. By an agreement, dated June 24, 1950, in similar terms mutatis mutandis to that of Apr. 6, 1950, the defendant agreed to sell to the plaintiff the plant and machinery in the P. quarry with the benefit of the hiring agreement. Owing to bad weather the royalties payable under the hiring agreements were less than had been anticipated, and in December, 1951, the plaintiff failed to pay the instalments due from him to the defendant. On Feb. 25, 1952, the defendant gave notices rescinding the agreements. The plaintiff never at any time expressed his readiness or ability to make further payments if the defendant was willing to waive his right to rescind. In April, 1952, the defendant acquired the lease of the W. quarry. In an action by the plaintiff to recover the instalments already paid to the defendant on the ground that their retention by the defendant amounted to the exaction of a penalty from which the plaintiff was entitled to be relieved,

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HELD: (i) (per SOMERVELL and ROMER, L.JJ.) on the true construction of the agreements between the plaintiff and the defendant, the forfeiture was to operate only on past instalments of the purchase money and the

plaintiff was left in possession of the royalties which he had received, and, therefore, the forfeiture clauses did not operate as penalties.

(ii) (per SOMERVELL, L.J.) the plaintiff could recover the instalments which he had paid only if he could satisfy the court that, in all the circumstances of the case, it was unconscionable of the defendant to retain them; he had failed to do so; and, therefore, he was not entitled to recover. (per DENNING, L.J.) as the forfeiture clause in each of the agreements was not, strictly, a penalty clause, the court could relieve the plaintiff against the forfeiture only (a) if the clause was of a penal nature in that the sum forfeited was out of all proportion to the damage, and (b) if it was unconscionable for the defendant to retain the money, and to obtain relief in such a case it was not essential for the plaintiff to be ready and willing to perform the contract; but, even if the clause were regarded as of a penal nature, in the circumstances of the case it was not unconscionable of the defendant to retain the money, and, therefore, the plaintiff could not obtain the relief sought. (per ROMER, L.J.) as the clause was not a penalty clause, no question of relief arose, and, therefore, the plaintiff was not entitled to recover.

(iii) the fact that the defendant acquired the lease of the W. quarry after rescinding the agreement of Apr. 6, 1950, did not prejudice his position, as he was under no obligation to the ~~defendant~~ ^{plaintiff} not to do so.

AS TO EQUITABLE RELIEF AGAINST PENALTIES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 189-192, paras. 177-180; and FOR CASES, see DIGEST, Vol. 20, pp. 515-519, Nos. 2428-2461.

D Cases referred to:

- (1) *Kemble v. Farren*, (1829), 6 Bing. 141; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; 17 Digest 144, 474.
- (2) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest 138, 426.
- (3) *Dies v. British & International Mining & Finance Corp., Ltd.*, [1939] 1 K.B. 724; 108 L.J.K.B. 398; 160 L.T. 563; Digest Supp.
- (4) *Re Dagenham (Thames) Dock Co. Ex p. Hulse*, (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 40 Digest 227, 1974.
- (5) *Steedman v. Drinkle*, [1916] 1 A.C. 275; 85 L.J.P.C. 79; 114 L.T. 248; 40 Digest 133, 1050.
- (6) *Mussen v. Van Diemen's Land Co.*, [1938] 1 All E.R. 210; [1938] Ch. 253; 107 L.J.Ch. 136; 158 L.T. 40; Digest Supp.
- (7) *Barton v. Capewell Continental Patents Co., Ltd.*, (1893), 68 L.T. 857; 57 J.P. 712; 17 Digest 146, 493.
- (8) *Public Works Comr. v. Hills*, [1906] A.C. 368; 75 L.J.P.C. 69; 94 L.T. 833; 17 Digest 138, 425.
- (9) *Cooden Engineering Co., Ltd. v. Stanford*, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.
- (10) *Palmer v. Temple*, (1839), 9 Ad. & El. 508; 8 L.J.Q.B. 179; 112 E.R. 1304; 40 Digest 228, 1981.
- (11) *Mayson v. Clouet*, [1924] A.C. 980; 93 L.J.P.C. 237; 131 L.T. 645; 40 Digest 242, 2123.
- (12) *Maynard v. Moseley*, (1676), 3 Swan. 651; 36 E.R. 1009; *sub nom. Maynard's Case*, Freem. Ch. 1; 22 E.R. 1016; 40 Digest 344, 2923.
- (13) *Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A.C. 319; 82 L.J.P.C. 77; 108 L.T. 306; 40 Digest 133, 1049.
- (14) *Howe v. Smith*, (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 40 Digest 226, 1959.

APPEAL by the defendant and CROSS-APPEAL by the plaintiff from an order of HALLETT, J., dated June 12, 1953, in an action to recover sums of money paid by

the plaintiff to the defendant as instalments of purchase price under two agreements between the parties which had been rescinded by the defendant on default in payment by the plaintiff. The subject-matter of the agreements was plant and machinery installed by the defendant in two chalk quarries known as "Washington" and "Playhatch".

In 1943 the defendant was granted a lease of the "Playhatch" quarry for a period of seven years with an option to renew. He installed plant and machinery in the quarry, and in 1948 he granted a licence to Dow-Mac Quarries, Ltd., who had been working the quarry for some months, to use the plant and machinery, in consideration of the payment of royalties, for the period of his lease and the further period of the option. He then exercised the option, extending the period of the lease to 1957. At some date before 1949 the defendant became the lessee of the "Washington" quarry, and, having installed plant and machinery, he worked it himself until 1949. In November, 1949, after the defendant had ceased to operate the quarry, the owner let it to Renown Lime Quarries, Ltd., for a term of twenty-one years, the lease providing for a minimum rent and the payment of royalties. By a deed dated Mar. 1, 1950, the defendant let his plant and machinery to the Renown company for so long as they should be lessees of the quarry less the last five months, on condition that they paid royalties and that they operated the plant and kept it in good order, fair wear and tear excepted.

In or about February or March, 1950, the plaintiff opened negotiations with the defendant with a view to taking over the benefit of the defendant's hiring agreement with the Renown company and purchasing the plant and machinery in the "Washington" quarry. Each side was legally advised. By an agreement dated Apr. 6, 1950, it was agreed that the plaintiff should purchase the plant and machinery with the benefit of the hiring agreement for £11,000, which was to be paid in the following instalments: £2,500 on the signing of the agreement, eight half-yearly instalments of £750, and a final payment in June, 1954, of £2,500. Clause 5 of the agreement provided that, if the purchaser (the plaintiff) made default in payment of an instalment for a period exceeding twenty-eight days, the vendor (the defendant) was entitled, on giving fourteen days' notice to rescind,

"to re-take possession of the plant, machinery and appliances specified in the schedule hereto and again to enter into enjoyment of the said agreement and the fruits thereof as though this agreement had never been executed. And in such event all payments made hereunder by the purchaser to the vendor shall be forfeited to the vendor who shall retain the same".

Clause 6 provided:

"The purchaser shall be entitled to the benefit of the said agreement and the plant, machinery and appliances specified in the schedule hereto as from Jan. 1, 1950, but until the completion of the purchase by the purchaser and the payment by him of the whole of the instalments hereinbefore stipulated he shall not become the owner of the said plant, machinery and appliances neither shall he sell charge or otherwise dispose of the same or any part thereof nor of the benefit of this agreement".

By an agreement dated June 24, 1950, the plaintiff agreed to purchase the benefit of the defendant's agreement with the Dow-Mac company and the plant and machinery in the "Playhatch" quarry. The purchase price was stated to be £14,000, but £3,000 of this sum represented an amount which the Dow-Mac company had paid in advance in respect of royalties and which was to be treated as a deposit. The remaining £11,000 was to be paid in the following instalments: £1,250 to be paid on Dec. 25, 1950, and quarterly payments of £750 ceasing on Mar. 25, 1954. It was provided that, if the plant for any reason required rebuilding or reinstating, the payment of any instalments then remaining due was to be postponed until the plant was re-built or reinstated. Clauses 6 and 7 of the

agreement reproduced the terms of cl. 5 and cl. 6 of the agreement of Apr. 6, 1950.

In December, 1951, the plaintiff defaulted in the payment of the instalments on both agreements and on Feb. 25, 1952, the defendant gave notices rescinding both agreements. The plaintiff never at any time expressed his readiness or ability to make further payments if the defendant were willing to waive his right to rescind. In April, 1952, the defendant acquired the Renown company's lease of the "Washington" quarry.

In an action to recover the instalments already paid by him under the two agreements, the plaintiff alleged that their retention by the defendant amounted to the exaction of a penalty from which he was entitled to be relieved. HALLETT, J., gave judgment for the defendant in respect of the agreement of June 24, 1950, concerning the "Playhatch" quarry, on the ground that the plaintiff had failed to show that it was unconscionable for the defendant to retain the money. In respect of the agreement of Apr. 6, 1950, concerning the "Washington" quarry, the learned judge gave judgment for the plaintiff on the ground that the defendant had prejudiced his position by purchasing the Renown company's lease. The defendant now appealed and the plaintiff cross-appealed.

*N. Lawson and J. M. Holden for the defendant.
Beney, Q.C., and Harold Brown for the plaintiff. vid. corrigenda*

Cur. adv. vult.

Feb. 12. The following judgments were read.

SOMERVELL, L.J., stated the facts and continued: The first question of construction is whether, on the defendant operating cl. 5 in the "Washington" agreement, the plaintiff became liable to account for and pay over the royalties which he had received in addition to forfeiting his instalments. If he did, the clause would, plainly, I think, be penal in its nature. I am quite clear, however, that it cannot be so construed. Reliance was placed on the words "as though this agreement had never been executed". I am doubtful whether these words

add anything, but, if it was intended that the vendor should not only keep the instalments but get back the royalties, it would have had to be expressed in much plainer words. The figures for royalties in the years previous to the agreement in the "Washington" case were as follows: to Jan. 31, 1948, £3,047 6s. 4d.; to Jan. 31, 1949, £2,603 11s. 6d.; to Jan. 31, 1950, £2,359 14s. If one takes a rough figure of £2,500 a year and takes the position at the end of 1951,

1952 and 1953, the comparison between instalments and royalties works out as follows. At the end of 1951 the instalments paid would be £5,500 and the royalties £5,000. At the end of 1952 the instalments paid would be £7,000 and the royalties £7,500, at the end of 1953 the instalments paid would be £8,500 and the royalties £10,000. In fact, of course, the figures were quite different. The bad weather reduced the royalties and the plaintiff was unable to find the

money. On the agreement as I have construed it, however, it would seem quite absurd to suggest that this provision was penal in its nature. The position under the "Playhatch" contract would be more favourable to the defendant. The figures of output were somewhat larger, but the average yearly instalments of the price were something over £3,000 a year. We have not the date when the advance payment for royalties was exhausted.

Many authorities were cited to the learned judge. It was contended that the penalty law as laid down in *Kemble v. Farren* (1), and *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (2), had no application to the present claim, and, therefore, the sums were irrecoverable. It was contended, on the other hand, that the clause was penal in its nature and should be disregarded, the plaintiff being entitled to recover the sums subject to a cross-claim for damages, or the restoration of the status quo. The learned judge reviewed the authorities and decided the case on lines which I will summarise. (i) In the absence of any

provision to the contrary a seller who rescinds must repay any part of the purchase price already paid, notwithstanding the default of the buyer: *Dies v. British & International Mining & Finance Corp., Ltd.* (3). (ii) Here there was a provision to the contrary and it was not unconscionable for the defendant to retain the money. (iii) The instalments could not be regarded as deposits. (iv) The instalments could not be regarded as a pre-estimate of liquidated damages, but were provisions of a penal nature. (v) There was a distinction between cases in which the court was asked to assist in recovering a penalty and cases such as the present in which the plaintiff sought to recover back sums properly paid as instalments. In the latter case two conditions must be satisfied. First, the effect of the clause must be penal, applying the principles laid down in the *Dunlop* case (2) ([1915] A.C. 86). Secondly, the court must be satisfied that in the circumstances of that particular case, i.e., looking not merely at the contract but at the circumstances at the time of the breach, it would be inequitable or unconscionable to allow the recipient to retain the money notwithstanding the power to do so contained in the clause. (vi) Although the status quo could be substantially restored by the plaintiff accounting for royalties received as against the instalments, he, the plaintiff, was prima facie precluded from recovering because after the notice he had made no offer and expressed no willingness to complete if the defendant was prepared to waive the breaches on which the notices were served. (vii) On the other hand, so far as the "Washington" case was concerned, the purchase by the defendant of Renown's lease in April, 1952, precluded him from relying on the plaintiff's unreadiness and unwillingness, because that purchase put it out of the defendant's power to carry out a sale to the plaintiff on the original terms if the plaintiff had agreed to pay the instalment on which he had defaulted and the further instalments. I would have felt a difficulty on any view in drawing that distinction between "Playhatch" and "Washington". I think, in the events which had happened, the defendant did not prejudice his position by that purchase. In other words, if the learned judge was right in his conclusion as to "Playhatch", there was no ground on which "Washington" should be distinguished.

Various arguments were developed before us. I am clear that the plaintiff could only recover if he could satisfy the court that it was unconscionable in the defendant to retain the money. I agree with the learned judge that he fails to do this and the analysis which I have made of the instalments and the sums which might have been anticipated reinforces the conclusion. Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter, the burden of showing unconscionability is not a light one. The learned judge, I think, proceeded on the basis that it could not be discharged unless the plaintiff was ready and able to complete the purchase, although, the defendant having rescinded, no decree for specific performance could be made.

I have had the advantage of reading the judgments which will be delivered by my brethren. ROMER, L.J., comes to the conclusion that after rescission by the vendor relief would be given only if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.

The first case to which I will refer is *Re Dagenham (Thames) Dock Co. Ex p. Hulse* (4). In that case there was a contract for the sale of land for £4,000 to

be paid in two instalments of £2,000 each. The purchaser was let into possession on payment of the first instalment. The date for the second instalment was extended by consent, but it was ultimately agreed that the instalment should be paid by a certain date, that time was to be of the "essence", and that, if the instalment was not paid in full by the due date, the vendors were to be entitled to re-enter and the £2,000 previously paid, together with any part of the balance paid, was to be forfeited. The clause, therefore, would operate if only a small part of the second instalment remained outstanding. There was a failure to pay the second instalment when due and the vendors began an action of ejectment. The matter came before this court, the vendor relying on the provisions of the contract. JAMES, L.J., said (8 Ch. App. 1025):

"In my opinion this is an extremely clear case of a mere penalty for non-payment of the purchase money. If the agreement were to be construed as the appellants contend, I greatly doubt whether it would not be void as being ultra vires."

MELLISH, L.J., said (*ibid.*):

"I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty."

It is not very easy to find out exactly what had happened, but it looks as if the purchasers were willing and able at that stage to produce the residue of the purchase money and relief was given on payment. It is interesting to compare the words used by the two learned lords justices in that case with the summary of the law as to penalties by TINDAL, C.J. (6 Bing. 148), in *Kemble v. Farren* (1):

"But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

As it seems to me, in the *Dagenham* case (4), JAMES, L.J., is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct. If that is right, it would seem wrong, and, as I think, illogical, to hold that no relief could be given where the plaintiff in default was unable to complete. If the learned lords justices had had any such limited principle in mind they would, I think, have worded their judgments differently. I think that this view is supported by *Steedman v. Drinkle* (5), although I agree that sentences in that case could be relied on as supporting the narrower view. There was a provision for forfeiture of instalments, time was of the "essence", and the buyer defaulted. The buyer sought a decree of specific performance, but, as time was of the essence and the vendor was unwilling, it was held that this claim failed. The Judicial Committee of the Privy Council, however, were of opinion ([1916] A.C. 279):

"that the stipulation in question was one for a penalty against which relief should be given on proper terms."

The terms were not settled and the buyer was left to apply to the court of first instance. That, therefore, was a case in which the readiness and willingness could not lead to a decree for specific performance, but, if the narrower argument is right, readiness and willingness is a condition precedent to any relief being given. This, as I have already said, seems illogical to my mind, if these forfeiture

clauses are, as was said in the *Dagenham* case (4), in the same general category as penalty clauses. I am not, of course, suggesting that the plaintiff's readiness in *Steedman's* case (5), was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation, it would have done so.

It was said, I think rightly, that in *Mussen v. Van Diemen's Land Co.* (6) FARWELL, J., inclined to the narrower view and certainly treated *Steedman's* case (5) as based on the readiness and willingness of the purchaser. On the other hand, I think that he took pains to make it clear that, on any view of the facts of that case, he did not think unconscionability was established. In the following passage he was clearly dealing with cases where the penalty principle was invoked by the plaintiff seeking to recover back money. He said ([1938] 1 All E.R. 217; [1938] Ch. 262):

"To entitle a plaintiff to relief from a penalty, it is necessary, in my judgment, for him to show that there is some ground or another on which it would be unconscionable for the defendants to retain the money, or the whole of the money. I confess that I find it difficult to see why, if parties enter into an agreement of this sort, it should be unconscionable on the part of the vendor, who has agreed to part with his land on agreed terms, to enforce the contract if he so desires. There may be circumstances, no doubt, in some cases, in which the court would take the view that it was unconscionable, and that the plaintiff was accordingly entitled to relief, but, unless I can be satisfied in this case that there is something unconscionable in what the defendants seek to do, I have no jurisdiction to grant any relief whatsoever. It should be observed that this is not strictly a case of a penalty at all since the payment in question was an integral part of the principal contract".

With regard to the last sentence, it was not the payment but its forfeiture which was in question. Any penalty provision is, of course, in one sense, a term of the contract, and all the plaintiff was seeking to do in the numerous cases in which equity gave relief was to enforce the bargain. There is, however, I agree, a difference between cases, for example, where a special penalty is added to normal interest and cases like the present where a purchaser has possession, on the one hand, and instalments are being paid, on the other. All I am concerned to say is that, in my opinion, the cases do not establish (i) that relief could never be given unless the plaintiff could show that he is financially in a position to complete and would be willing to do so if the defendant were himself prepared to waive the breach and complete the contract, or (ii) that after rescission no relief can be given unless there is fraud or sharp practice.

There is only one other point, on which I should like to express my agreement with the learned judge. As the basis of the plaintiff's right, if he has one, is the unconscionability of the defendant's retaining sums which have been paid to him as instalments, I agree that the circumstances of the particular case should be looked at and the question is not one to be decided by looking only at the contract. For the above reasons, I would allow the appeal in respect of the "Washington" contract and dismiss the cross-appeal.

DENNING, L.J.: There was acute contest as to the proper legal principles to apply in this case. On the one hand, counsel for the plaintiff urged us to hold that the buyer was entitled to recover the instalments at law. He said that the forfeiture clause should be ignored because it was of a penal character, and, once it was ignored, it meant that the buyer was left with a simple right to repayment of his money on the lines of *Dies v. British & International Mining & Finance Corp., Ltd.* (3), subject only to a cross-claim for damages. In asking us to ignore the forfeiture clause, counsel relied on the familiar tests which are

used to distinguish between penalties and liquidated damages, and said that these tests had been applied in cases for the repayment of money, citing *Barton v. Capewell Continental Patents Co., Ltd.* (7) and *Public Works Comr. v. Hills* (8). In neither of those cases, however, was the point argued or discussed, and I do not think they warrant counsel's proposition. There is, I think, a plain distinction between penalty cases, strictly so called, and cases like the present. It is this.

A When one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in *Hills'* case (8). The claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression: see the valuable judgments of SOMERVELL, L.J., and HODSON, L.J., in *Cooden Engineering Co., Ltd. v. Stanford* (9).

B In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause—a forfeiture clause, if you please—permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer, the plaintiff, is to recover it, he must, I think, have recourse to somewhat different principles from those applicable to penalties, strictly so called. On the other hand, counsel for the defendant urged us to hold that the plaintiff could only recover the money if he was able and willing to perform the contract and for this purpose he ought to pay or offer to pay the instalments which were in arrear and be willing to pay the future instalments as they became due: and he relied on *Mussen v. Van Diemen's Land Co.* (6). I think that this contention goes too far in the opposite direction. If the plaintiff was seeking to re-establish the contract, he would, of course, have to pay up the arrears and to show himself willing to perform the contract in the future, just as a lessee, who has suffered a forfeiture, has to do when he seeks to re-establish the lease. So, also, if the plaintiff were seeking specific performance, he would have to show himself able and willing to perform his part. But the plaintiff's object here is not to re-establish the contract. It is to get his money back: and to do this, I do not think it is necessary for him to go so far as to show he is ready and willing to perform the contract.

E F I reject, therefore, the arguments of counsel at each extreme. It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer v. Temple* (10), *Mayson v. Clouet* (11), *Dies v. British & International Mining & Finance Corpn., Ltd.* (3), and WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 2, p. 1006. G (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* (5), where the Board consisted of a strong three, VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER. The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that SOMERVELL, L.J., has

said about it, differing herein from the view of ROMER, L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money. Inasmuch as the only case in which this jurisdiction has been exercised is *Steedman v. Drinkle* (5), I have examined the record and would draw attention to the circumstances of that case. The agreement was, in effect, a hire-purchase agreement of land. The purchase money was payable by instalments over six years, completion to be at the end of the six years, and meanwhile the purchasers were to be let into possession of the land as tenants, with the instalments ranking as rent. In case of default the vendor was at liberty to cancel the contract and retain the payments that had been made. The purchasers paid the first instalment and went into possession, but they failed to pay the second instalment which was due at the end of the first year. The value of the land had risen greatly during that year and the vendor seized on the purchaser's default as giving him the opportunity to rescind the contract. Without previous warning, the vendor gave notice cancelling the contract. The purchasers at once tendered the amount due, but the vendor refused to accept it. The purchasers issued a writ for specific performance and meanwhile remained in possession of the land, taking the crops off it. They failed to get specific performance in the first court, then succeeded in the Court of Appeal [the Supreme Court of Saskatchewan *en banc*], but failed again in the Privy Council on the ground that time was expressly of the essence of the contract. Nevertheless, the Privy Council relieved the purchasers from forfeiture of the sums already paid. The purchasers would, no doubt, have to give credit for the crops they had taken from the land during the three years or more that they had been in possession, but, subject to that credit, they would get their money back.

In *Mussen v. Van Diemen's Land Co.* (6) FARWELL, J., said that the whole basis of the decision in *Steedman v. Drinkle* (5), was that the purchasers were ready and willing to perform the contract, but I think that that is much too narrow an explanation. Readiness and willingness is essential in specific performance, and in relief from forfeiture of leases, but not in relief from forfeiture of sums paid. The basis of the decision in *Steedman v. Drinkle* (5) was, I think, that the vendor had somewhat sharply exercised his right to rescind the contract and re-take the land, and it was unconscionable for him also to forfeit the sums already paid. Equity could not specifically enforce the contract, but it could and would relieve against the forfeiture.

In the course of the argument before us SOMERVELL, L.J., put an illustration which shows the necessity for this equity even though the buyer is not ready and willing to perform the contract. Suppose a buyer has agreed to buy a necklace by instalments, and the contract provides that, on default in payment of any one instalment, the seller is entitled to rescind the contract and forfeit the instalments already paid. The buyer pays ninety per cent. of the price but fails to pay the last instalment. He is not able to perform the contract because he simply cannot find the money. The seller thereupon rescinds the contract, re-takes the necklace, and re-sells it at a higher price. Surely equity will relieve the buyer against forfeiture of the money on such terms as may be just. Again, suppose that a vendor of property, in lieu of the usual ten per cent. deposit, stipulates for an initial payment of fifty per cent. of the price as a deposit and a part payment, and later, when the purchaser fails to complete, the vendor re-sells the property at a profit and, in addition, claims to forfeit the fifty per cent. deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages. These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing

to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiff's default, but because it is, in the particular case, unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. This equity of restitution is to be tested, I think, not at the time of the contract, but by the conditions existing when it is invoked. Suppose, for instance, that in the instance of the necklace, the first instalment was only five per cent. of the price and the buyer made default on the second instalment. There would be no equity by which he could ask for the first instalment to be repaid to him any more than he could claim repayment of a deposit. But it is very different after ninety per cent. has been paid. Again, delay may be very material. Thus, in *Mussen's* case (6), the court was much influenced by the fact that the purchaser had allowed nearly six years to elapse before claiming restitution. He had already had a good deal of land conveyed to him and, during his six years' delay, values had so greatly changed that it may be that he had his money's worth. At any rate, it was not unconscionable for the defendant to retain the money.

Applying these principles to the present case, even if one regards the forfeiture clause as of a penal nature—as the judge did and I am prepared to do—nevertheless I do not think it was unconscionable for the defendant to retain the money. The plaintiff seems to have gambled on the royalties being higher than they were. He thought they would go a long way to enable him to pay the instalments, but owing to bad weather they turned out to be smaller than he hoped and he could not find the additional amount necessary to pay the instalments. The judge summarised the position neatly when he said that the plaintiff

“is in the position of a gambler who has lost his stake and is now saying that it is for the court of equity to get it back for him”.

He said:

“If it is a question of what is unconscionable, or, to use a word with a less legal flavour, unfair, I can see nothing whatever unfair in the defendant retaining the money”.

With that finding of the judge I entirely agree and think that it disposes of the plaintiff's claim to restitution. Despite this finding, however, the judge did allow the plaintiff to recover the instalments he had paid on the “Washington” quarry. The reason was because, after the plaintiff made default, the defendant bought up the interest of the Renown company in the quarry and thereby disabled himself from fulfilling the contract with the plaintiff if called on to do so. I do not myself think that, in this case, that makes any difference. It might have done if there had been no forfeiture clause and the buyer was claiming at law for the return of his instalments, because then the buyer would have to show that the seller had treated the contract as at an end: see *Palmer v. Temple* (10) (9 Ad. & El. 521). But in the present case the plaintiff cannot claim at law. There is a forfeiture clause which prevents him doing so. He can only claim in equity, and he does not gain an equity simply because the defendant has bought up the quarry. I do not think, therefore, that the judge was right in allowing the plaintiff to recover the instalments which he had paid on the “Washington” quarry. The plaintiff should not be allowed to recover anything. I agree that the appeal of the defendant should be allowed, but the cross-appeal should be dismissed.

ROMER, L.J.: It appears to me that it is an essential foundation for the plaintiff's contention to the effect that cl. 5 of the agreement of Apr. 6, 1950, and the corresponding clause (cl. 6) of the agreement of June 24, 1950, operated as penalties, from which he is entitled to be relieved, that he should be able to establish that on the true construction of those clauses the defendant would be entitled, on the default of the plaintiff in paying an instalment, not only to

retain the instalments which had been previously paid but also to recover from the plaintiff the royalties which he had received from the hirers of the plant. I say this because, where A. agrees to sell an income-producing asset to B. by deferred payments and it is expressly provided in the contract that, if B. (who is allowed to enter into immediate possession) defaults in payment of an instalment, A. may rescind and thereupon B. shall forfeit the instalments which he has paid, but shall be entitled to retain the income which he has received, no question of a penalty can arise—and a fortiori where profits and instalments are likely to be equated to the extent which SOMERVELL, L.J., has indicated in his judgment. The position is the same if a bargain to that effect is implicit in the contract although not introduced into it by express language. It is only if a purchaser, on default, forfeits to the vendor both past instalments and past profits of an income-producing asset that he can be regarded as entering the area of jurisdiction which the plaintiff is seeking to invoke in the present case. What, then, was the position in this regard under the relevant clauses in the two agreements? In my opinion, it is quite plain that on the vendor rescinding by reason of the purchaser's default the ensuing forfeiture was to operate only on past instalments of the purchase moneys and that the purchaser was to be left in undisturbed possession of the royalties which he had previously received. The plaintiff's contention to the contrary was entirely based on the provision in the clauses that, if the vendor elected to "rescind", he was to be entitled again to enter into enjoyment of the hiring agreements and the fruits thereof "as though" the agreements between vendor and purchaser "had never been executed". The argument is that if the agreements had never been executed the vendor would have been entitled to all the profits of the hiring agreements and that the object of the clauses was to restore these profits to him on rescission. In my judgment, the learned judge was quite right in rejecting this argument, which involves the conception of rescission *ab initio*, with the result (*inter alia*) that the vendor would be automatically deprived of any accrued rights arising from the indemnities contained in cl. 4 of the first agreement and cl. 5 (i) (b) of the second. It is quite clear to me that the contemplated "rescissions" were not to operate retrospectively and that the "fruits" of the hiring agreements which the vendor was "again" (a word not without significance) to enjoy were confined to future profits.

On this view of the matter, as I have already indicated, no question of penalties or relief therefrom arises and the plaintiff's claim against the defendant wholly fails, with the result that the defendant's appeal should be allowed and the cross-appeal should be dismissed. Out of deference, however, to the argument which was addressed to us on the assumption that the forfeiture clause in each agreement constituted a penalty, or something in the nature of a penalty, I should like to deal with the question whether the plaintiff could have successfully sought the intervention of equity, in relation to the contractual results of these provisions, if the profit-producing quality of the properties to which I have referred had not existed. The matter was considered by FARWELL, J., in *Mussen's case* (6), but before referring further to that case it would be convenient to consider the point as one of principle. Generally speaking, courts of equity have never interfered with contracts merely by reason of their being improvident. As LORD NOTTINGHAM, C., said in *Maynard v. Moseley* (12) (3 Swan. 655): "The Chancery mends no man's bargain". To this rule exceptions were made, notably in favour of expectant heirs and borrowers, to whom equity manifested some tenderness, on the supposition that the sale or mortgaging of their inheritances or properties was usually induced by the pressure of financial need. Such persons were regarded as being to some extent at the mercy of persons who were willing, on terms, to enter into financial relations with them and the court frequently intervened so as to relieve them from the strict letter of their obligations on such conditions as it considered fair and just. The equity of redemption

which mortgagors have enjoyed for over three hundred years had its origin in this exceptional jurisdiction and may be taken as an example of it. In general, however, as I say, people were expected to abide by their contracts and, if a man made a foolish or improvident one, so much the worse for him. The question, then, is whether a purchaser, who freely and voluntarily negotiates and executes a contract of sale on terms that the price is to be paid by instalments and that, on default by him of payment of any instalment, the vendor may rescind the contract and retain any instalments previously paid, is entitled to relief in equity if he finds himself unable to comply with his bargain. It is to be observed that, in such a case, no element of pressure or duress exists and there is no question of the purchaser acting under the stress of economic necessity. Both parties to the contract are on terms of bargaining equality with each other, the one desiring to exchange cash for property, the other desiring to exchange property for cash. I confess that, in these circumstances, I am unable to see what ground there is for interference by a court of equity if it ultimately turns out that the terms on which these exchanges are mutually agreed operate hardly on either vendor or purchaser. If one of the terms which the vendor requires is unacceptable to the purchaser, he is under no compulsion to accept it. He can either keep his money and forgo the property or he can purchase a similar property from some other vendor who is more tolerant in his approach to the conditions of sale. If a man agrees to buy property by instalments which he will forfeit to the vendor if he cannot continue them to completion, he knows perfectly well the risk which he is taking and I do not know what right he has to appeal to equity if that risk does in fact ripen into actuality. That was the view which FARWELL, J., expressed without hesitation in *Mussen's case* (6), and I respectfully and entirely agree with it.

There are, however, reported cases in which equity has given partial and conditional relief to purchasers who default in their payments on the footing that such a forfeiture clause amounts to something in the nature of a penalty. In *Re Dagenham (Thames) Dock Co. Ex p. Hulse* (4), a statutory company agreed to purchase certain land for the purposes of its undertaking. The contract provided for an immediate payment of £2,000 and that the balance of the price should be paid on a subsequent date (time to be of the essence), and it was stipulated that on default by the company in making punctual payment of this balance the vendors should recover possession of the entire property and the original £2,000 should be forfeited to them. The company did, in fact, make default in payment of the balance and a month later an order was made to wind it up. Shortly afterwards the vendors sued in ejectment and obtained an order by consent to sign judgment, they undertaking not to issue execution until further order and to abide by any order the court might make as to the property comprised in the contract. It seems from the papers at the Record Office that negotiations for the payment of the outstanding purchase money then took place, but as they were fruitless the vendors applied for liberty to issue execution and for delivery up of the land free from all claims by the company. LORD ROMILLY, M.R., offered them relief appropriate to the enforcement of a vendor's lien, but this was refused, and thereupon LORD ROMILLY declined to make any further order. On appeal JAMES, L.J., and MELLISH, L.J., agreed with the Master of the Rolls in refusing to make the order for which the vendors were asking. It is interesting, however, to note exactly what they did. Whether or not they were asked to do so by the liquidator of the company I do not know (although I gather from the papers that they were not), but they did not declare that the stipulation for forfeiture was void as against the company as being a penalty or something in the nature of a penalty. All that the lords justices did was to relieve the company from its operation on payment of the residue of the purchase money with interest. In other words, they, in effect, extended the time for payment of the balance in spite of the provision that time was to be of the

essence of the contract, a course which was plainly justifiable if only by reason of the fact that the vendors themselves had twice postponed the date which had been originally agreed for the payment. The vendors filed an affidavit on their application to the Master of the Rolls in which they stated that the liquidator of the company had represented that, if further time were allowed, the company would be able to come to some satisfactory arrangement, and, presumably, the court was satisfied that there was a reasonable prospect of the company being able to satisfy the vendors, if extra time were given, for otherwise there was no object in allowing them a further chance of completing the contract.

Kilmer v. British Columbia Orchard Lands, Ltd. (13) was another case in which similar relief was given to a purchaser who was in default but desired further time to complete his obligations. Under the contract (as appears from the judgment of the Judicial Committee), the purchase money was to be paid together with interest by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment, at an appointed date, of the instalment of purchase money and the interest then payable or any part thereof, the agreement was to be null and void, all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to re-sell the property immediately. The purchaser was let into possession on payment of the first instalment on the execution of the agreement but defaulted in payment of a subsequent instalment. The vendors thereupon sued for a declaration that the agreement was null and void. The purchaser counterclaimed for specific performance, and, when the case came on for trial, obtained leave to pay into court the amount which was still owing under the contract. The trial judge dismissed the action and decreed specific performance on the counterclaim, relieving the purchaser from any forfeiture or penalties incurred. The Court of Appeal of British Columbia reversed this decision and declared the agreement null and void. The Privy Council concluded that the case fell substantially within the decision of the *Dagenham Dock Co.* case (4), which they impliedly approved, and restored the order which the trial judge had made dismissing the action and decreeing specific performance (a course which was only justified, as is pointed out in *Steedman v. Drinkle* (5), on the footing that the vendors had waived the stipulation as to time being of the essence—and, therefore, had not validly rescinded the contract). In *Kilmer's* case (13), therefore, as in the *Dagenham Dock* case (4), the court intervened by giving a purchaser, who, although in default in punctual payment, desired a further chance of completing his purchase, an opportunity of doing so. So far as I can see, in neither of these cases did the court declare, or even intimate, that the purchaser should be relieved from the forfeiture if he failed, through want of funds, to take advantage of the limited relief which was extended to him—although, admittedly, there was little reason to deal with this point in *Kilmer's* case (13), as the purchaser had brought the whole of the unpaid purchase money and interest into court.

Apart from *Steedman v. Drinkle* (5), to which I will return, two other cases require mention, though I do not think that either of them has much bearing on the present question. The first is *Public Works Comr. v. Hills* (8). In that case a railway contractor was relieved from forfeiture of certain sums of money notwithstanding that he became contractually liable to forfeit them, but (as was pointed out by LORD DUNEDIN in the *Dunlop Pneumatic Tyre Co.* case (2) ([1915] A.C. 87)) the question there was whether those sums were penalties (in the strict sense) or liquidated damages and the Judicial Committee held that they were the former. The second is *Mayson v. Clouet* (11), where a defaulting purchaser, although adjudged liable to forfeit his deposit, was held entitled to recover, on rescission by the vendor, subsequent instalments of purchase money which he had paid. LORD DUNEDIN, in delivering the judgment of the Privy Council, said ([1924] A.C. 985, 987) that questions such as that which was

before them must always depend on the terms of the particular contract and that on the construction of the agreement between Mayson and Clouet only the deposit was forfeitable. The purchaser does not appear to have contended, as an alternative to his submission on construction which succeeded, that, if in fact the forfeiture clause operated on the subsequent instalments as well as on the initial deposit, it should be regarded pro tanto as being a penalty, and the Board did not expressly deal with the matter from that aspect, although LORD DUNEDIN said (*ibid.*, 987):

“The truth is that the [vendor’s] contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue”.

- Pausing, then, at this point, it appears to me that the cases established that,
- B if a purchaser defaults in punctual payment of instalments of purchase money, the court will, in a proper case, relieve the purchaser from his contractual liability to forfeit instalments (apart from the deposit) already paid to the extent of giving him a further chance and further time to pay the money which is in arrear if he is able and willing to do so. But the cases do not, in my judgment, show that the court will relieve such a purchaser to any further extent than this.
- C The decision of the Privy Council in *Steedman v. Drinkle* (5) would, at first sight, appear to have gone further than this and to have relieved a defaulting purchaser from forfeiting past instalments, notwithstanding that the vendor had already validly rescinded the sale agreement so that there was no question of the purchaser, by being given further time, being able to complete the purchase. So far, however, as one can gather, this point was not really in issue, nor could it be,
- D having regard to the pleadings in the case. The purchase money under the contract in question was \$16,000, which was payable as to \$1,000 on the signing of the agreement and as to the balance by six annual instalments on Dec. 1, in each year. The purchaser paid the \$1,000, but his assigns defaulted in the payment of the first of these instalments and the vendors thereupon gave notice cancelling the agreement. Three weeks or so after the date on which the instalment should have been paid the assigns tendered the amount thereof to the vendor who declined to accept it. The assigns, accordingly, started an action in which they claimed specific performance of the contract and, alternatively, relief from forfeiture of their rights and interest under the agreement and of their equitable rights or interest in the lands, on terms. The vendor counter-claimed for a declaration that the agreement had been validly determined. The
- F trial judge held that, as the contract had made time of the essence, he could not grant the plaintiffs relief against the forfeiture of their interest in the land. In other words, he could not grant them a decree of specific performance. There was, however, a provision in the contract that, if the purchaser defaulted in any of the payments, the vendor might, in addition to cancelling the agreement, retain any payments made on account of it as and by way of liquidated damages, and the judge intimated that he was prepared to allow an amendment of the statement of claim so as to relieve the plaintiffs from forfeiture, under this provision, of the amount paid. The plaintiffs, however, refused this offer as they wanted a decree of specific performance. They appealed to the Supreme Court of Saskatchewan who, reversing the trial judge’s decision, granted the plaintiffs a decree. From this order the vendor appealed to the Judicial Committee.
- H The issue, therefore, before the Board was, not whether the plaintiffs should be relieved from forfeiting the amount which had been already paid (an issue which they had declined the opportunity of raising), but whether they were or were not entitled to a decree of specific performance. The Board allowed the vendor’s appeal on the ground that he had validly rescinded the agreement, which could not, therefore, be enforced against him. In the course of their judgment they did, however, say that the provision for forfeiting instalments already paid was one for a penalty against which relief should be given on proper

terms and that, for that purpose, the plaintiffs should have liberty to apply to the court of first instance. Now, as to that, the following comments suggest themselves. (i) The point does not appear to have been argued, and had not been introduced as an issue by the plaintiffs when they were invited by the trial judge to rely on it as a ground for conditional relief. (ii) It may well be that the vendor did not contest it. Had he done so, he would hardly have been given (as he was given) the whole of his costs of the appeal to the Privy Council and of the proceedings in the courts below. (iii) It would appear that, as the plaintiffs had not even paid the first of the deferred annual instalments, the only sum affected by the forfeiture clause was the \$1,000 which had been paid on the signing of the agreement, which may explain why neither side seems to have attached much importance to the matter. (iv) It is not altogether clear why this sum was not forfeitable to the vendor as a deposit: see *Howe v. Smith* (14).

In *Mussen's* case (6) FARWELL, J., was obviously a little puzzled by *Steedman v. Drinkle* (5). After considering the case he said that, in his judgment, it turned on its own particular circumstances and was of no general application. He then said ([1938] 1 All E.R. 219):

"In my judgment, the whole basis of that decision turns on the fact that the appellant was willing to perform the contract, and the only reason why performance was impossible was that the respondents refused to agree to specific performance, and the terms of the contract made it impossible for the court to decree specific performance. The Board thereupon thought that it was unconscionable for the respondents to take up the attitude of saying, 'We will not complete, but we will retain the money,' and on that ground the Board granted relief."

Whether that be the true explanation, or whether the explanation is that the point was assumed or conceded, I am certainly in agreement with FARWELL, J., that the case was a special one and cannot be treated as of general application. In my judgment, the decision cannot be regarded as a satisfactory authority for the view that an equity exists in a purchaser, as against a vendor who has validly rescinded the agreement by reason of the purchaser's default, to recover instalments of purchase money which the vendor is contractually entitled to retain. FARWELL, J., in *Mussen's* case (6), expressed the opinion that there is no such equity and I agree with him. There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting on his contractual right to retain instalments of purchase money already paid. In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice, or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract.

DENNING, L.J., in his judgment has referred to the hypothetical case, which was suggested during the argument, of a purchaser who buys a pearl necklace on terms that the purchase price is to be payable by instalments and that the vendor is to be entitled to get the necklace back and retain all previous payments if the purchaser makes default in the punctual payment of any instalment, even the final one. It would certainly seem hard that the purchaser should lose both the necklace and all previous instalments owing to his inability to pay the last one. But that is the bargain into which the purchaser freely entered and the risk which he voluntarily accepted. The court would, doubtless, as I have already indicated, give him further time to find the money if he could establish some probability of his being able to do so, but I do not know why it should interfere further; nor would it be easy to determine at what point in

his failure to pay the agreed instalments the suggested equity would arise. In any event, I venture to suggest that it is extremely unlikely that such a case would occur in practice, for a purchaser who had paid, say, nine-tenths of the agreed price for the necklace would have little difficulty in borrowing the remaining one-tenth on the security of his interest therein.

A It will appear from what I have already said that, in my opinion, *Mussen's* case (6) was rightly decided and that I agree with the grounds and reasoning on which the decision was based, namely, that, subject to the exceptions or qualifications to which I have referred (and which FARWELL, J., in terms recognised), there is no "equity . . . in favour of a purchaser who has failed to complete his contract through no fault of the vendor." For my part I share the reluctance, which FARWELL, J., expressed, to sponsor such an equity. It seems to me that in the long run it is much better that people who freely negotiate and conclude a contract of sale should be held to their "bargain" rather than that the judges should intervene by substituting, each according to his own individual sense of fairness, terms which are contrary to those which the parties have agreed on for themselves. Agreeing as I do with the judgment of FARWELL, J., no useful purpose would be served by further considering the case beyond emphasising (possibly *ex abundanti cautela*) that the decision of FARWELL, J., was directed, not to relief from penalties in the strict sense, but to relief from the forfeiture of sums which the purchaser had paid in pursuance of the contract and in part payment of the purchase money for the property agreed to be sold. I have dealt with this question at, I am afraid, some length because it is an important one and because we heard considerable argument on at least some aspects of it.

D It does not in truth arise in the present case because, on the facts and on the true construction of the agreements between the plaintiff and the defendant, nothing in the nature of a penalty (or, indeed, of a forfeiture in any real sense) enters into the picture. I would, however, like to point out that the plaintiff could not, in my opinion, invoke any equitable jurisdiction or remedy in the present case. Even after the defendant rescinded he invited the plaintiff to make some proposal for the belated fulfilment of his obligations but without any response from the plaintiff, who never made the slightest attempt to remedy his default. But, further, although it appears that he received a sum of £4,000 from Canada, he paid none of it towards the discharge of his obligations to the defendant but diverted it all elsewhere, and conduct of that kind is a poor qualification in a suitor for equitable relief. In my opinion, the learned judge, in his careful judgment in this case, came to a right conclusion (on the footing that a penalty was involved) in refusing to give relief to the plaintiff in respect of the "Playhatch" agreement, but, with respect, I think he was in error in giving relief in respect of the "Washington" agreement because, although the defendant, after rescinding, did take over the Renown company's lease, he was under no obligation whatever to the plaintiff not to do so. His rescission of the "Washington" agreement was perfectly lawful and nothing that happened thereafter could affect the rights which accrued to him as a result of putting an end to it. Further, as I have already indicated, no equity exists, in my opinion, in favour of a purchaser after the vendor has validly rescinded in the absence, at all events, of special circumstances of a kind which certainly did not exist in the present case. I agree with the order which my Lord has proposed.

Appeal allowed and cross-appeal dismissed.

H Solicitors: *Kenneth Brown, Baker, Baker* (for the defendant); *Lovell, Son & Pitfield*, agents for *Pitfield & Oglethorpe*, Petworth, Sussex (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re ALLAN (*deceased*). ALLAN *v.* MIDLAND BANK
EXECUTOR AND TRUSTEE CO., LTD. AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.JJ.),
February 17, 1954.]

Power of Appointment—Special power to appoint—Objects—Power to appoint limited interest in contemplation of marriage to any surviving wife—Power exercised by irrevocable deed—Marriage dissolved on wife's petition—Death of appointor.

A

By his will, the testator conferred on his son, F.A., a power to appoint by deed revocable or irrevocable executed prior to and in contemplation of marriage, or by will or codicil, a life or less interest in a settled fund to any wife who might survive him. In 1934 the testator died. In 1937, in contemplation of marriage, F.A. executed a deed irrevocably appointing an annuity of £3,000 out of the settled fund to the plaintiff if she should survive him. The marriage was solemnised, but in 1951 dissolved on the petition of the plaintiff. F.A. died in the same year. The plaintiff claimed the annuity.

B

HELD: the definition of the objects of the power was common to the whole provision and equally applicable whether the power was executed by deed on the occasion of the marriage or by will or codicil and, therefore, no one was an object of the power unless she survived the appointor and also was his wife at the time of his death. As the plaintiff ceased to be the wife of the appointor before his death, the appointment became ineffective.

C

Re Williams' Settlement ([1929] 2 Ch. 361), followed.

D

AS TO THE INTERPRETATION OF THE WORD "WIFE", see HALSBURY, *Hailsham Edn.*, Vol. 34, p. 326, para. 375; and FOR CASES, see DIGEST, Vol. 44, pp. 872-875, Nos. 7283-7310.

Cases referred to:

- (1) *Re Williams' Settlement*, [1929] 2 Ch. 361; 98 L.J.Ch. 358; 141 L.T. 579; Digest Supp.
- (2) *Bullmore v. Wynter*, (1883), 22 Ch.D. 619; 47 J.P. 373; *sub nom. Re Bullmore*, 52 L.J.Ch. 456; 48 L.T. 309; 44 Digest 875, 7314.
- (3) *Re Slaughter*, [1945] 2 All E.R. 214; [1945] Ch. 355; 115 L.J.Ch. 1; 173 L.T. 81; 2nd Digest Supp.

E

APPEAL by the plaintiff from a decision of DANCKWERTS, J., dated July 3, 1953, on an originating summons to determine whether, in the events which had happened, the plaintiff, Alida Virginie Allan, was an object of the power of appointment given by the will of the testator, Arthur Campbell Allan.

F

By his will, made in 1933, the testator gave to each of his son and daughters a life interest in the residue of his estate and provided

"that such child of mine may by any deeds or deed revocable or irrevocable executed prior to and in contemplation of marriage or by will or codicil appoint to or for the benefit of any wife or husband who may survive him or her an interest for her or his life or any less period in the whole or any part of such share and subject to any conditions such child of mine may think fit."

G

The testator died in 1934. In 1937 his son, Francis Anthony Selby Allan, shortly before and in contemplation of his marriage with the plaintiff, exercised the power by deed as follows:

H

"I hereby in contemplation of the said marriage irrevocably direct and appoint that if the said marriage shall be solemnised and the said Alida Virginie Duret shall survive me then after the death of the survivor of me and my mother the trustees of the said will shall out of the income of my settled share under the said will of my father's residuary estate pay to the said Alida Virginie Duret the yearly sum of £3,000."

The marriage was solemnised in 1937, but in 1951, on the plaintiff's petition, it was dissolved. The appointor died, without issue and without having remarried, in December, 1951. DANCKWERTS, J., held that the plaintiff was not an object of the power.

R. J. S. Thompson for the plaintiff.
Grove for the trustees.

- A *Raymond Jennings, Q.C.*, and *Brunyate* for residuary legatees, interested on failure of the appointment.

SIR RAYMOND EVERSHED, M.R., stated the facts and continued: The question now is whether the plaintiff, Alida Virginie Allan, is within the power given by the testator's will, i.e., whether, in the events which have happened, she, having survived her husband but having ceased to be his wife before his death, is an object of the power.

- B Problems of this character have been on other occasions before the courts, and it seems to me that the consideration of such problems in the decided cases makes it tolerably clear that, in the absence of some special consideration, a power given by deed or will to appoint for the benefit of any wife who may survive the appointor is a power having the quality that nobody can be an object of it unless she both survives the appointor and also is his wife at the time of the appointor's death. The most important of the cases for present purposes, though not the latest, is, I think, *Re Williams' Settlement* (1). It was a decision of this court. EVE, J., had decided the case in the sense I have already indicated. It is, I think, helpful to see what was the power which was there under discussion, and I, therefore, read a passage at the beginning of the judgment of EVE, J. (1929] 2 Ch. 364):

- E "Under the settlement made on her marriage to a Mr. Williams in April, 1902, the lady who at the time of her death was Mrs. Elias had a power, in the event which happened, of there being but one child of that marriage, on the occasion and in contemplation of or after any future marriage, to withdraw from the trusts of the first marriage settlement three-fourths of the settled fund, and to appoint the same '... in favour of the issue of the second marriage and her husband, but so that any husband who may survive her shall not take more than a life interest'".

- F The second marriage had come to grief, and the lady, who was originally Mrs. Williams and had become Mrs. Humphries, became eventually Mrs. Elias. She had on the occasion of her second marriage, with Mr. Humphries exercised the power. All three of her husbands survived her. The question was whether Mr. Humphries was a person within the ambit of the power I have read. EVE, J., decided that question negatively and his opinion was affirmed in the Court of Appeal. RUSSELL, L.J., in a short and succinct judgment, put it thus (and DANCKWERTS, J., regarded his judgment as shortly stating the point) (*ibid.*, 367):

"I think this gentleman is not an object of this power, because he could not be properly described as a husband of this lady who survived her".

- H Counsel for the plaintiff says that, in truth, that citation begs the question, and he points to the circumstance, as was said by LAWRENCE, L.J. (*ibid.*), that *Bullmore v. Wynter* (2), which was somewhat relied on by counsel for the plaintiff, was not expressly overruled, but rather distinguished. Nevertheless, it is, to my mind, quite clear that the power which was before the court in *Re Williams' Settlement* (1) was construed as a power in favour of a person who must satisfy two conditions, viz., that of survivorship of the appointor and that of being the appointor's husband at the appointor's death. I then ask myself: Is there in this case any distinguishing characteristic? The answer submitted by counsel

for the plaintiff is that here the power to appoint by deed is limited so as to be exercisable not only prior to and in contemplation of marriage, but also afterwards, and counsel's point, putting it briefly, but, I hope, not too summarily, is that the manifest purpose of so limiting the power was to enable the husband, not so much to make provision for his wife should she survive him and become his widow, but to provide an adequate marriage consideration, as that formula is known to lawyers. I see the force of the argument, which is reflected to some extent in the language of VAISEY, J., in his judgment in *Re Slaughter* (3).

The result which the authorities seem to me to render inevitable, appears to be somewhat hard for this plaintiff, particularly since, by exercising the remedy available to her in the courts of terminating her marriage, she forfeited her chance of a very substantial life interest. Still, those are considerations which cannot be conclusive, indeed, they are, perhaps, not even relevant. The question is one of construction, and to the argument of counsel for the plaintiff there seem to me to be, at any rate, two answers. First, the question is not so much of the purpose in choosing particular occasions for the exercising of the power, but of the construction of the words which define the objects of the power. Those words are "any wife or husband who may survive him or her". That definition of the objects of the power is common to the whole provision, and equally applicable whether the power is exercised on the occasion of the marriage by deed or at any time by will. The matter may be tested also in this way (and this is the second answer to the point made by counsel for the plaintiff as it was put to him in the course of the argument by JENKINS, L.J.): Let us suppose the appointor here chose the occasion of the marriage to exercise the power by deed, but followed exactly, in stating the object of the appointment, the language in the will, i.e., let it be supposed that on the occasion of the marriage he exercised the power so as to direct the trustees to pay after the death of himself and his mother the named sum to any wife who might survive him. It seems to me that it would be quite impossible for the plaintiff in the present case to assert, in the circumstances I have supposed, that she was entitled to take under the appointment. The result of so looking at it really is to bring one back to the first answer, which is that the problem is, as I think, to construe the vital words "any wife who may survive him", and in the light of the authorities I am myself quite satisfied that only one answer can be given to this question.

Forcible though the argument of counsel for the plaintiff is in its logic, I do not think it is forcible enough to outweigh the other considerations which are fundamental to the decided cases. To yield to his compelling suggestions would be, I think, to interpose refinements in a matter of this kind which would be a source of trouble and difficulty, and, in many ways, highly undesirable. I, therefore, agree with DANCKWERTS, J., that the answer must be that the appointment in the circumstances became ineffective. I have only stated, at some length, perhaps, my own reasons, in addition to those which DANCKWERTS, J., gave, out of consideration for the argument of counsel and the natural feelings of the lady he represents. In my opinion, the appeal must fail.

DENNING, L.J.: If Mrs. Allan had not divorced her husband, she would, on the death of her mother-in-law, be entitled to £3,000 a year, but because she divorced her husband, as she was entitled by law to do, she does not get anything. It seems a very hard result, but it is the result of the language which the testator used. I agree with my Lord that we have no option but to dismiss the appeal.

JENKINS, L.J.: I agree and have nothing to add.

Solicitors: *E. H. Silverstone & Co.* (for the plaintiff): *Ward, Bowic & Co.* (for the trustees and residuary legatees).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BRAMMER v. BRAMMER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Sachs, J.), February 10, 11, 1954.]

Justices—Husband and wife—Maintenance order—Discharge—Adultery—“Fresh” evidence—Evidence available on previous application by wife to vary order—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

A

In 1940 the husband left the wife at the matrimonial home and went to live elsewhere. On Feb. 9, 1944, justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, in favour of the wife, whereby the husband was ordered to pay a weekly sum for the maintenance of the wife and of the children of the marriage. In 1946 the wife committed an act of adultery. In February, 1947, the husband visited the wife and there was a reconciliation, the husband having sexual intercourse with the wife. The husband did not, however, continue to stay with the wife, but returned to the place where he had been living. On Apr. 19, 1950, justices, on the application of the wife, made an order varying the amount payable under the order of Feb. 9, 1944. On that occasion the husband did not put forward the wife's adultery by way of defence or of objection to the variation. On an application by the husband, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for the discharge of the order on the ground, inter alia, that since the making of the order in 1944 the wife had committed adultery,

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HELD: the two parts of s. 7 must be read together, so that the requirement that “cause” must be shown “upon fresh evidence” applied to the second part, under which the present application was made: *Natborny v. Natborny* ([1933] P. 1), applied; since the evidence of the wife's adultery was available to the husband at the time of the proceedings in 1950, it could not now be said to be “fresh evidence” on which to found the present application; which would, accordingly, be dismissed.

E

AS TO DISCHARGE AND VARIATION OF ORDERS, see HALSBURY, *Hails*—ham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, *Replacement* Vol. 27, pp. 722-728, Nos. 6901-6950.

FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 7, see F HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 852.

Cases referred to:

- (1) *Read v. Read*, [1952] P. 119; 3rd Digest Supp.
- (2) *Natborny v. Natborny*, [1933] P. 1; 101 L.J.P. 58; 147 L.T. 252; 96 J.P. 351; 27 Digest, *Replacement*, 725, 6928.
- (3) *Johnson v. Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest, *Replacement*, 727, 6940.
- (4) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest, *Replacement*, 724, 6922.
- (5) *Humphries v. Humphries*, [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14; 21 Digest, 177, 294.

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APPEAL by the husband against a decision of the Colwyn Bay justices, dated Nov. 11, 1953, whereby they refused to discharge an order made on Feb. 9, 1944, and varied on Apr. 19, 1950.

The parties were married in 1922 and there were five children of the marriage. In 1940 the husband left the matrimonial home at Colwyn Bay and went to Birmingham. On Feb. 9, 1944, on the application of the wife, justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had been guilty of wilful neglect

to provide reasonable maintenance for the wife and the children. On Apr. 19, 1950, on the wife's application, the amount payable under the order was varied by the justices. On Nov. 6, 1953, the husband applied for the discharge of the original order of Feb. 9, 1944, as varied by the order of Apr. 19, 1950, on the grounds (i) that since the making of the order the wife had committed adultery, and (ii) that the wife had unreasonably refused to resume cohabitation with the husband. On Nov. 11, 1953, the justices found, *inter alia*, (i) that the wife had committed one act of adultery in 1946 which had been condoned by the husband in February, 1947, and (ii) that the wife was justified in refusing to return to the husband. They dismissed the application and the husband appealed. This report deals solely with the issues raised by the first ground of the husband's application. A

E. B. B. Richards for the husband. B

Victor Williams for the wife.

LORD MERRIMAN, P.: The matrimonial home was at Colwyn Bay, and in 1940 the husband left the wife there and went to Birmingham where he formed an association with a Mrs. H., who bore him a child. It is common ground that Mrs. H. and the husband continued to live together until the beginning of May, 1953. On the wife's admission, in or about the year 1946 she committed a single act of adultery, that is to say, she committed adultery after the making of the order on Feb. 9, 1944. But in February, 1947, there was a reconciliation, and I think that the husband must be taken to have condoned the wife's adultery. The wife also, I think, intended to condone what she knew of the husband's association with Mrs. H. Things went on as before, the wife still living at Colwyn Bay and the husband living at Birmingham, and, whatever promises he may have made to the wife, his association with Mrs. H. continued for, roughly speaking, a further six years. C

There is no doubt that, had the husband in 1947 caused a summons to be issued for the discharge of the order of Feb. 9, 1944, on the ground that the wife had committed the admitted act of adultery, he would have succeeded, because *Read v. Read* (1) decides that it is impossible to import into the provisions of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the proviso which occurs in s. 6 in connection with the condonation of adultery. Section 7, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), reads: D

"A court of summary jurisdiction . . . may . . . upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any . . . order . . . If any married woman upon whose application an order shall have been made . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged. Provided that the court may, if the court think fit—(a) refuse to discharge the order if, in the opinion of the court, such act of adultery . . . was condoned to by . . . the husband . . ."

E

As the act of adultery had occurred after the making of the order in 1944 it would have been "cause being shown upon fresh evidence" within that section, and I think that in 1947 the court would have had no option but to discharge the order. But no such application was made, and, what is not less important, when the order was varied by the order of Apr. 19, 1950, this act of adultery was not brought forward by way of defence or of objection to the making of the fresh order. It is unnecessary to decide how the matter would have stood at that date, but I will assume, perhaps too favourably to the husband, that it could even then have been brought forward as "cause being shown upon fresh evidence." We are considering the position as it stood in November, 1953, G

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when the present application was made by the husband to discharge this order, or this combination of two orders, under s. 7.

Natborny v. Natborny (2) is, in my opinion, of great importance on this matter, for that case shows that, in connection with a charge of adultery put forward under s. 7 as the ground of an application for the discharge of a subsisting order, the whole section must be read together. One of the effects of reading the whole section together is that the time limit of six months, which applies to making the substantive complaint of adultery as the basis of an order, is not imported into the allegation of an act of adultery having been committed since the making of the order. The reason is that the earlier part of the section, which states that "cause" must be "shown upon fresh evidence to the satisfaction of the court at any time", governs the whole section—although the power under the first part of the section to alter, vary, or discharge an order, is discretionary, whereas on proof of adultery or of a resumption of cohabitation, the order must be discharged and there is no discretion, except as provided by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1). That, I think, is plain from the judgment of ROMER, L.J., where he says ([1933] P. 16):

"If on fresh evidence an application is made under the first part of s. 7 of the Act of 1895 asking the court to alter, vary, or discharge an order, and such fresh evidence shows that the wife has either voluntarily resumed cohabitation, or has committed an act of adultery, the court no longer has the wide discretion that it would have had in other cases."

From that it follows that, provided the charge of adultery is brought on what can be called "fresh evidence" within the meaning of s. 7, it is not barred by the time limit of six months.

I assume, then, that on Apr. 19, 1950, when the wife applied to get the order of Feb. 9, 1944, varied in her favour as regards the amount, the husband would have been entitled, following *Johnson v. Johnson* (3), to say: "I produce fresh evidence of her having committed adultery since 1944. The evidence is fresh because she had not committed the adultery in or before 1944; therefore, it has happened since 1944; and, therefore, the question whether I could have reasonably put it before the court in 1944 does not arise. And as I am entitled to say that this is fresh evidence, the fact that the adultery, of which I am now complaining as cause to resist this application and to set the old order aside, is outside the six months, that does not matter": see *Read v. Read* (1), or *Ruther v. Ruther* (4) cited in *Read v. Read* (1). But the question is whether or not the husband can say that in November, 1953. In my opinion, it is impossible for him to attempt to do so. There was nothing "fresh" about the evidence in 1953. He was not producing this allegation of adultery "upon fresh evidence", since it was available to him when the order was varied on Apr. 19, 1950. For that reason, alone, in my opinion, that ground of his present application fails.

I think it can be put in another way, which I merely indicate without attempting to decide. One of the elements of estoppel inter partes is that, if there is the opportunity to put forward a particular defence which is an answer on an occasion in the past, and there has been deliberate abstention from putting forward that defence, the defendant ought to be estopped from putting it forward on a later occasion. However, I do not think it is necessary to develop or examine that aspect of the matter.

[HIS LORDSHIP dealt with the second ground of the husband's application and concluded:] In my opinion, on both grounds this appeal fails and should be dismissed.

SACHS, J.: One of the issues argued before this court was whether or not such adultery had been established on the part of the wife as to make it obligatory on the court to discharge the maintenance order by virtue of the

provisions of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. The adultery charged was fully known to the husband before proceedings in 1950 resulted in a further maintenance order of an amount varied from that which had been previously ordered in 1944. On those proceedings, had the husband so chosen, he could have put in evidence the wife's adultery, and it may well have been that he would have succeeded on that occasion in securing the discharge of the order. He did not do so. In my opinion, the evidence which he had available in 1950 cannot be said to be "fresh evidence" as regards proceedings in 1953. I take the view that "fresh evidence" must mean "fresh" in relation to whatever were the immediately preceding relevant proceedings—in this case the 1950 proceedings. Therefore, the adultery in 1946 does not come within the definition of "fresh evidence" which has held the field since *Johnson v. Johnson* (3) in that it could not be said that this evidence was not available to the husband at the date of the previous proceedings in 1950. In that respect I, too, desire to mention the judgment of ROMER, L.J., in *Natborny v. Natborny* (2) to which my Lord has referred, and which, to my mind, makes it entirely clear, if it was not clear previously, that the words "fresh evidence" in the first portion of s. 7 must relate also to the matters referred to in the second portion of that section.

On that, accordingly, I found my view. Like my Lord, I will refrain from discussing the question of estoppel and from canvassing the fine distinction between allegations in the nature of a defence which are available as a traverse and allegations which are available only by way of confession and avoidance. Between these two types of allegation there lies the important distinction referred to in *Humphries v. Humphries* (5).

As regards the other issues which have been raised in this case I have nothing to add, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *David Thomas, Williamson & Co.*, Colwyn Bay (for the husband); *Whitfield, Byrne & Dean*, agents for *Osborn, Bennison & Hughes*, Colwyn Bay (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

TITHE REDEMPTION COMMISSION *v.* RUNCORN URBAN DISTRICT COUNCIL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.J.J.), February 18, 19, 22, 23, 1954.]

Tithe and Tithe Rentcharge—"Owner" of land—Highway authority—Liability to bear apportioned part of redemption annuity in respect of land occupied by highway—*Tithe Act, 1936* (c. 43), s. 10 (1), s. 17 (1)—*Law of Property Act, 1925* (c. 20), s. 7 (1) (as amended by *Law of Property (Amendment) Act, 1926* (c. 11), s. 7 and schedule)—*Local Government Act, 1929* (c. 17), s. 29 (2).

Highway—Highway authority—Ownership of land—Liability to apportioned part of tithe redemption annuity—*Tithe Act, 1936* (c. 43), s. 10 (1), s. 17 (1)—*Law of Property Act, 1925* (c. 20), s. 7 (1) (as amended by *Law of Property (Amendment) Act, 1926* (c. 11), s. 7 and schedule)—*Local Government Act, 1929* (c. 17), s. 29 (2).

By virtue of the Local Government Act, 1929, s. 29 (2), and a statutory order, certain highways became vested in the defendant authority. The Tithe Redemption Commission claimed that the authority was liable to pay tithe redemption annuity in respect of those highways as owner thereof within the meaning of the Tithe Act, 1936, s. 17 (1).

HELD: the vesting according to a formula similar to that of s. 29 (2) of the Act of 1929 would have operated before 1926 to confer on the authority a legal estate in some part of the land (including the surface), i.e., a fee simple determinable on the land ceasing to be used as a highway; the Act of 1929 being a "similar statute" within the Law of Property Act, 1925, s. 7 (1), the fee simple vested in the authority after 1925 was a fee simple absolute; and, therefore, the authority was the "owner of land" within the Tithe Act, 1936, s. 17 (1) (a), and was liable to bear an apportioned share of the tithe redemption annuity payable in respect of the land of which the highway formed part.

Rolls v. St. George the Martyr, Southwark, Vestry (1880) (14 Ch.D. 785), *Tunbridge Wells Corpn. v. Baird* ([1896] A.C. 434), and *Foley's Charity Trustees v. Dudley Corpn.* ([1910] 1 K.B. 317), applied.

Decision of DANCKWERTS, J. ([1953] 2 All E.R. 1303), affirmed.

AS TO TITHE REDEMPTION ANNUITY, see HALSBURY, Hailsham Edn., Vol. 11, pp. 893, 894, paras. 1600-1602.

FOR THE TITHE ACT, 1936, s. 10 and s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 304 and 314.

Cases referred to:

(1) *Hertfordshire County Council v. Lea Sand, Ltd.*, (1933), 98 J.P. 109; Digest Supp.

(2) *Coverdale v. Charlton*, (1878), 4 Q.B.D. 104; 48 L.J.Q.B. 128; 40 L.T. 88; 43 J.P. 268; 26 Digest 329, 616.

(3) *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K.B. 317; 79 L.J.K.B. 410; 102 L.T. 1; 74 J.P. 41; 26 Digest 324, 581.

(4) *Rolls v. St. George the Martyr, Southwark, Vestry*, (1880), 14 Ch.D. 785; 49 L.J.Ch. 691; 43 L.T. 140; 44 J.P. 680; 26 Digest 330, 627.

(5) *Tunbridge Wells Corpn. v. Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 26 Digest 330, 618.

APPEAL by the defendants, Runcorn Urban District Council, from an order of DANCKWERTS, J., dated Oct. 30, 1953, reported [1953] 2 All E.R. 1303.

On an originating summons issued by the Tithe Redemption Commission, DANCKWERTS, J., held that, on the true construction of the Tithe Act, 1936, and in particular of s. 17 (1) thereof, the defendant authority, in whom, by virtue of the Local Government Act, 1929, s. 29 (2), and the County of Chester Review

Order, 1936, a highway had become vested, were an "owner" of the land over which the highway ran within the meaning of the Tithe Act, 1936, s. 17 (1), and so was liable under s. 10 (1) of the Act of 1936 to bear an apportioned share of the tithe redemption annuity payable in respect of land of which the highway formed part.

Russell, Q.C., and *R. E. Megarry* for the first defendants, the Runcorn Urban District Council.

Cross, Q.C., and *W. F. Waite* for the plaintiffs, the Tithe Redemption Commission.

R. L. Stone for the second defendants, the Imperial Chemical Industries, Ltd., owners of the land abutting the highway.

SIR RAYMOND EVERSHED, M.R.: The short question in this appeal is whether the appellants, the Runcorn Urban District Council, are liable to the respondents, the Tithe Redemption Commission, for an amount of tithe redemption annuity chargeable under the Tithe Act, 1936. The amount claimed is that part of a larger annual sum (and the correctness of the apportionment is not in dispute) which is attributable to certain highways now forming part of a larger area within the district of the Runcorn council. The larger area is, apart from the highways, admittedly in the exclusive ownership of the respondents, Imperial Chemical Industries, Ltd.

The relevant history of this area in Runcorn and the legislative history which preceded the passing of the Tithe Act, 1936, and the imposition of tithe rentcharge annuities for securing the compensation payment on extinguishment of the former tithe rentcharges have been fully stated in an affidavit sworn in these proceedings by the secretary of the commission, and are not material to be set forth in this judgment. We were informed that the present action was a test action to obtain the opinion of the court on the question whether, having regard to the language of the Tithe Act, 1936, and, in particular, s. 17 thereof, a highway authority in whom a highway has become vested by virtue of a statute has an interest in land of the kind or quality sufficient to render it liable to a charge in respect of tithe redemption annuity. The inquiry is limited to cases in which the right of the highway authority to the highway depends on the operation of one or other of the statutes vesting highways in local authorities as distinct from cases where such vesting has been by way of a grant of the soil of the highway in an ordinary conveyancing sense.

In the present action the vesting of the relevant highways took effect pursuant to s. 29 of the Local Government Act, 1929, an Act which was passed and came into operation after the coming into effect of the Law of Property Act, 1925, the Settled Land Act, 1925, and the other statutes compendiously referred to as the property legislation of 1925. As will presently appear, it is this last-mentioned fact which, to my mind, gives rise to the real difficulty in the case.

It is conceded that the liability of the local authority depends on the answer to the question: Are the local authority owners of the relevant highways within the meaning of the Tithe Act, 1936, s. 17? So far as is relevant, sub-s. (1) of that section provides:

" . . . the person who is to be deemed for the purposes of this Act to be the owner of land shall be—(a) the estate owner in respect of the fee simple thereof . . . "

Sub-section (3) provides that " 'estate owner' has the same meaning as in the Law of Property Act, 1925 ". That definition necessarily introduces, by reference, the definitions in the Law of Property Act, 1925, s. 205 (1) of which includes, in para. (v), " 'Estate owner' means the owner of a legal estate ", and in para. (x),

" 'Legal estates' mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates."

The result, therefore (and so far there is no difference between counsel for the local authority, on the one hand, and counsel for the commission, on the other) is that, if the commission are to be entitled to succeed, they must show that the local authority are, as regards the relevant highways, the owners of a legal estate in fee simple.

In order to answer that apparently simple question, it will be necessary for me in due course to refer to other parts of the Law of Property Act, 1925, for, as is well known, since the passing of that Act only certain kinds of interests in land are capable of subsisting as legal estates. But I must first ascertain what, by virtue of the relevant statute, has been "vested" (and I put that word in quotation marks) in the local authority in respect of these roads. As I have already said, that vesting took effect by virtue of the Local Government Act, 1929, s. 29, sub-s. 2 of which, so far as is relevant, provides:

"... all roads in relation to which they have [the functions previously mentioned] and the materials thereof and all drains belonging thereto shall vest in the"

named council. It is to be noted that the formula that I have quoted was incorporated by Parliament in the Act of 1929, passed after Jan. 1, 1926, when Parliament must be taken to have been aware of the terms, and effect of its previous enactments of 1925. The formula is not novel. The same formula is found in many previous statutes in *pari materia*, for example, the Public Health Act, 1875. *Prima facie*, therefore, Parliament in 1929, as regards the vesting of highways, must have intended the same effect as had been produced by the earlier and similar legislation. I have thought it desirable to state that apparently obvious fact because one of the peculiarities of this case is that, on one view of the matter, the situation of highway authorities vis-à-vis tithe rentcharge annuities may, as a result of property legislation, be different according as the vesting took place before or after Jan. 1, 1926. If that view were right, the result would, no doubt, be surprising, but, if it is so, it has revealed a curious and, no doubt, unpremeditated by-product of the property legislation of 1925.

In those circumstances, it is desirable, in my judgment, first, to inquire what was the effect in law of the vesting by virtue of such a formula as is found in the Act of 1929, according to the old law of the land before the legislation of 1925. It has been the main argument of counsel for the local authority that the effect was not to vest in or confer on the highway authority a fee simple or legal estate in the highway of one of the kinds well-recognised and understood by the old land law, but rather a special and peculiar species of proprietorship, having, no doubt, attributes common to the old estates in land, but not being in truth such an estate—conferring, that is to say, a special right to the surface and an undefined area below and above the surface, with all such ancillary rights and powers as were requisite for the authority in the performance of its statutory duties, but no more, and, in any event, not conferring an estate or interest in the land as known and understood to the general law. Support for this view was invoked particularly from the language of FARWELL, J., in *Hertfordshire County Council v. Lea Sand, Ltd.* (1) (98 J.P. 112):

"It is quite unnecessary for me to refer in detail to any of the many authorities which relate to this question, because it is now clearly established, I think beyond all doubt, that a highroad does vest in the road authority. It does not vest in fee simple; that at any rate is plain. The right of the original owner of the land remains untouched, and he remains the owner in fee simple of the land, but subject to there being vested in the road authority the actual road itself and so much of the soil as is necessary to enable the road authority to perform its statutory duties of repairing and maintaining the road as a highway."

If this view is correct, then counsel advances, as the necessary consequence, the attractive conclusion that all the difficulties are circumvented. The local

authority is not, and never was the owner of the legal estate for the purposes of the Tithe Act, 1936, or any analogous statute. In particular, its interest is altogether outside the scope and conveyancing purview of the property legislation of 1925. I have been unable to accept this premise, notwithstanding the language I have quoted from the judgment of FARWELL, J., for, in my judgment, we are bound by authority to hold that a vesting, according to a formula such as that of the Act of 1929, operated to confer on a highway authority in respect of some part of the land, which although indefinite in extent included the essential surface (i.e., essential for the purpose of tithe, tithe rentcharges and the Tithe Act, 1936), a legal estate known to the law, viz., a fee simple determinable on the happening of a particular event, the event of the land in question ceasing to be used as a highway.

This, in my judgment, is the result of a number of cases, beginning (perhaps somewhat uncertainly) with *Coverdale v. Charlton* (2) and ending with *Foley's Charity Trustees v. Dudley Corpn.* (3). I propose to refer to three of those cases, viz.: *Rolls v. St. George the Martyr, Southwark, Vestry* (4), *Tunbridge Wells Corpn. v. Baird* (5) and *Foley's Charity Trustees v. Dudley Corpn.* (3), which I have already mentioned. These cases, in my view, and particularly the last, constitute authority binding on this court that the highway authority acquired, by virtue of what I will call the statutory vesting of a highway in the form noticed, a legal estate, i.e., a fee simple determinable.

In *Rolls v. Vestry of St. George* (4) the question arose because, the highway in question having ceased to be used as such, the highway authority had claimed to be able to dispose of the area of the highway and to appropriate the proceeds to themselves under the Public Health Act, 1875. That claim was resisted by the previous owner of the land or his successor in title. In the course of the judgments, the following language was used, first of all by JAMES, L.J. His Lordship says (14 Ch.D. 796):

"It appears to me that the legitimate construction of the enactment that streets being highways shall vest is that streets if and so long as they are highways shall be vested. There are no words of inheritance, there are no words of perpetuity in the Act, there is nothing to say whether the streets are to vest in fee simple or for any limited estate, and it appears to me that they are given to and vested in the public body for the purposes of the Act and during the time for which those purposes require them to be held, and no longer. Words of divesting or defeasance are not required, because to my mind the interest of the vestry is exactly like a limited estate. If an estate is given to a woman during her widowhood words of defeasance are not required to divest it on her marriage, because the estate has ceased when the original limit is arrived at. So in this case it appears to me that when the thing has ceased to be a highway, when it has ceased to be a street, then it ceases to be vested, because the period for which it was to be vested in the board has come to an end."

COTTON, L.J., uses somewhat similar language (*ibid.*, 798):

"The estate or interest of the local board, whatever it was, was in that case [*Coverdale v. Charlton* (2)] undoubtedly still continuing in them, and none of the judges, so far as I can see, intended, and certainly I did not intend, to decide what was the period for which this material thing was vested in the local board. That is the question which we have to decide in the present case, and I agree with the conclusion at which JAMES, L.J., has arrived, that the estate and interest of the vestry are limited by reference to the period for which the street is used in a particular way, and that, although there is no divesting clause, yet the estate and interest of the vestry cease when and if this (which I call a street) ceases to be used as a highway."

The point to which those observations were particularly directed was this. That it was said on behalf of the vestry that the street having been vested in them, there was nothing to indicate in any statute, deed or otherwise that it had ever been divested out of them. As the learned lords justices pointed out, that was unnecessary, because automatically the estate ceased to be in the authority when its purposes had become exhausted. But, in my judgment, there is no sufficient warrant for suggesting that in the mind of JAMES, L.J., or COTTON, L.J., the result was a kind of interest unknown to and not understood by the law. I think that the analogy which JAMES, L.J., gave of an interest given to a woman during her widowhood showed quite clearly that the result to his mind was an estate or interest in land perfectly intelligible in law.

The next case is *Tunbridge Wells Corpn. v. Baird* (5), a case which went to the House of Lords, and in which the case of *Rolls v. Vestry of St. George* (4) was referred to. The headnote states ([1896] A.C. 434):

“ . . . where a local Act authorised the urban authority to erect and maintain ‘ in any street or public place, or on land belonging to them or under their control ’ lavatories for the use of the public: HELD, that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them within the meaning of the Public Health Act, 1875.”

The point, therefore, really turned on the question whether the right of the local authority, the highway authority, extended to such an extent below the surface of the street as to enable them to make the lavatories in the sub-soil. In the course of his speech, LORD HALSBURY, L.C., uses these words (*ibid.*, 437):

“ My Lords, for my own part, I am disposed to adopt every word of what JAMES, L.J., said in the passage [in *Rolls v. Vestry of St. George* (4) (14 Ch.D. 796)] that has been quoted as to the true effect and meaning of the vesting of a ‘ street ’ in a local body. That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as JAMES, L.J., points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof. The same section that vests the street in them vests also the materials, the actual personal property provided for the purpose of repair, and so forth.”

LORD HERSCHELL says (*ibid.*, 442):

“ My Lords, it seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use.”

It is true that LORD MACNAGHTEN uses rather more cautious language when he says in his short speech (*ibid.*):

“ . . . I think the meaning of s. 149 of the Public Health Act, 1875, is to give the urban sanitary authority the control and management of streets coming within the description therein contained, and such statutory right in the nature of a right of property as may be sufficient to authorise them to sue and be sued as occasion may require in the course of such control and management ”.

Both LORD HALSBURY and LORD HERSCHELL, to my mind, indicated plainly their view that what passed to the highway authority was a right of property, and I think, particularly having regard to their reliance on the language of

JAMES, L.J., they meant a right of property known to and recognised and understood by the law.

The matter, however, so far as this court is concerned, seems to me to be made still clearer in the third of the cases I have mentioned, *Foley's Charity Trustees v. Dudley Corpn.* (3). The question there concerned liability for payment of a certain rentcharge. The headnote reads thus ([1910] 1 K.B. 317):

"For more than one hundred years a fee farm rent had been paid to certain charity trustees in respect of a piece of land acquired for the widening of a turnpike road and since forming part of the road, but no conveyance to the turnpike trustees was forthcoming. The rentcharge was paid, first, by the turnpike trustees, who had statutory power to buy land for widening the roads under their control, and, on the expiration of the turnpike trust in 1871 by virtue of the Annual Turnpike Acts Continuance Act, 1870, by the defendant corporation, in whom as the highway authority the road had become vested under the Public Health Act, 1848. The corporation having refused to make any further payments, the charity trustees brought an action against them in the county court for arrears of the rentcharge."

The precise point to which the argument was directed was whether the corporation, as highway authority, had, by virtue of the vesting in them of the highway under the Public Health Act, 1848, such an interest in the land as would make them terre tenants; but it is, to my mind, clear that, involved in it, was the question whether they had an estate in land known to and understood by the law. I venture to read a part of the argument of Mr. Astbury who appeared for the respondent plaintiff. He said (*ibid.*, 319):

"The appellants [Dudley Corporation] are liable . . . for this rentcharge . . . The piece of land in question admittedly forms part of the highway, which is vested in the appellants by the Public Health Act. That vesting confers upon the highway authority the possession and ownership of so much of the soil as is required for the purposes of the highway . . . The interest which the appellants take is a statutory fee simple interest determinable in an event which has not happened, namely, on the road ceasing to be a highway. To the extent of their interest their rights over the soil do not differ from the rights of private owners."

He cited *Rolls v. St. George the Martyr, Southwark, Vestry* (4), and that was the argument which, I think, this court accepted. SIR HERBERT COZENS-HARDY, M.R., says (*ibid.*, 322):

"It is, to my mind, not open to this court to question that road authorities in the position of the defendants have a property in and possession of the surface of the road, and of and in an undefined depth below the surface, and have also a property in an undefined section of the air above, so far in each case as is necessary for the discharge of their duties. That has been decided, to mention two only of the cases, by the Court of Appeal in *Coverdale v. Charlton* (2) and by the House of Lords in *Tunbridge Wells Corpn. v. Baird* (5)".

After referring to certain other authorities, he continues (*ibid.*):

"In fact, as I think I put it, it is a fallacy to say that a road authority, whose rights to the soil are limited, are, to the extent of those rights, in a worse position than a private owner, whose rights to the soil are unlimited. What then is the position? I think that the true position is this: that the road authority have what I may venture to call a determinable statutory fee simple interest in such portion of the soil as is vested in them at all . . . They are liable because they are in possession of the land, not in the full sense, no doubt, usque ad inferos, but they are in possession, and they are in possession not as termor or bailiff, but in a character which renders them liable to the rentcharge."

FLETCHER MOULTON, L.J., and FARWELL, L.J., delivered judgments to the same effect. I quote one short passage from FARWELL, L.J. (*ibid.*, 325):

"I think that the estate of the authority may be defined either as a statutory freehold or as a statutory fee simple conditional. It is plain that it is statutory, and the somewhat anomalous nature of the estate is immaterial because it is created by Act of Parliament".

A At the conclusion of that paragraph, referring to another case, he says (*ibid.*):

"That appears to me to show that the true definition is either statutory fee simple conditional or statutory freehold".

Counsel for the local authority has emphasised the use of the adjective "statutory" and said that, though the noun "freehold" is used, it is so qualified by the word "statutory" as to mean something analogous to, but not the same as, an ordinary freehold estate known to the law. In the context, as I read it, it seems to me that that is not true. I think that the word "statutory" was used only to indicate that the estate, although a legal estate understood by the law, was the creature of statute, because it was conferred by statute and had, of course, this peculiarity, that the exact quantity or limits were undefined.

C I think, therefore, as I have already said, that these cases show that a highway authority which had vested in it highways in that statutory form which I have already mentioned acquired an estate known to the law, namely, a fee simple determinable. I refer to, but I do not take time to quote, the passage in CHALLIS ON REAL PROPERTY, 3rd ed., to which our attention was drawn—"Determinable Fees", ch. 17, p. 251, and following.

D It is true that in *Foley's* case (3) there were strong grounds, both in common sense and justice, for arriving at the conclusion which the court reached, but I think it clear that, if the Tithe Act, 1936 (with appropriate amendments to its definitions), had been enacted twenty years earlier, it would have been impossible to say, following *Foley's* case (3), that a highway authority, in respect of highways acquired in the way I have mentioned, would not have been liable to the tithe redemption annuity. What, then, was the effect of the property legislation of 1925? Before I read other relevant sections I observe that, to my mind, where a highway authority took by virtue of some enactment prior to Jan. 1, 1926, it would be impossible for them to escape the conclusion that, one way or another, they would have been estate owners within the meaning of s. 17 of the Tithe Act, 1936. They would, indeed, have been, as I think, on the horns of a dilemma.

F Either the interest which they acquired would have been converted into an absolute legal estate in fee simple, being a legal estate authorised by the Law of Property Act, 1925, or their former determinable fee would have been converted into an equitable determinable fee simple, and in that event, by virtue of the transitional provisions of the Law of Property Act, 1925, the actual legal estate would have vested in the highway authority on trust for themselves to the extent of their equitable interest. But, in the present case, the vesting did not occur until 1929, and the transitional provisions of the Act of 1925 are not, therefore, applicable. If the interest vested by s. 29 (2) of the Act of 1929 is converted into an equitable interest, the land would appear to be settled land, for I do not for myself accept the submission made by junior counsel for the local authority that the land could not be said to be limited in trust. But it is not clear to me that any legal estate would now be vested in the highway authority, although the highway authority might have been able and might be able to require it to be so vested.

I now read the Law of Property Act, 1925, s. 1, so far as it is relevant:

"(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—(a) An estate in fee simple absolute in possession; (b) A term of years absolute . . . (3) All other estates, interests, and charges in or over land take effect as equitable interests".

If that section stood alone, it is plain that it would not apply to a fee simple interest determinable in the way I have mentioned: in other words, the interest of the highway authority is not, as I think, covered by s. 1 (1).

I turn now to s. 7 which is in these terms:

"(1) A fee simple which, by virtue of the Lands Clauses Acts, the School Sites Acts, or any similar statute, is liable to be divested, is for the purposes of this Act a fee simple absolute, and remains liable to be divested as if this Act had not been passed . . . (3) The provisions of—(a) the Forfeiture Act, 1870 . . . (b) the Friendly Societies Act, 1896, in regard to land to which that Act applies; (c) any other statutes conferring special facilities or prescribing special modes (whether by way of registered memorial or otherwise) for disposing of or acquiring land, or providing for the vesting (by conveyance or otherwise) of the land in trustees or any person, or the holder for the time being of an office or any corporation sole or aggregate (including the Crown); shall remain in full force. This sub-section does not authorise an entailed interest to take effect otherwise than as an equitable interest."

Sub-section (3) (a) is repealed by the Criminal Justice Act, 1948, s. 83 and sched. X.

DANCKWERTS, J., in the court below, decided this case in favour of the plaintiffs by holding that the interest taken by the highway authority was comprehended by the provisions of s. 7 (1). In this court sub-s. (3) has also been referred to, but I am not satisfied that that sub-section applies, so to speak, prospectively, that is to say, I am not satisfied that the words "any other statutes" can mean and include statutes passed after the date of the Act of 1925. I need not discuss the other matters which were debated on that paragraph. It seems to me that the use of the formula "shall remain in full force" makes it impossible to hold that the other statutes mentioned would comprehend, e.g., the Local Government Act, 1929.

There remains, however, s. 7 (1), and the real question and the only question there is: Is the Local Government Act, 1929, a "similar statute" within the meaning of the words I have used? Counsel for the local authority says that it is not. He says that the similarity required in the phrase "Lands Clauses Acts, the School Sites Acts, or any similar statute" is of this nature, that it must be shown that the statute in question in terms effects a divesting on the happening of some named event of land which, apart from that statutory provision, would remain absolutely vested. In the present case the point is made that there is not, and never was, any absolute out and out vesting of a fee simple: all that was passed, or, apart from the Law of Property Act, 1925, would have passed, was an estate in land persisting only until the happening of the specified event and then an automatic determination of the interest; there was, therefore, no absolute vesting, and, consequently, no divesting. Counsel for the local authority refers particularly to the language that I have already read of the judgment of JAMES, L.J., in *Rolls v. Vestry of St. George* (4). Alternatively, counsel says, if there is a divesting, it is not a divesting "by virtue of" the particular statute here in question; it is a divesting by the operation of the general law. The distinction is on any view a narrow one. Take, for example, the Schools Sites Act, 1841, one of the Acts mentioned in terms in the sub-section. By s. 10 of that Act, there is set out the form of grant appropriate to the purpose of the Act, and the material terms of the form of grant are that the land is conveyed to the particular body or authority

" . . . to hold unto and to the use of [the grantees] for the purposes of the said Act, and to be applied as a site for a school for poor persons of and in the parish of (blank) and for the residence of the schoolmaster of the said school (or for other purposes of the said school), and for no other purpose whatever".

Section 2, after empowering lands to be conveyed by a limited owner, ends with the following provision:

“ Provided also, that upon the said land so granted as aforesaid . . . ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise . . . as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding ”.

A In the Lands Clauses Acts the situation is somewhat similar, though, as counsel for the second defendants observed, on the happening of the event there relevant the property would not revert, as in the Schools Sites Act, 1841, but would pass to the adjoining owners.

B In this case the estate passed to the local authority for the purposes of use as a highway. It is not altogether easy to distinguish, as a matter of common sense, between that kind of case and the Schools Sites Act, 1841, where, according to the form of the grant, the grant is to the persons named as grantees for the purposes, and solely for the purposes, of use as a school. On the happening of the disabling event in each case, the original owners, or their successors, are entitled to resume their proprietorship. As a matter of common sense and
C ordinary language, to my mind, the result is really the same. So long as the land is used as a highway, it remains vested in the local authority. On its ceasing to be a highway, the authority's interest is automatically “ divested ” in favour of the original owner or of his successors. The original owner could never, as I think, sensibly say, after the Act of 1929, that he took or had any reversionary interest or remainder. His only right was to have the land back on the happening
D of the event of the land ceasing to be used as a highway.

Although I confess to have found the matter difficult, I think on the whole that this statute is a “ similar statute ” within the meaning of the Law of Property Act, 1925, s. 7 (1), for I think that the genus or family of statutes there referred to is that of statutes providing for the acquisition of land, whether compulsorily or not, for use for public purposes or for the purposes of public undertakings,
E so that the right of property in the land acquired or vested subsists so long only as it is required for those purposes. I, therefore, conclude that the case is covered by s. 7 (1). That was the conclusion of DANCKWERTS, J. I agree with his conclusion and I think that this appeal fails and should be dismissed.

F **DENNING, L.J.:** Counsel for the commission destroyed the arguments of counsel for the local authority in one sentence when he said that they had raised the dust and then claimed that we could not see through it. Our eyes, however, are not blinded by dust of that kind. The statute of 1929 vested in the local authority the top spit, or, perhaps, I should say the top two spits, of the road for a legal estate in fee simple determinable in the event of its ceasing to be a public highway. This estate ranks as a fee simple absolute in possession, because
G the statute of 1929 comes within the category of “ similar statutes ” mentioned in the Law of Property Act, 1925, s. 7 (1). This category comprises all statutes which vest property in a body for public purposes, with a proviso, express or implied, that their interest shall determine if the property should cease to be required for those purposes. The local authority is, therefore, the estate owner in respect of the fee simple and is liable to pay the appropriate portion of the tithe redemption annuity. I agree that the appeal should be dismissed.
H

JENKINS, L.J.: I agree, for the reasons stated by my Lord, that this appeal fails and should be dismissed. On the question whether the Local Government Act, 1929, s. 29 of which contains the relevant vesting provisions, was quoad those provisions a “ similar statute ” as compared with the Lands Clauses Acts and the School Sites Acts mentioned by way of example in the Law of Property Act, 1925, s. 7 (1), and created a fee simple liable to be divested within the meaning of that sub-section, I derive some assistance from this passage

in the judgment of FLETCHER MOULTON, L.J., in *Foley's Charity Trustees v. Dudley Corpn.* (3) ([1910] 1 K.B. 324):

"Therefore the defendants have this property in the land in question. It certainly includes the surface, and it includes so much as is necessary to support the surface as a road. For what period does this last? It is a fee simple subject to this, that if the road should be properly and legally abandoned and cease to be a highway, then the freehold will revert to some other person".

Those words, in my view, are apt to describe a fee simple which is liable to be divested in the event to which they refer, and, inasmuch as I agree with my Lord that the relevant similarity for the purposes of s. 7 (1) of the Act of 1925 is that the "similar statute" should be one under which or pursuant to which there is created a fee simple liable to be divested, and that the divesting should be liable to take place in the event of the property ceasing to be used for the purposes contemplated by the enactment, it is, in my judgment, right to hold that in this case s. 29 of the Local Government Act, 1929, created a fee simple liable to be divested within the meaning of s. 7 (1) of the Act of 1925, and was an enactment in the material respects similar to the two types of enactment mentioned in that sub-section, namely, the Lands Clauses Acts and the School Sites Acts. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Ponsford & Devenish*, agents for *T. J. Lewis*, clerk to Runcorn Urban District Council (for the first defendants); *Solicitor, Tithe Redemption Commission*; *J. W. Ridsdale* (for the second defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SERVILLE v. CONSTANCE AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), February 17, 18, 1954.]

Passing Off—Professional description—Confusion with defendant—Boxing title—Plaintiff newcomer to England.

The plaintiff, a boxer, had, since December, 1952, held the title of "welter-weight champion of Trinidad", and was recognised as such by the Trinidad Boxing Board of Control. On arrival in England in December, 1953, the plaintiff found the first defendant well established as a boxer and styling himself and being described in boxing circles as welter-weight champion of Trinidad. On Jan. 26, 1954, the plaintiff issued a writ against the first defendant and his manager, the second defendant, and claimed that the championship of Trinidad was his stock in trade, that the first defendant was passing himself off as the champion, and that confusion would result. On a motion in the action for an injunction to restrain the first defendant from so styling himself,

HELD: the plaintiff being a newcomer to this country had no reputation here to protect and there was no likelihood of his being confused by the public with the first defendant, and since the element of confusion, which was essential to a passing-off action, was, therefore, lacking, the plaintiff was not entitled to the relief which he sought.

Semle: If malice could be shown, an action for slander of title would lie.

AS TO TRADE NAMES AND PASSING-OFF, see HALSBURY, Hailsham Edn., Vol. 32, pp. 614-621, 629, paras. 920-924, 932; and FOR CASES, see DIGEST, Vol. 43, pp. 265, 282-285, Nos. 1021, 1022, 1122-1146.

Cases referred to:

(1) *Balden v. Shorter*, [1933] Ch. 427; 102 L.J.Ch. 191; 148 L.T. 471; Digest Supp.

- (2) *Hines v. Winnick*, [1947] 2 All E.R. 517; [1947] Ch. 708; [1948] L.J.R. 187; 2nd Digest Supp.
- (3) *Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.*, [1901] 2 Ch. 513; 85 L.T. 20; *sub nom. Panhard et Levassor (Société Anonyme Anciens Etablissements) v. Panhard Levassor Motor Co., Ltd.*, 70 L.J.Ch. 738; 28 Digest 459, 744.

A MOTION treated as the trial of an action for an injunction that the first defendant, Hector Constance, be restrained from using the title of welter-weight champion of Trinidad or any other style resembling the style or title of the plaintiff.

Grayson for the plaintiff.

Arthur Bagnall for the defendants.

B HARMAN, J.: This is a motion treated as the trial of the action between two young coloured men, natives of the island of Trinidad, each of whom has crossed the seas to this country in order to pursue his fortunes with his fists. The plaintiff is the later-comer of the two. He arrived only in December, 1953, and here found the first defendant well established in the world of fisticuffs and describing himself and being described as "welter-weight champion of Trinidad".

C As the plaintiff was in fact and in right himself the welter-weight champion of Trinidad, he certainly had ground for complaint. I think there is nothing to be said in that respect for the conduct of the first defendant or his manager, the second defendant, both of whom, in my judgment, must have known perfectly well that the first defendant was not that which he was represented to be. The very experienced manager employed by the first defendant must also have known well the regulation set out in the constitution and regulations of the British Boxing Board of Control which provides:

"A promoter shall not bill a boxer or publish in the Press that the boxer holds a particular title unless he has fully satisfied himself that the boxer is officially recognised as holding such title".

E The second defendant could have taken no steps to do anything of the sort, because he would have found, had he made any inquiry into the matter, that his protégé had never held the title of "welter-weight champion of Trinidad". I have been shown a postcard bearing a photograph of the first defendant in a pugilistic attitude with the words, "Hector Constance, welter-weight champion of Trinidad: sole manager, Jack Burns, 'Phone Tottenham Hale 381." I have

F no doubt that by so describing himself the first defendant reaped considerable benefit. Not content with that, however, he also described himself as "champion of the British West Indies", which, as he must have known perfectly well, was a non-existent title.

When the plaintiff arrived in this country in December, 1953, he had himself been recognised for a year past as the welter-weight champion of Trinidad,

G following a contest in December, 1952. He was so recognised by the local boxing board of control, a body performing functions similar to those of the British board of control in this country and entitled to name the person it approves as the champion at any weight. It is fair to say that the first defendant came to England in September, 1952, before the plaintiff was declared champion, and that earlier in 1952 he had, in a ten-round contest, defeated the plaintiff.

H The plaintiff says that he made some complaint at the offices of the British Boxing Board of Control, but that he did not obtain any satisfaction from them. He obtained a licence from the board, but none the less found, as he says, that he could not get any engagements, and he attributes that to the defendants' conduct. The first defendant, who has acquired a considerable reputation in the ring in this country, probably owes his advance more to his skill than to the title to which he has wrongly laid claim. Nevertheless, a title of that sort is obviously a matter of importance, as the regulation I have read indicates, and it

gives a man that start in the world which will enable him to obtain engagements.

The plaintiff, at some time which does not appear, ascertained that the first defendant was billed to appear at the Albert Hall in a tournament presented by an individual styling himself Stan Baker, which is described as a champion boxing tournament for Tuesday, Jan. 26, 1954. In the centre of the poster Hector Constance, the first defendant, is billed to box against a person known as George Happe. That defendant is described in the same bill as "champion of the British West Indies", which, of course, he was not. On Jan. 22 the plaintiff consulted a solicitor. There was very little time before the fight at the Albert Hall took place and it appears that the solicitor applied to the legal aid committee for an emergency certificate for his client to bring proceedings at the public expense. I was relieved to hear, however, that in fact this action has not, in the events which have happened, involved any expense to the public. The plaintiff's solicitor, apparently, rang up the British Boxing Board of Control, who by their secretary, one Waltham, were in communication with him and the plaintiff on Saturday, Jan. 23, and told them that the board of control had ample power to deal with this kind of dispute and that it was not worth their while to go to law because the board would deal with their complaints quickly and effectively. That, I think, is so because a board of control of this sort has, in fact, absolute command over those who make their living by following the sport in question. It is the greatest pity that hint was not taken and the matter immediately referred to the board.

A writ was issued in this action on the morning of Tuesday, Jan. 26, and an ex parte application was made to me on the same day. It was said that the matter was urgent in that the fight at the Albert Hall was to take place that night and it was, therefore, essential that relief should be given, otherwise the whole proceeding would be stultified. I did not consider that it was a matter for such relief, but it appears that some notice was taken in the Press of what passed on that occasion and, as a result, the first defendant went with his manager to consult the board who told him that he must withdraw his claim to the titles. Indeed, the master of ceremonies at the Albert Hall was told, and, as far as I know, he carried out his instructions, that he must not, when introducing the first defendant in the ring, describe him as "welter-weight champion of the British West Indies". As a result, in the next edition of the board's bulletin, a document which is circulated among its members and also communicated to the Press, a notice appeared with the assent of the first defendant and his manager in these words:

"Boxer Hector Constance. Hector Constance wishes it to be known that he does not make claim to be the welter-weight champion of Trinidad or British West Indies. Promoters are therefore instructed not to bill or advertise in any way that Constance is the holder of either of these titles."

That, in fact, gave the plaintiff all that he wanted. He was offered, when the motion first came before me and before the evidence was complete, an undertaking to much the same effect, but he, through his legal advisers, refused it because he was not offered his costs, and, therefore, the time of this court has been occupied for a day and a half in arguments concerning the costs of this motion which was, in the circumstances of the case, unnecessary.

However that may be, I must decide the legal problem which, regarded as such, is not uninteresting. It is clear enough, I think, that the defendants, by using the title, welter-weight champion of Trinidad, were slandering the title of the plaintiff, or were uttering what the law sometimes calls an injurious falsehood about the plaintiff. That the plaintiff would have had a cause of action against the defendant under that head I do not doubt. The leading modern case on the subject is *Balden v. Shorter* (1). The gist of that action, however, is malice, and it will not lie in the absence of proof that the defendant made his statement, knowing it to be untrue and with the object of causing

injury, or with what, in other connections, lawyers call a by or sinister purpose. The plaintiff here admits that he is not in a position to prove that the defendants had the intention of injuring him, or that they knew that he was the accredited welter-weight champion of Trinidad. Therefore, those advising the plaintiff elected not to rest their claim on that cause of action.

A This action has been brought as a passing-off action, or, as was said in the course of argument, a colourable imitation of a passing-off action. As such it seems to me a complete novelty. It is said that the championship of Trinidad is the plaintiff's stock in trade, that whosoever steals that is passing himself off in a sense as the plaintiff, and that confusion will arise. It is said, further, that the kind of relief to which the plaintiff is entitled is an injunction to restrain the defendant from using, in connection with his pugilistic activities, the title of
B welter-weight champion of Trinidad or any other style resembling the style or title of the plaintiff, or calculated to lead to the confusion of the defendant, Constance, with the plaintiff as a boxer under the style or title of "welter-weight champion of Trinidad". That seems to me something entirely new. The action of passing-off, as I understand it, is essentially a cause of action arising out of confusion. That element seems to be entirely lacking here. There is no confusion
C here between Hector Constance and Hugh Serville, because nobody believes, when they see Hector Constance in the ring, that they are looking at Hugh Serville. There is no likelihood of one being confused with the other. The plaintiff cannot allege, as it would be necessary for him to allege, in the statement of claim, that the words "welter-weight champion of Trinidad", when applied to a boxer, indicate to the English public the plaintiff and the plaintiff alone.
D The answer is that nobody in this country knows anything about the plaintiff, who came here only last December, and who, therefore, has no reputation here to protect. The case is unlike the *Panhard Levassor* case (3). Indeed, the words "welter-weight champion of Trinidad", if they point to anyone in this country, point to the defendant who is to some extent known, because he appears to have been successful. Therefore, this is the opposite, so to speak, of a passing-off case—since it concerns the unknown seeking remedies against the known, and
E not the well-known seeking remedies against the unknown.

I may also point this out. To be a champion is to be here today and gone tomorrow. There is nothing inherent to the plaintiff in being a champion. Two minutes in the ring may easily see the end of that on any day. It would be curious if he could obtain the permanent remedy of an injunction against a defendant
F from representing himself as the champion when tomorrow he may in fact become the champion. It seems to me, therefore, that this is not a case of passing off at all, since there are none of the essential elements of passing off involved.

It was argued that this case was analogous to one recently decided by VAISEY, J., *Hines v. Winnick* (2), where the plaintiff had become identified in broadcasting with a certain "Dr. Crock and his Crackpots". That had become
G the sobriquet of the plaintiff who had the right to protect his reputation. The plaintiff had become identified with Dr. Crock, so that when the words "Dr. Crock" were mentioned any person who listened to the wireless would say: "Yes, that is the plaintiff"; but, when "the welter-weight champion of Trinidad" is mentioned to a boxing enthusiast, it is very unlikely that he will say: "That is the plaintiff", because he has never heard of the plaintiff.
H Therefore, it seems to me that that line of cases does not help the plaintiff at all.

I do not propose to enlarge further on the law, because it appears to me that on the facts the essential element of the action cannot be predicated. The plaintiff, therefore, although I think he had great reason to complain of the defendant's conduct, has chosen the wrong remedy.

Counsel for the defendants, very properly, said that he was prepared to admit that the plaintiff is at the present moment holder of the welter-weight championship of Trinidad, and that the first defendant is not, and to give an undertaking

not to represent that the first defendant holds the championship so long as the plaintiff holds it.

Declaration accordingly.

Solicitors: *S. M. Fruitman* (for the plaintiff); *Barnett, Janner & Davis* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

A

B

R. v. MABER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Pilcher and Slade, JJ.),
March 1, 1954.]

Criminal Law—Appeal—Sentence—Probation order—Breach—Probation order, together with statement of breach in respect of which charge brought, to be before the court.

C

Where a person is sentenced for a breach of a probation order and appeals to the Court of Criminal Appeal, the probation order, together with a statement of the breach in respect of which the charge was brought, should be included in the papers before the court.

D

APPLICATION for leave to appeal against sentence.

The applicant, Patricia Maber, was, at West London Magistrate's Court on Dec. 23, 1953, found guilty of having failed to comply with the conditions of a probation order, and, under the Criminal Justice Act, 1948, s. 29 (1), she was sent to the County of London Quarter Sessions for sentence, where, on Jan. 6, 1954, she was sentenced to a period of Borstal training.

E

No counsel appeared.

PILCHER, J., delivered the following judgment of the court. This application is refused. It appears that the probation order, with a statement of the breach with which the applicant was charged, was not sent to quarter sessions, and it is not before us now. The court desires to say that, where a person is sentenced for the breach of a probation order, and appeals to this court, the probation order, together with a statement of the breach in respect of which the charge was brought, should be with the papers. In this case, however, it is clear that the applicant, who pleaded Guilty to the breach of the order, was a thoroughly unsatisfactory young woman who did not co-operate with the probation officer, and so probably no harm has been done.

F

G

Application refused.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re SANDERS' WILL TRUSTS. PUBLIC TRUSTEE *v.*
McLAREN AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), February 24, 1954.]

Charity—Relief of poverty—Gift “for the working classes and their families” in certain area—Reference by testator to “my general charitable intention”—Effect of localisation of gift.

A By cl. 2 (a) of a codicil to his will a testator gave his residuary estate to his trustee and directed that he should stand possessed of one third part thereof on trust to apply the same in any manner which his trustee in his absolute discretion should consider “to be in furtherance of my general charitable intention . . . namely to provide or to assist in providing dwellings for the working classes and their families resident in the area of Pembroke Dock . . . or within a radius of five miles therefrom (with preference to actual dock workers and their families employed at the said docks) . . .” On a summons to determine whether the trust contained in cl. 2 (a) was a valid charitable trust,

C HELD: (i) a trust for the relief of poverty could not be inferred from the words of the clause because, although a man might be a member of the working class, it did not follow that he was poor.

Re Glyn's Will Trusts ([1950] 2 All E.R. 1150 n.), distinguished.

(ii) the localisation of the gift to a particular area could not make the gift a valid charitable gift where its purpose was specified and was not charitable per se.

D *Williams' Trustees v. Inland Revenue Comrs.* ([1947] 1 All E.R. 513), followed.

(iii) the use of the words “my general charitable intention” by the testator did not validate the particular intention specified by him which was not, in fact, a charitable intention, and, therefore, the gift failed.

E AS TO TRUSTS FOR RELIEF OF POVERTY, see HALSBURY, Simonds Edn., Vol. 4, pp. 213-218, paras. 492-495.

Cases referred to:

- (1) *Re Sutton*, [1901] 2 Ch. 640; 70 L.J.Ch. 747; 85 L.T. 411; 66 J.P. 39; 8 Digest 274, 420.
- (2) *Green & Sons v. Minister of Health* (No. 2), [1947] 2 All E.R. 469; [1948] 1 K.B. 34; [1948] L.J.R. 1; 111 J.P. 530; 2nd Digest Supp.
- (3) *Belcher v. Reading Corpn.*, [1949] 2 All E.R. 969; [1950] Ch. 380; 114 J.P. 21; 2nd Digest Supp.
- (4) *Re Coulthurst*, [1951] 1 All E.R. 774; [1951] Ch. 661; 2nd Digest Supp.
- (5) *Re Dudgeon*, (1896), 74 L.T. 613; 8 Digest 243, 22.
- (6) *Re Lucas*, [1922] 2 Ch. 52; 91 L.J.Ch. 480; 127 L.T. 272; Digest Supp.
- (7) *Re Glyn's Will Trusts*, [1950] 2 All E.R. 1150 n.; 66 (pt. 2) T.L.R. 510; 2nd Digest Supp.
- (8) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.
- (9) *Goodman v. Saltash Corpn.*, (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 8 Digest 327, 1099.
- (10) *Re Wilson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.

H ADJOURNED SUMMONS to determine whether, on the true construction of the codicil to the will of William Henry Sanders, one third part of his residuary trust fund, which was by cl. 2 (a) of the said codicil directed to be applied in the provision or in assisting the provision of dwellings for the working classes and their families resident in the area of Pembroke Dock, Pembrokeshire, or within

a radius of five miles therefrom, was held on a valid charitable trust or was undisposed of by the said will and codicil of the testator.

By cl. 2 of a codicil dated Aug. 18, 1951, to his will dated Aug. 17, 1951, the testator gave the residue of his estate which he called his residuary trust fund, to his trustee, the Public Trustee, on the usual administrative trusts and directed:

(a) "My trustee shall apply one equal third part of my residuary trust fund in any manner which he in his absolute discretion considers to be in furtherance of my general charitable intention with regard to the disposal thereof, namely, to provide or to assist in providing dwellings for the working classes and their families resident in the area of Pembroke Dock, Pembrokeshire, Wales or within a radius of five miles therefrom (with preference to actual dock workers and their families employed at the said docks) . . . Without prejudice to the generality of my said charitable intention or to the said absolute discretion of my trustee I declare that my trustee shall have all or any of the following powers in giving effect to this bequest; (i) to purchase land for the purpose of providing dwellings for the said working classes in the said area or radius in accordance and conformity with the provisions of the Working Classes Dwellings Act, 1890 . . ."

The testator, who was in practice as a solicitor at his death on Aug. 19, 1951, left one sister, the first defendant, Caroline Anne McLaren, the sole next of kin.

Wigglesworth for the Public Trustee, the trustee of the will.

Parbury for the first defendant.

N. S. S. Warren for the Attorney-General.

HARMAN, J., stated the facts and continued: The Working Classes Dwellings Act, 1890, referred to in cl. 2 (a) (i) of the codicil, and evidently known to the testator, is an Act, as its long title shows

"to facilitate gifts of land for dwellings for the working classes in populous places".

The object of the Act was to provide that not more than five acres of land might be bought for that purpose without involving the purchaser in the difficulties of the Mortmain and Charitable Uses Acts. In my judgment, the reference to that Act in the codicil is a reference to the purchase of land up to five acres thus facilitated.

The question has been raised whether the disposition of the one-third of the residuary trust fund in cl. 2 (a) is a valid charitable bequest. It seems ironical that in a will drawn so elaborately and with so much knowledge of the machinery of charitable bequests and containing what one might call the magic words, "general charitable intention", there should, nevertheless, be a question for this court to determine whether charity is intended to be benefited. However, on looking at the gift in cl. 2 (a), one is immediately confronted with the fact that the testator had a certain intention, which he called "my general charitable intention", to provide

"dwellings for the working classes and their families resident in the area of Pembroke Dock . . ."

with preference for dock workers. That gift was primarily upheld before me as being, in effect, a gift for the relief of poverty. Indeed, I think it was not suggested that, unless there was to be found an indication sufficient to induce the court to find the element of poverty in the recipients, there was any way in which the gift could be upheld. The beneficiaries are what the testator calls "the working classes and their families"; not widows, orphans or dependants of persons of the working classes, but persons still working and preferably dockers working in the Pembroke Docks. It is difficult to see how the element of poverty is to be inferred in them.

In *Re Sutton* (1) BUCKLEY, J., says at the end of his judgment ([1901] 2 Ch. 646):

"... the Act of 1890 [the Working Classes Dwellings Act, 1890] is not an Act dealing with charitable matters, but is an Act providing for erecting dwellings for the working classes. Now, the poor need not necessarily be poor of the class known as the working class, and many of the working class, as we know, are not poor".

A So that over fifty years ago the law recognised that the terms "the working classes" and "the poor" were not synonymous. Although a man be a member of the working class it does not follow that he is poor. It was pointed out recently by DENNING, J., in *Green & Sons v. Minister of Health* (No. 2) (2), that the expression "working classes" is now an anachronism. The learned judge said ([1947] 2 All E.R. 470):

B "Much has been said in this case as to the meaning of 'working classes' ... These words, 'working classes' have appeared in a number of Acts for the last hundred years. I have no doubt that a hundred years ago, the expression had a meaning which was reasonably well understood. 'Working classes' fifty years ago denoted a class which included men working in the fields or the factories, in the docks or in the mines, on the railways or on the roads, at a weekly wage. The wages of people of that class were lower than those of most of the other members of the community, and they were looked upon as a lower class. That has all now disappeared. The social revolution in the last fifty years has made the words 'working classes' quite inappropriate today. There is no such separate class as the working classes. C The bank clerk or the civil servant, the school teacher or the cashier, the tradesman or the clergyman, do not earn wages or salaries higher than the mechanic or the electrician, the fitter or the mineworker, the bricklayer or the dock labourer. Nor is there any social distinction between one or the other. No one of them is of a higher or a lower class. In my opinion the words 'working classes' used in the Acts are quite inappropriate to modern D social conditions".

E He then points out that the words, nevertheless, appear in the Housing Act, 1936, but it is notable that that solecism, if such it was, was remedied by the Housing Act, 1949, s. 1 and sched. I, which removes the words "working classes", whenever those words appear in the Act of 1936.

F In *Belcher v. Reading Corpn.* (3) the court again had to deal with this expression, "the working classes". That case concerned the inhabitants of council houses in Reading who sued the Reading Corporation which had raised the rents and put forward various reasons against the increase of the rents. Their contention was rejected by ROMER, J., who, in passing, glanced at the judgment of DENNING, J., in *Green's case* (2). The learned judge said this ([1949] 2 All E.R. 984):

G "The phrase ['the working classes'] has a far wider and far less certain signification than it used to possess ..."

Then he referred to the Housing Act, 1949, adding (*ibid.*):

H "In so far as the phrase, the working class, is still capable of definition, there is no doubt but that it can properly and fairly be applied to the tenants of the privately owned houses in and near Reading of which ... particulars [were given in] evidence".

The phrase "working class", if it means anything, may mean persons who occupy council houses or houses of that standard. There are now many privately owned houses of that standard, and it may be that "working class" means persons who would occupy such houses if they could obtain them. I cannot think that the description of someone as a man who is anxious to live in a council house connotes that he is poor. Poverty is no part of the qualification for

obtaining a house of that type, and, accordingly, I do not see that I can infer poverty from the words used by the testator.

I was referred by counsel on behalf of the Attorney-General to a number of cases in which, although the word "poverty" was not used, the qualification of poverty was inferred from the general context. Thus, in *Re Coulthurst* (4) the Court of Appeal came to the conclusion that a gift for widows whose financial circumstances made them most deserving of assistance connoted that they were poor widows. Similarly, in *Re Dudgeon* (5) STIRLING, J., held that the fact that the amount there under discussion was 4s. a week could be taken to mean that such an amount must be given to a person to whom 4s. a week would be worth having, and who must, therefore, be a poor person. The same argument was used in *Re Lucas* (6), which was decided by RUSSELL, J. Finally, in *Re Glyn's Will Trusts* (7), DANCKWERTS, J., had to construe the words

"for . . . building . . . free cottages for old women of the working classes of the age of sixty years or upwards".

There the expression "working classes" again appears, and, having construed it merely as meaning persons who had to work for their living, the learned judge came to the conclusion that an old woman who had worked for her living and was over sixty years of age was a person likely to be in straitened circumstances, and, therefore, poor, and on that account he held the gift to be a valid gift. The ratio decidendi was that out of "old age" and "working class" you might argue that poverty was a necessary qualification. In this case, however, there is nothing of that kind. These are not old persons, nor are they widows. They are merely men working in the docks and their families, and, therefore, I cannot infer any element of poverty.

The next possibility is in the proposition that this is a bequest confined to an area, viz., within a radius of five miles from Pembroke Dock. It is well settled now, however, that where the purpose is declared the localisation of the gift will not make it valid as a charitable gift. LORD SIMONDS, who gave the leading opinion in *Williams' Trustees v. Inland Revenue Comrs.* (8), said ([1947] 1 All E.R. 519):

"It was argued that the limitation of the purpose to a particular locality was sufficient to validate the gift, that is to say, though purposes beneficial to the community might fail, yet purposes beneficial to a localised section of the community were charitable. That argument was rejected by this House. If the purposes are not charitable per se, the localisation of them will not make them charitable".

Later he dealt with the difficult case of *Goodman v. Saltash Corpn.* (9), and came to the conclusion that there the localisation of the gift rendered the gift valid because the purposes of the gift were not specified, and, therefore, the court could read in a purpose within the intendment of the preamble to the statute 43 Elizabeth, c. 4, but if the purpose of the gift is specified, one can read in no such purpose.

Lastly, it was said that this testator has evinced expressly a general charitable intention. I cannot doubt that being a solicitor he knew perfectly well that a general charitable intention is an overriding intention to devote the estate to charity in general. No doubt, there may be in addition a particular indication of the form of charity intended, but if that fails the general charitable intention will remain. That emerges from the classic passage in the judgment of PARKER, J., in *Re Wilson* (10) ([1913] 1 Ch. 321). But does this bequest in fact contain a general intention overriding the particular intention which the testator indicates with so much care? The Attorney-General's argument on this part of the case came to this, that there could be inferred in those words an intention to relieve poverty among persons in this locality, so that it came to the same result, namely, that some intention to relieve poverty

could be spelt out of the context. I can find no such intention. It seems to me that, on the express words that the testator has used, he has made this a gift for a particular purpose. No doubt, in his view, that purpose was charitable. In that sense he intended the gift to be generally charitable because his trustees were left a discretion, and the directions which he gives with such particularity were expressed to be "without prejudice to the generality" of their discretion.

A Only in that sense, I think, did he have a general charitable intention with regard to the first third of his estate, because he says "namely", and he refers to what he calls a general charitable intention. If that intent turns out, as I think it does, not to be charitable, the fact that he describes it as general, when on the face of it it is particular, does not seem to me to be of any avail. I cannot infer the relief of poverty, impotence, or old age from the word "general" as used by the testator in this codicil.

B Therefore, I think that it naturally follows that this gift of one-third of his estate fails because the purpose is not within the preamble to the statute of Elizabeth, and, therefore, is not charitable.

Declaration accordingly.

Solicitors: *Whitlock & Storr* (for the Public Trustee and first defendant);
Treasury Solicitor.

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

PARKE, DAVIS & CO. v. COMPTROLLER-GENERAL OF PATENTS, DESIGNS AND TRADE MARKS AND OTHERS.

D [HOUSE OF LORDS (Lord Simonds, L.C., Lord Oaksey, Lord Morton of Henryton, Lord Asquith of Bishopstone and Lord Cohen), February 5, 8, March 11, 1954.]

Patent—Licence—Compulsory licence—Medicine—Application for compulsory licence within three years from grant—Effect of International Convention for Protection of Industrial Property, 1934 (1938, Cmd. 5833), art. 5 (A) (4)—Patents Act, 1949 (c. 87), s. 41 (1) (b), s. 45 (3).

E The appellants, a company registered in the United States of America, obtained a grant of three British letters patent concerning a process for the production of a non-toxic antibiotic. Within three years from the date of the grant, the second respondents, manufacturers in England of pharmaceutical products, applied, under the Patents Act, 1949, s. 41 (1) (b), to the

F Comptroller-General of Patents, Designs and Trade Marks for a compulsory licence. The appellants applied for an order prohibiting the Comptroller-General from entertaining the application on the ground that, having regard to the International Convention for the Protection of Industrial Property of 1934, art. 5 (A) (4), and s. 45 (3) of the Act of 1949, no compulsory licence could be given before the expiration of three years from the date of the grant of the patent.

G HELD: article 5 (A) of the 1934 convention was limited to cases where there were abuses of patent rights within para. (2) of that article, and so the article applied only to licences granted under s. 37 and s. 40 of the Act of 1949 and had no application to licences granted under s. 41 (1) of the Act, under which the right to a compulsory licence arose, not by reason

H of the patentee's exercise or non-exercise of his monopoly, but solely on account of the character of the patent; and, therefore, the order made by the Comptroller-General under s. 41 (1) was not at variance under s. 45 (3) with art. 5 (A) of the convention.

Decision of COURT OF APPEAL, *sub nom. R. v. Comptroller-General of Patents. Ex p. Parke, Davis & Co* ([1953] 2 All E.R. 137), affirmed.

FOR THE PATENTS ACT, 1949, s. 41 and s. 45, see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 678, 681.

APPEAL by the patentees, Parke, Davis & Co. (a corporation organised under the law of the State of Michigan in the United States of America) from an order of the Court of Appeal, dated May 12, 1953, and reported [1953] 2 All E.R. 137, affirming an order of the Divisional Court, dated Mar. 20, 1953, and reported [1953] 1 All E.R. 862, dismissing a motion for an order of prohibition prohibiting the Comptroller-General of Patents, Designs and Trade Marks from entertaining an application by the second respondents, British Drug Houses, Ltd., for compulsory licences under the patents No. 652280, No. 660381 and No. 652273. A

Pritt, Q.C., Shelley, Q.C., and Aldous for the appellants.

P. J. S. Bevan for the first respondent, the Comptroller-General of Patents.

Sir Hartley Shawcross, Q.C., Graham, Q.C., and Gratwick for the second respondents, British Drug Houses, Ltd.

The House took time for consideration. B

Mar. 11. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, I have had the benefit of reading the opinion which my noble and learned friend, LORD COHEN, is about to deliver, and, as I agree with it in all respects, I do not think it necessary to trouble your Lordships with a separate opinion. The question at issue appears to me to be incapable of any answer, except that which has unanimously been given by the Divisional Court, the Court of Appeal, and your Lordships. I shall content myself, therefore, with moving that the appeal be dismissed with costs. C

LORD OAKSEY: My Lords, I, too, have had the advantage of reading the opinion which my noble and learned friend, LORD COHEN, is about to deliver, and I agree with it. D

LORD COHEN: I am asked by my noble and learned friend, LORD MORTON OF HENRYTON, who is unable to be present today, to say that he, too, agrees that the appeal should be dismissed with costs.

LORD ASQUITH OF BISHOPSTONE: My Lords, the point raised in this case is an extremely short one, namely, whether art. 5 (A) of the International Convention for the Protection of Industrial Property of 1934 (hereafter called "art. 5 (A)") is limited to cases in which there are "abuses" of patent rights within the meaning of that article, or not. The answer, in my view, plainly is that it is so limited, and that, consequently, the appeal fails. E

The following are the reasons why the contest is narrowed down to this issue, and the reasons why I think that that contest should be resolved in the sense indicated. (i) Section 45 (3) of the Patents Act, 1949, reads as follows: F

"No order shall be made in pursuance of any application under s. 37 to s. 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country." G

(ii) Sections 37-42 mentioned in this section obviously cover s. 41, and s. 41 is the section under which the order complained of by the appellants has been made in this case. (iii) Applications for orders under s. 41 are *not*, as I read that section, based on the abuse of patent rights by the patentee. In this respect s. 41, in my judgment, contrasts with s. 37, application for orders under which *are* based on such "abuses". The provisions of s. 41 are based on the special position of food, medicines and surgical appliances as articles in urgent demand. (iv) The point for decision is, therefore, whether an order made under s. 41, and, therefore (if I am right so far), *not* made on the ground of an "abuse of patent rights", is invalidated by art. 5 (A) of the 1934 convention. (v) It, accordingly, becomes crucial to decide whether art. 5 (A) is limited to orders made on the ground of "abuse" or extends to orders made on other grounds: which other H

grounds alone, in my view, can be entertained under s. 41. (vi) I am satisfied that art. 5 (A) is limited to orders based on "abuse". It has five paragraphs, of which the fourth is the most important. The first paragraph is clearly directed (and limited) to objectionable conduct on the part of the patentee, which may be paraphrased as "abuse". The second and third paragraphs are based on the existence of "abuse" eo nomine. The fourth, the application of which is mainly in question, is, I think, also quite clearly so limited. The words "In any case" ("En tout cas") with which this paragraph opens have been much relied on by the appellants, as imparting generality of application to the paragraph. But, in my view, having regard to the last three paragraphs, it is to be read as applying to situations ejusdem generis with those to which the earlier paragraphs apply, namely, cases founded on "abuse". "In any case" means "in any such case". If there was any doubt on this point it is surely removed by the words which follow:

"... this licence may only be granted if the patentee is unable to justify himself by legitimate reasons".

To justify himself against what? Clearly against the suggestion that he has been guilty of abusing his rights, as, for instance, by conduct falling within s. 37. A man cannot be required to justify himself in respect of something which is not his fault, e.g., the vital character of, or urgent need for, the commodities in question, which is the real ground for applications under s. 41.

For these reasons, in my view, the order made under s. 41 is not in any way at variance with the only relevant provision of any convention and should be upheld. Much discussion has revolved round the question whether the construction of art. 5 (A) which I favour depends on reading that article along with precedent English legislation, e.g., the English Patents and Designs Acts of 1919 and 1907. I would only say that if those Acts had never been passed I should still construe the article in the same sense. For these short reasons, in addition to those in the opinion about to be delivered by my noble and learned friend, LORD COHEN, which I have had the advantage of reading, I agree that the appeal should be dismissed.

LORD COHEN: My Lords, this is an appeal from an order of the Court of Appeal affirming a decision of the Divisional Court who rejected a motion for an order of prohibition, the object of which was to restrain the respondent, the Comptroller-General of Patents (to whom I shall refer hereafter as "the Comptroller") from permitting an application by the second respondents, British Drug Houses, Ltd., for a compulsory licence to proceed. The application was made under s. 41 of the Patents Act, 1949, in respect of three convention patents granted to the appellants in the years 1951 and 1952. The original applications in relation to those patents were made in the United States of America and the British applications were based thereon.

Section 41, reproducing s. 38A of the Patents and Designs Act, 1907, is one of a group of sections (ss. 37-45) dealing with compulsory licences and revocation of patents. Section 37 enables any person interested to apply to the Comptroller for authority to exercise the patent monopoly on a number of grounds, all of which are related to the patentee's own exercise or non-exercise of his monopoly. Section 38 and s. 39 deal with the operation of s. 37. Section 40 enables any government department to apply on any of the grounds mentioned in s. 37 for the indorsement of a patent with the words "licences of right" or for the grant to any person specified in the application of a licence under the patent. An application cannot be made under s. 37 or under s. 40 until the expiration of three years from the date of the sealing of the patent to which the application relates. This restriction was required to give effect to art. 5 of the 1934 convention, to which I shall refer hereafter. Section 41 differs from s. 37 and s. 40 in that the right to a compulsory licence arises, not by reason of the patentee's

exercise or non-exercise of his monopoly, but solely on account of the character of the invention, i.e., if the patent is in force in respect of—(a) a substance capable of being used as food or medicine or in the production of food or medicine; or (b) a process for producing such a substance as aforesaid; or (c) any invention capable of being used as or as part of a surgical or curative device. It provides that the Comptroller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application. Section 41 differs from s. 37 and s. 40 also in that no restriction is placed by the section on the time at which application can be made. It can be made at any time after the grant of the patent. Section 42 deals with the revocation of a patent in respect of which an order for a compulsory licence has been made and provides that no application for revocation can be made until two years have expired from the date of the grant of the compulsory licence. This restriction also owes its origin to art. 5 of the 1934 convention. The only other provision of the group of sections to which I need refer is s. 45 (3), which is in the following terms:

“No order shall be made in pursuance of any application under s. 37 to s. 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country”,

a description which includes the United States of America.

In the case before your Lordships the appellants admit that the second respondents' application is in respect of patents which fall within s. 41, but they allege that, as the application was admittedly made within three years of the earliest date of issue of any of the three patents to which the application relates, the Comptroller had no jurisdiction to entertain the application because of art. 5 of the International Convention for the Protection of Industrial Property (Treaty Series No. 55 of 1938). This convention was signed on June 2, 1934, and ratified by His Majesty, the ratification being deposited on June 30, 1938. The convention which was signed was in the French language. In an official translation art. 5, so far as material, reads as follows:

“A. (1) The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent. (2) Nevertheless each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. (3) These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses. (4) In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent, and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons. No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence.”

The question at issue between the parties is whether para. (4) of art. 5 (A) applies only to licences granted under s. 37 and s. 40 of the Act of 1949 or extends to licences granted under s. 41 of that Act.

The 1934 convention replaced an earlier convention signed in 1925 dealing with the same subject-matter. The first three paragraphs of art. 5 of that convention were in the same terms as para. (1), para. (2) and para. (3) of art. 5 (A) of the 1934 convention. The fourth paragraph read as follows :

“In no case can the patent be made liable to such measures before the

expiration of at least three years from the date of grant of the patent and then only if the patentee is unable to justify himself by legitimate reasons."

It is, I think, plain that para. (2) and para. (3) of both conventions are directed and directed only to enabling a contracting country to protect the public interest against some act or neglect of the patentee—i.e., against an abuse by the patentee of his monopoly rights—and have no relation to an application under s. 41 based on the character of the invention. Counsel for the appellants submitted that there was no material distinction between s. 37 and s. 41, since in either case the Comptroller would not grant a licence if the patentee were willing to do so on reasonable terms. I am unable to accede to this argument. In a case under s. 41 the willingness of the patentee to grant a licence on reasonable terms might result in the applicant accepting it and thus obviate the need for an order, but I do not think it would deprive the Comptroller of jurisdiction to grant compulsory licences.

If the measures referred to in para. (2) and para. (3) of the 1925 convention were measures to prevent the abuses of the kind referred to in s. 37, it necessarily follows that para. (4) dealt only with the same measures, for the expression "such measures" can refer and refer only to the measures mentioned in para. (2). If that be so, it is plain that s. 38A of the Patents and Designs Act, 1907, did not conflict with any provision of the 1925 convention and that a licence could have been granted under s. 38A at any time after the grant of the patent. But it is said that the change of language in art. 5 (A) of the 1934 convention is significant enough to make para. (4) embrace the case of licences under patents in respect of food and medicine. I agree with JENKINS, L.J., that, if such a change in the law had been intended, I should have expected to find plain language used to effect it. I cannot see any such plain language in para. (4) of art. 5 (A). On the contrary, the change in language is, in my opinion, such as was the inevitable consequence of introducing the two years' period of grace between the granting of the first compulsory licence and the institution of any proceedings for revocation. Moreover, the provision in para. (4) that the licence may only be granted if the patentee is unable to justify himself by legitimate reasons seems to me appropriate only to an application for a licence grounded on some act or default of the patentee.

Counsel for the appellants relied strongly on the use of the words "in any case" with which para. (4) begins. I cannot accede to the argument. Like JENKINS, L.J., I think that the widest meaning which can be given to the phrase is "in any case of the kind dealt with by this article." To see what kind of case the article deals with it is necessary to look at the earlier paragraphs of it, and, for the reason I have given, I think it is clear that the earlier paragraphs deal only with applications for compulsory licences grounded on abuse of the monopoly. I would add that, while "in any case" is, no doubt, a literal translation of "en tout cas", a less literal translation might more accurately have rendered the sense of the French original. The last sentence of para. (4) seems to me to lead to the same conclusion. The revocation there referred to must, I think, be a revocation grounded on abuse. Counsel submitted that the very fact that s. 45 (3) referred to a group of sections which included s. 41, strongly supported the appellants' case, for it suggested that the grant of a licence under s. 41 might be at variance with some convention. I doubt whether it is proper to construe the provisions of the convention by reference to an Act passed eleven years after the convention came into force, and I incline to the view that the inclusion of s. 41 in the group of sections referred to in s. 45 (3) is explained if s. 45 (3) is construed as referring, not merely to any convention existing at the date of coming into force of the Act, but also to all such treaties, arrangements or engagements as might thereafter be made. It must also be noted that s. 37, s. 40 and s. 42 are all framed so as to conform with the requirements of art. 5 (A) and yet the draftsman of the Act thought it necessary to include references

to them in s. 45 (3). This suggests that, if s. 45 (3) was not inserted for the reason I have indicated, it was inserted *ex abundanti cautela* and not on account of any definite view as to the bearing of art. 5 of the convention on each of s. 37 to s. 42.

I cannot sum up my conclusion on the matter of construction in language better than that used by JENKINS, L.J., when he said ([1953] 2 All E.R. 147):

"... reading art. 5 of the 1934 convention as a whole, and giving the best consideration I can to the various indications as to its meaning to be extracted from the language used, it seems to me that it is reasonably plain that this article is referring simply to measures, whether by way of grant of compulsory licence or revocation, to prevent abuses of monopoly rights, and has no reference at all to the special provisions of the English legislation under which a compulsory licence may be granted in respect of substances capable of being used as food or medicine."

I do not find it necessary, therefore, to reach a conclusion as to how far it is permissible to have recourse to the history of the English legislation in order to construe the provisions of the convention. If it is permissible, that history would, I think, lead to the same conclusion. Whenever the British government was party to a convention of this kind, it took steps at once to make such amendments in its patent legislation as it thought necessary to give effect to its obligations under the convention. It did so in 1938. Yet it did not introduce any time limit into the provisions of the Act dealing with compulsory licences under patents covering food and medicine (s. 38A). As MORRIS, L.J., said in the Court of Appeal, on the appellants' submissions, from 1938 to 1949 the legislature, having set out in 1938 to embody in English law the matters agreed to by the convention, entirely failed to understand the language of the convention. If in 1949 the full effect of the words had become apparent in the sense for which the appellants contend, I should have thought that in s. 41 there would have been some express reference to the time limitation.

For the reasons I have given I would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Tackley, Fall & Read* (for the appellants); *Solicitor, Board of Trade* (for the first respondent, the Comptroller-General of Patents); *Bristows, Cooke & Carpmael* (for the second respondents, British Drug Houses, Ltd.).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re WORTHINGTON (deceased). *Ex parte* LEIGHTON AND
ANOTHER *v.* MACLEOD.

[CHANCERY DIVISION (Upjohn, J.), February 1, March 1, 1954.]

Executor and Administrator—Administrator—Remuneration—Solicitor sole administrator—Insolvent estate—Profit costs of preparing petition for administration in bankruptcy and of preparing and lodging accounts.

- A By his will the deceased, who died in September, 1947, appointed his widow to be his sole executrix and beneficiary. In November, 1947, the widow instructed a firm of solicitors, of which L. was partner, to act for her in the administration of the deceased's estate. Finding that the estate was insolvent, the solicitors tried to negotiate a compromise with the creditors
- B in the hope of saving something for the widow. In 1949, when it appeared that a compromise might be possible, the widow, who was living abroad, appointed L. her attorney, and on May 10, 1950, letters of administration with the will annexed of the deceased's estate were granted to L. By 1952 it became clear that the creditors' claims could not be settled, and L. decided that, in the interests of all parties, the proper course would be to have the estate administered in bankruptcy. On a petition presented by him under
- C the Bankruptcy Act, 1914, s. 130 (9), an order was made for the administration in bankruptcy of the estate and a trustee was appointed. The costs of preparing the petition and of preparing and lodging accounts pursuant to the Bankruptcy Rules, 1952, r. 304, were disallowed on taxation on the ground that, as L. was a partner in the firm of solicitors, no costs could be recovered.
- D **Held:** the court had an inherent jurisdiction to allow remuneration to an administrator in a proper case: *Re Masters* ([1953] 1 All E.R. 19), applied; but the jurisdiction should be exercised sparingly and only in exceptional cases; notwithstanding that L. acted throughout solely in the interests of the widow and the creditors and that, as he was acquainted with the whole matter, the estate benefited by the fact that he prepared the petition and the accounts, there was nothing which could be described as exceptional, and,
- E therefore, the court could not allow him the costs for which he asked.

Observation of EVE, J., in *Re Salmen* (1912) (107 L.T. 110), questioned.

AS TO PROFIT COSTS OF SOLICITOR-REPRESENTATIVE, see HALSBURY, Hailsham Edn., Vol. 14, p. 424, para. 802; and FOR CASES, see DIGEST, Vol. 24, pp. 602-605, Nos. 6327-6358.

F Cases referred to:

- (1) *Re Masters*, [1953] 1 All E.R. 19.
- (2) *Dale v. Inland Revenue Comrs.*, [1953] 2 All E.R. 671; [1954] A.C. 11.
- (3) *Re White*, [1898] 1 Ch. 297; 67 L.J.Ch. 139; *affd.* C.A., [1898] 2 Ch. 217; 67 L.J.Ch. 502; 78 L.T. 770; 24 Digest 603, 6341.
- G (4) *Re Macadam*, [1945] 2 All E.R. 664; [1946] Ch. 73; 115 L.J.Ch. 14; 173 L.T. 395; 2nd Digest Supp.
- (5) *Bainbrigge v. Blair*, (1845), 8 Beav. 588; 5 L.T.O.S. 454; 50 E.R. 231; *sub nom.* *Blair v. Bainbrigge*, 14 L.J.Ch. 405; 42 Digest 117, 1141.
- (6) *Cradock v. Piper*, (1850), 1 Mac. & G. 664 (41 E.R. 1422); 1 H. & Tw. 617 (47 E.R. 1556); 19 L.J.Ch. 107; 15 L.T.O.S. 61; 42 Digest 117, 1144.
- H (7) *Re Salmen*, (1912), 107 L.T. 108; 24 Digest 609, 6400.
- (8) *Forster v. Ridley*, (1864), 4 De G.J. & Sm. 452; 46 E.R. 993; *sub nom.* *Foster v. Ridley*, 11 L.T. 200; 43 Digest 775, 2156.

MOTION.

The applicants, Lionel Lazarus Leighton and Franks, Charlesly and Leighton, a firm of solicitors, sought, inter alia, an order that, notwithstanding that Mr. Leighton was a solicitor of the Supreme Court of Justice and a partner in the applicant firm, (a) he might be at liberty to charge the estate of Sydney Neville

Worthington, deceased, by way of remuneration the usual solicitors' professional fees, charges and allowances as between solicitor and client for all work done by him in and about the administration of the estate as administrator thereof under letters of administration granted to him out of the Principal Probate Registry on May 10, 1950; and (b) that the applicant firm might be at liberty to charge the estate by way of remuneration their proper taxed costs as between solicitor and client incurred on the instructions of Mr. Leighton as administrator.

By his will, dated May 28, 1940, the deceased, who died on Sept. 27, 1947, appointed his widow, Mrs. Freda Josephine Worthington, to be his sole executrix and beneficiary. In November, 1947, the widow instructed the applicant firm to act for her in the administration of the deceased's estate, and Mr. Leighton was the member of the firm who dealt with the matter. Shortly after the firm commenced to act for the widow, it was found that the estate was insolvent, the claims against it amounting to over £45,000, and the assets available to meet them being approximately £9,500. In the circumstances the firm advised the widow that little purpose would be served by her applying for a grant of probate of the will, as this would occasion her a great deal of expense and there would be little prospect of her receiving any moneys out of the estate for herself. In or about September, 1948, the widow, being in poor financial circumstances, went to New Zealand to live with her daughter. Before she left Mr. Leighton told her that his firm would endeavour to compromise the claims of the creditors so that a small sum might be saved for her out of the estate. By October, 1948, the two chief creditors had agreed in principle to compromise their claims, and on Oct. 11, 1948, the firm wrote to the widow suggesting that she should appoint an attorney to act for her in the United Kingdom and to take a grant of letters of administration with the will annexed to the estate. Wishing to assist her by keeping the costs of administration to a minimum and with the hope of saving something out of the estate for her, the firm suggested to her that Mr. Leighton or one of his partners would be prepared to act as attorney, or she could appoint any other person whom she wished. By a power of attorney dated May 2, 1949, the widow appointed Mr. Leighton her attorney, and on May 10, 1950, letters of administration with the will annexed of the estate were granted to him. Throughout 1950 and 1951 Mr. Leighton carried on the negotiations with the creditors and the realisation of the estate. By April, 1952, it became clear that no settlement of the claims could be reached, and Mr. Leighton decided that it would be in the interests of the widow and of the creditors that the estate should be administered in bankruptcy. By an order, dated Apr. 16, 1952, and made on a petition by Mr. Leighton under the Bankruptcy Act, 1914, s. 130 (9), it was ordered that the estate should be administered in bankruptcy, that one of the official receivers should be the trustee, and that the costs of the petition should be costs in the administration. By a certificate of appointment, dated May 27, 1952, it was certified that the respondent should act as trustee in place of the official receiver who had been appointed as trustee by the order of Apr. 16, 1952. The costs of the petition for administration in bankruptcy and of filing and preparing an account of the administration of the estate, pursuant to the Bankruptcy Rules, 1952 (S.I., 1952, No. 2114), r. 304, were carried in by the applicant firm for taxation, but were not allowed on the ground that, as Mr. Leighton was at all material times a partner in the firm, no costs could be recovered by him or by the firm. By the motion the applicants asked, *inter alia*, that these costs should be allowed.

E. D. Sutcliffe for the applicants.

J. G. K. Sheldon for the respondent, the trustee in bankruptcy.

UPJOHN, J., stated the facts, and continued: Mr. Leighton is the sole administrator of the deceased, and the law as to receiving remuneration is quite clear. He cannot charge for work done as administrator, but must give his services gratuitously. On the other hand, it cannot be doubted that the court

has a jurisdiction to direct that remuneration shall, in a proper case, be allowed to the administrator. That, I think, is clear from the recent decision in *Re Masters* (1) and from the speech of LORD COHEN in *Dale v. Inland Revenue Comrs.* (2). Referring to earlier authorities, including *Re White* (3), LORD COHEN said ([1953] 2 All E.R. 678):

A "These cases, undoubtedly, establish that a trustee cannot make a profit out of his trusteeship unless authorised so to do by the instrument creating the trusteeship or by an order of the court, and that if a testator attaches remuneration to the trusteeship, that remuneration is, as between the trustee and the estate, bounty, liable to legacy duty while that duty was leviable and postponed to the claims of creditors if the estate was insolvent . . ."

B In *Re White* (3) the Court of Appeal, affirming the decision of KEKEWICH, J., held that, even though there was a clause in the will empowering the trustee, who was a solicitor, to charge for work done as a solicitor, he was not entitled to his profit costs, when the estate became insolvent, as they were a gift to him.

C Equally, I think it is clear that, although there is a jurisdiction in the court to allow remuneration to trustees, that jurisdiction should be exercised only sparingly and in exceptional cases. In *Re Masters* (1) ([1953] 1 All E.R. 20) DANCKWERTS, J., gave one example of a case where the jurisdiction was exercised. That was *Re Macadam* (4), where trustees, by virtue of the trust holding of shares in a company, became directors and received directors' fees, and it was held that in the circumstances of that particular case it would be proper to allow them to keep, at any rate, part of those fees as and by way of remuneration for doing the exceptional work of acting as directors. Another illustration was given by LORD LANGDALE, M.R., in *Bainbrigge v. Blair* (5), which was decided in 1845. In that case it was held that a trustee acting as solicitor in the trust matters was merely entitled to costs out of pocket. Referring, purely by way of example, to the case of a trustee who said that he was willing to do certain matters which required to be carried out for the benefit of the trust, but was not prepared to spend the time necessary to do those things unless he received some remuneration, LORD LANGDALE, M.R., said (8 Beav. 596):

E "In such a case, it is competent for the court, considering what is beneficial to the cestuis que trust, and is calculated to promote their interest, to take the matter into consideration, and to give proper remuneration to that person who alone, by his own exertion, can produce that benefit."

F In passing, I should, perhaps, observe that it may well be that *Bainbrigge v. Blair* (5) would have been decided differently if it had come on for hearing a few years later than it did, because it would appear to be the type of case of which the leading authority is *Cradock v. Piper* (6), which decided that, where a solicitor trustee acts for himself and co-trustees, then, if the work which he has done for himself and his co-trustees has been of benefit to the estate and no additional expense has been incurred by his acting for himself, he is entitled to claim and to charge for his professional services. That rule is well recognised and must be taken as settled, but it is exceptional and anomalous and not to be extended beyond the case where a trustee is acting for himself and another or others. Notwithstanding that *Bainbrigge v. Blair* (5) might have been decided differently, I think that, having regard to the statement which I have quoted from the judgment of LORD LANGDALE, M.R., the decision is useful as showing

H by way of example the sort of cases in which the court might exercise its discretion to allow remuneration. I must not be taken as laying down any rule that where trustees act as directors or refuse to undertake work in the future without remuneration the court ought to treat them as exceptional cases and allow remuneration. I merely refer to those cases as examples of what may in some circumstances be considered exceptional cases, and where the court, on a review of all the relevant facts, may come to the conclusion that remuneration should be allowed.

The matter was also considered by EVE, J., and the Court of Appeal in *Re Salmen* (7). In that case the testator appointed three persons as executors and trustees of his will and gave to them his business, and the premises where it was carried on, on trust to carry on the same for such period as they might think fit, and he gave power to the trustees to employ one or more of them at a salary to manage the business. One of the executors and trustees having been appointed by the others of them to manage the business at a salary which was duly paid to him, they claimed to be entitled, in an action brought for the administration of the estate, to be allowed that remuneration. It was anticipated that the estate would prove to be insolvent, and it was held that the allowance claimed could not be made to the executors and trustees as against creditors of the estate. In his judgment EVE, J., said (107 L.T. 110):

"I am not saying that the court has not jurisdiction in exceptional cases to provide for remuneration of executors and trustees even in the absence of special provision in the will. And in the face of the decision in *Forster v. Ridley* (8), to which Mr. Buckmaster has drawn my attention, it would be impossible for me to say that there is no such jurisdiction. But I think that it is a jurisdiction which must be founded on some proposition of this sort: That the circumstances of the case raise an implied contract on the part of those persons against whom the claim for remuneration is made to remuneration for services which the person claiming to be remunerated has discharged . . ."

I do not think it is right to put the matter on such a basis. I think the true rule is that the court has an inherent jurisdiction to allow a trustee remuneration even as against creditors, but that the jurisdiction must be exercised sparingly and only in exceptional cases. When *Re Salmen* (7) went to the Court of Appeal, it was held that the matter was governed by the decision in *Re White* (1) and the court did not deal with the question of inherent jurisdiction at all.

In the present case Mr. Leighton has acted with absolute propriety and solely in the interests of those interested in the estate. It is said that the whole object of his becoming attorney administrator was to keep the costs down to a minimum. The work that Mr. Leighton did of preparing the petition and preparing the necessary accounts was work which had to be done by somebody, and the estate, therefore, has suffered no loss. On the contrary, it has benefited because Mr. Leighton was acquainted with the whole matter and, therefore, could prepare the petition and the various accounts more quickly and less expensively than anyone else. I think that there is much force in that. But the rule seems to me to be a strict one, and, if I granted the application in this case, it might be open to solicitors in almost every case to say: "We have acted honestly and properly. There has been no loss to the estate. Let us have our costs", and the salutary rule that a solicitor trustee cannot charge for his services would be virtually destroyed. Though I have much sympathy with Mr. Leighton, I can find nothing in this case which can be described as exceptional in any way, and on that ground I must refuse this motion.

Application dismissed.

Solicitors: *Franks, Charlesly & Leighton* (for the applicants); *Kingsley, Napley & Co.* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

**Re DARK'S WILL TRUSTS. GLOVER AND ANOTHER v.
DARK AND OTHERS.**

[CHANCERY DIVISION (Roxburgh, J.), March 3, 1954.]

Trust and Trustee—Trustee—Retirement and appointment of new trustees—Settlement created by will—Executors by representation becoming trustees of settlement for purposes of Settled Land Act, 1925, under provisions of the Act—Settled Land Act, 1925 (c. 18), s. 30 (3)—Trustee Act, 1925 (c. 19), s. 36 (1), s. 64 (1), s. 68 (5).

By his will, dated Sept. 10, 1908, the testator, who died on Feb. 16, 1910, appointed three persons as executors and trustees and devised to them the L. estate to be held on certain trusts. On Jan. 1, 1926, under the provisions of the Settled Land Act, 1925, the estate became settled land. In 1952 G., the last survivor of the executors appointed by the testator, died, and the plaintiffs, who were G.'s executors, became executors of the testator by representation, and, under the Settled Land Act, 1925, s. 30 (3), the trustees of the settlement of the L. estate for the purposes of the Act. They now wished to retire from the trusts of the settlement and to appoint other trustees in their place.

HELD: the plaintiffs could not retire and appoint new trustees under s. 30 (3) of the Settled Land Act, as the concluding words of that sub-section, which referred to "the provisions of the Trustee Act, 1925, relating to the appointment of new trustees", applied only in the case of a sole personal representative, but, as the plaintiffs were appointed trustees under the provisions of an "instrument", as defined in the Trustee Act, 1925, s. 68 (5), viz., an Act of Parliament, being the Settled Land Act, 1925, by s. 64 (1) of the Trustee Act all the powers contained in that Act with reference to the appointment of new trustees and the discharge and retirement of trustees applied to them, and, therefore, they had power to retire and to appoint new trustees under s. 36 (1) of the Trustee Act.

FOR THE SETTLED LAND ACT, 1925, s. 30 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 23, p. 85; and FOR THE TRUSTEE ACT, 1925, s. 36 (1), s. 64 (1) and s. 68 (5), see *ibid.*, Vol. 26, pp. 107, 148, and 151.

ADJOURNED SUMMONS to determine, inter alia, whether, under the powers conferred by the Settled Land Act, 1925, s. 30 (3), or otherwise, the plaintiffs, Kenneth Frank Glover and Roy Glover, who were the executors by representation of the will of John Dark, deceased, had power to retire from the trusts of the settlement of the testator's settled estate, known as the Limebury estate, and to appoint other trustees in their place.

By his will, dated Sept. 10, 1908, the testator, who died on Feb. 16, 1910, appointed Frank Glover and two other persons to be the executors and trustees thereof and devised all his real estate, including the Limebury estate, to them to hold on trusts thereafter declared. On Jan. 1, 1926, under the provisions of the Settled Land Act, 1925, the Limebury estate became settled land. One of the executors appointed by the testator died in 1932 and another died in 1948, leaving Frank Glover sole surviving executor and trustee. In 1952 Frank Glover died, and the plaintiffs, who were the executors of his will, became executors, by representation, of the testator and, under the Settled Land Act, 1925, s. 30 (3), the trustees of the settlement of the Limebury estate for the purposes of the Act. They now desired to retire from their position as trustees and to appoint in their place the first and second defendants, who were willing to accept the trusts.

Wigan for the plaintiffs.

I. M. Phillips for the first defendant.

A. P. McNabb for the second defendant.

G. D. Morton for the third and fourth defendants (persons beneficially interested in the settled estate).

ROXBURGH, J.: This little point is interesting, if only as an example of how dangerous it is to think that words in an Act of Parliament necessarily mean what they say. The personal representatives of one Frank Glover are the present trustees of the testator's settled estate, known as the Limebury estate, in Devonshire, for the purposes of the Settled Land Act, 1925, by virtue of s. 30 (3) of that Act. Section 30 (3) reads:

"Where a settlement is created by will . . . and apart from this sub-section there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly."

The short point is: Can the plaintiffs, who are the personal representatives by representation of the deceased, do what they want to do, namely, retire from being trustees for the purposes of the Settled Land Act of the settlement and appoint other such trustees in their place? I am told that this has been the subject of learned and serious debate. I do not think that they can do it under the concluding words of s. 30 (3). At first I thought that, perhaps, they could, but I think that those words are to be confined to the case of a sole personal representative. Section 30 (3) does not say that the provisions of the Trustee Act, 1925, relating to the retirement and appointment of new trustees shall apply. It only says that the provisions of the Trustee Act relating to the appointment of new trustees shall apply. But, in my judgment, a perusal of the Trustee Act, with the necessary equipment of the definitions, solves the problem.

I must begin by pointing out the fact that "instrument" in the Trustee Act, 1925, includes an Act of Parliament. That appears from s. 68 (5). That being so, in my judgment, s. 64 (1) of the Trustee Act plainly applies to the present case. Section 64 (1) reads:

"All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act, 1925 . . . whether such trustees are appointed by the court or by the settlement, or under provisions contained in any instrument."

It will be noted that both "appointment" and "retirement" are expressly mentioned in the sub-section. In this case the trustees are appointed under the provisions of an instrument as defined in the Trustee Act, namely, an Act of Parliament, being the Settled Land Act, 1925. Accordingly, it seems to me that s. 64 (1) of the Trustee Act fits the case like a glove. That, of course, introduces s. 36 (1) of the Trustee Act, and there is no further difficulty in the case. Accordingly, I answer the question in the affirmative.

Order accordingly.

Solicitors: *Wigan & Co.*, agents for *T. A. Goaman & Wright*, Bideford (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WORMALD v. COLE.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Hodson, L.J.J.), February 16, 17, 26, 1954.]

Animal—Trespass—Cattle—Personal injury to occupier of land—No vice or negligence—Liability of owner.

A The defendant was the owner of cattle of a quiet and well behaved disposition. Without negligence on his part, they escaped from his land into the grounds of the plaintiff's house, and, while she was trying in the dark to prevent their getting on to her garden, without her doing anything to frighten them, one of them knocked her down and injured her.

B HELD: the defendant was liable for the plaintiff's personal injuries, as being damage, not too remote, naturally resulting to the occupier of land from the trespass thereon of the defendant's cattle acting according to their natural propensity.

Lee v. Riley (1865) (18 C.B.N.S. 722), *Ellis v. Loftus Iron Co.* (1874) (L.R. 10 C.P. 10), and dicta of KENNEDY, L.J., in *Bradley v. Wallaces, Ltd.* ([1913] 3 K.B. 637) and of ATKIN, L.J., in *Buckle v. Holmes* ([1926] 2 K.B. 129), applied.

C *Manton v. Brocklebank* ([1923] 2 K.B. 212), distinguished.

Dictum of LORD DU PARCQ in *Searle v. Wallbank* ([1947] 1 All E.R. 20), not followed.

AS TO LIABILITY FOR TRESPASS BY DOMESTIC ANIMALS, see HALSBURY, Simonds Edn., Vol. 1, pp. 668, 669, paras. 1274, 1275; and FOR CASES, see DIGEST, Vol. 2, pp. 223-229, Nos. 154-197.

D Cases referred to:

(1) *Ellis v. Loftus Iron Co.*, (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 2 Digest 227, 183.

(2) *Scott v. Shepherd*, (1773), 2 Wm. Bl. 892 (96 E.R. 525); 3 Wils. 403 (95 E.R. 1124); 36 Digest, Replacement, 23, 100.

E (3) *Smith v. Cook*, (1875), 1 Q.B.D. 79; 45 L.J.Q.B. 122; 33 L.T. 722; 40 J.P. 247; 2 Digest 253, 345.

(4) *Anderson v. Buckton*, (1719), 1 Stra. 192 (93 E.R. 467); 11 Mod. Rep. 303 (88 E.R. 1054); 2 Digest 295, 657.

(5) *Lee v. Riley*, (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 144 E.R. 629; 2 Digest 226, 180.

F (6) *Cox v. Burbidge*, (1863), 13 C.B.N.S. 430; 32 L.J.C.P. 89; 143 E.R. 171; 2 Digest 233, 218.

(7) *Star v. Rookesby*, (1711), 1 Salk. 335; 91 E.R. 295; 2 Digest 226, 179.

(8) *Theyer v. Purnell* (*Parnell*), [1918] 2 K.B. 333; 119 L.T. 285; 2 Digest 295, 659.

(9) *Bradley v. Wallaces, Ltd.*, [1913] 3 K.B. 629; 82 L.J.K.B. 1074; 109 L.T. 281; 6 B.W.C.C. 706; 2 Digest 236, 236.

G (10) *Manton v. Brocklebank*, [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; Digest Supp.

(11) *Buckle v. Holmes*, [1926] 2 K.B. 125; 95 L.J.K.B. 547; 134 L.T. 743; 90 J.P. 109; Digest Supp.

(12) *Searle v. Wallbank*, [1947] 1 All E.R. 12; [1947] A.C. 341; [1947] L.J.R. 258; 176 L.T. 104; 2nd Digest Supp.

H (13) *Mason v. Keeling*, (1699), 1 Ld. Raym. 606 (91 E.R. 1305); 12 Mod. Rep. 332 (88 E.R. 1359); 2 Digest 243, 274.

(14) *Tillett v. Ward*, (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546; 47 J.P. 438; 2 Digest 224, 167.

(15) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.

(16) *Deen v. Davies*, [1935] 2 K.B. 282; 104 L.J.K.B. 540; 153 L.T. 90; Digest Supp.

- (17) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub nom. Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest, Replacement, 38, 185.

APPEAL against an order of CROOM-JOHNSON, J., dated Oct. 14, 1953, at Norfolk Assizes, dismissing an action for damages for negligence and trespass.

The plaintiff had been knocked down and injured by a heifer, which with other cattle had escaped from the owner's land into the grounds of her house. CROOM-JOHNSON, J., found that the defendant had not been guilty of negligence and held that he was not liable in trespass for the personal injuries. The plaintiff appealed. A

Salmon, Q.C., and *I. C. Baillieu* for the plaintiff.

Marven Everett, Q.C., and *J. W. Russell* for the defendant.

Cur. adv. vult. B

Feb. 26. The following judgments were read.

LORD GODDARD, C.J.: This appeal raises yet another, and, so it is said, a novel, question in the law relating to personal injury caused by animals to human beings. The plaintiff, a lady over eighty years of age, was knocked down and trampled on by a heifer belonging to the defendant which was trespassing in her garden, and thereby sustained most grievous injuries, and as it is suggested that the case presents features which distinguish it from the many previous decisions on the subject, it is necessary to state the facts carefully. The action was tried at the Norfolk Assizes by CROOM-JOHNSON, J., in June of last year, and the learned judge did not deliver judgment till Oct. 14. It is, I think, clear from what he said that he depended on the shorthand note for his statement of the facts rather than on his recollection of the evidence at the hearing. Accordingly, as we have the same note, this court is in as good a position as the learned judge for forming an opinion as to the facts, and, moreover, the incidents which led to the accident are not really in dispute. C D

The plaintiff lives in a cottage approached from the road by a small drive, the house being on the left and the garden on the right. At the end of the drive there is a garage, and at that end her property adjoins that occupied by the defendant. On his land and adjoining the plaintiff's is a shed open on one side, but with doors on that nearest to the plaintiff's land, and in some way or another, it matters not how, it was possible for cattle to get through, as they did, from the defendant's land into the plaintiff's drive in spite of some rails which the defendant had put up on the open side of the shed. E F

At the material time the defendant had a number of young cattle, apparently both heifers and bullocks, on his land. They were quiet, well-behaved beasts and had given no trouble. At about 7.30 p.m. on Oct. 8, 1951, when, of course, it was dark, the plaintiff's man, Mr. Dunnell, who lived on her premises, realised that some of these animals had got into the drive. He saw a white one pass his window. He told his mistress and asked her to telephone the defendant, which she did. Unfortunately the defendant was out and could not be got at. Mr. Dunnell went out to try to drive the beasts back, so as to prevent damage to the garden. Most of them were either then up to, or he drove them up to, the garage, and he got the plaintiff's car out and placed it across the drive so as to pen them in. But two had got away from the others and had gone lower down the drive and nearer the house. Meanwhile, the plaintiff had come out to tell Mr. Dunnell that the defendant could not be found, and as she came into the drive she saw these two beasts and thought she had better try to stop their going into her garden. The evidence at this point is not very clear, which is not surprising, but it seems that she raised her stick to compel, as she put it, the animals to stay where they were, but they, or one of them, ran in her direction and knocked her down, and then turned and came back again trampling on her as she lay on the ground. G H

A There was no proof that either Mr. Dunnell or the plaintiff did anything improper which would frighten the beast, nor does it seem that it attacked the plaintiff. A witness of experience with this class of animal put it that in the dark, in unusual surroundings, a heifer would be upset and would try to get back to her companions. The defendant himself put it that, in his opinion, the accident was due to the clumsiness of the animal and not to panic. The reasonable inference seems to me to be that the beast's natural instinct was to rejoin the others. She, accordingly, ran towards the garage, and in the dark knocked down the plaintiff and trod on her, and then turned, as Mr. Dunnell and the car were in her way, and running back in the dark trod again on the recumbent plaintiff. In fact, these unfortunate happenings to the plaintiff may be described as accidental in the true sense, being due to the reasons I have described, and there is no ground for attributing them to an attack by the animal on the plaintiff.

B In trying to rejoin her fellows or to get back to her usual surroundings, the animal would seem to have been following natural instincts, and the collisions with the plaintiff may be described as purely fortuitous, which would probably never have happened had the incident occurred during daylight.

C The case presented for the plaintiff is based solely on cattle trespass and damage naturally resulting therefrom. On the other hand, it is said that, for this cause of action, no damages can be recovered in law except for the actual damage done to the soil and for the depasturing of crops growing thereon which may be eaten or trodden by the trespassing animal. In his careful argument counsel for the plaintiff admitted (though it must not be assumed that I necessarily agree) that had the injuries been caused by an attack or by vicious propensity in the animal, in the absence of scienter, he could not succeed; but he contended that, if the damage was due to natural propensity, the plaintiff could recover. It was on this ground that he distinguished this case from the many previous decisions, and it is, I think, true to say that hitherto there does not seem to have been any reported case where the injury to a human being has been caused otherwise than by a so-called vicious action of an animal. Is it, then, the law that in no case can injury caused to mankind by an animal be actionable in the absence of scienter? In my opinion, the all-important consideration is that the plaintiff was the occupier of land on which a trespass was committed, so that the only question is whether the damage is too remote.

D

E

F Cattle trespass is one of the most ancient causes of action known to the common law. From the writs collected and set out in PROFESSOR GLANVILLE WILLIAMS'S work on the LAW OF ANIMALS (Cambridge University Press, 1939) it is evident that it was well established in the fourteenth century. The action lies apart altogether from negligence, and, as BRETT, J., put it in *Ellis v. Loftus Iron Co.* (1) (L.R. 10 C.P. 13), the mere act of an animal belonging to man may be a trespass inasmuch as the same act, if done by himself, would have been a trespass. For this he cites BLACKSTONE, 16th ed., vol. 3, c. 12, p. 211, where it is stated that a man is answerable not only for his own trespass but for that of his cattle also,

G and

“if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.”

H The passage in COMYNS' DIGEST, tit. Trespass, C., to which BRETT, J., refers is to the same effect, but does not add anything to this statement of the law. In *Scott v. Shepherd* (2), the leading case as to the difference between trespass and case, it was laid down that, if the act be in the first instance unlawful, trespass will lie for the consequences of it, so it appears, as I said above, that the real question is whether the personal injuries in this case are the consequence of the unlawful entry of the cattle on the plaintiff's land. Speaking for myself, if it were not for the many previous decisions, I do not think I should feel any

difficulty in saying that they were, but as BLACKBURN, J., said in *Smith v. Cook* (3) (1 Q.B.D. 82), the law has been settled by authority rather than by reason, so an examination of the cases is necessary.

There seems no doubt that originally the damage in an action of cattle trespass was confined to damage to the surface trespassed on and to the depasturing of the crop. This appears from the writs collected in PROFESSOR GLANVILLE WILLIAMS's book to which I have already referred. The first extension of this rule seems to have been in *Anderson v. Buckton* (4), where the plaintiff recovered because his cattle were infected with disease by the trespassing beasts. So some advance on the ancient rule was then established. The next step was in the oft-cited case of *Lee v. Riley* (5), 147 years later. A mare strayed on to the plaintiff's land through a defective hedge and kicked the plaintiff's horse with the result that it had to be killed. There was no evidence that the mare was vicious, and so reliance was placed on *Cox v. Burbidge* (6) to which I shall refer in a moment. The case was an appeal from the county court, so there were no formal pleadings. ERLE, C.J., and KEATING, J., dealt with it purely as one of cattle trespass. BYLES, J., and MONTAGUE SMITH, J., considered it from the point of view of negligence. (In parenthesis I may mention that, at any rate where the escape is due to a defect in a fence which the defendant is bound to repair, the action lay either in trespass or case—*Star v. Rookesby* (7)). All four judges held the damage caused by the death of the horse was not too remote. ERLE, C.J., said (18 C.B.N.S. 733, 734) that it was unnecessary to consider scienter, and the injury was not one which was characteristic of vice or ferocity in the ordinary sense. The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time among strange horses. He refused to regard the case as governed by *Cox v. Burbidge* (6), and concluded by saying that there was abundant evidence that the mare trespassed on the plaintiff's close and there did the injury of which the plaintiff complained. MONTAGUE SMITH, J. (*ibid.*, 735), though he regarded the cause of action as negligence, considered the damage was not too remote, and said the accident might have happened without any vice and was probably occasioned by the sudden meeting together of strange horses in the night-time.

Before passing to *Ellis v. Loftus Iron Co.* (1), it is necessary to say a word about *Cox v. Burbidge* (6), always regarded as a leading case in the law relating to animals. There the horse strayed on to the highway where it injured the plaintiff. As there was no proof of scienter, it was held there was no liability. The vital distinction between that case and *Lee v. Riley* (5) is that, in the former, the plaintiff could not maintain an action for cattle trespass as he did not own the soil in the highway, nor would the action lie in negligence because the law is, unfortunately as some may think, that the owner of an animal does not owe a duty to persons using a highway to prevent his animals straying thereon. The plaintiff could, therefore, only recover on proof of scienter in an action for negligence, and of scienter there was no proof.

Coming now to *Ellis v. Loftus Iron Co.* (1), *Lee v. Riley* (5) was followed. Here, again, it was one animal injuring another, and the court, holding that there was a technical trespass by the defendant's horse, decided that the damage was not too remote. It is, I think, often assumed that both in this case and in *Lee v. Riley* (5) the basis of the decision was that it was natural in horses to attack one another, but I cannot find that any of the judgments so state. In *Lee's* case (5) ERLE, C.J., said no more than that the two horses had a contest, and BYLES, J., said it appeared that the defendant's horse kicked the plaintiff's in sport or quarrel. In the *Loftus* case (1) nothing was said on the subject. In both cases it appears to me that the ratio decidendi was the same, i.e., a trespassing horse damaged another the property of the occupier of the close. The reason for the one injuring the other was not explained and it might have been

pure accident, and it followed that the damage resulted from the trespass. *Lee v. Riley* (5) was considered as conclusive of *Ellis v. Loftus Iron Co.* (1), and, so far as I am aware, the decision has never been questioned. Of course, as in all actions of trespass, it is only the occupier who can recover in respect of the wrong. But what distinction, so far as remoteness of damage is concerned, can be drawn between an injury inflicted by a trespassing animal on the occupier himself and one inflicted on his horse or other chattel? Let us see if subsequent cases have

A drawn such a distinction. I may refer to *Theyer v. Purnell* (*Parnell*) (8), because while that was a case again of injury to sheep, which were infected by trespassing animals, and not of personal injury to the owner, the Divisional Court, LAWRENCE, J., and AVORY, J., reviewed many of the cases and held that, where the action was founded on trespass, the doctrine of scienter had no application.

B Turning now to *Bradley v. Wallaces, Ltd.* (9), a workman was killed by the kick of a horse brought on to his employers' premises by a third party, from whom the employers claimed indemnity for the compensation they had to pay the dependants of the workman. There was no proof of scienter. Assuming that the bringing of the horse to the yard was a trespass, KENNEDY, L.J., pointed out ([1913] 3 K.B. 637), that, if it did damage to the occupiers of the yard, the owners of the horse would have to pay for it, but the injured man could not have

C sued for trespass. So far as negligence was concerned, there being no proof of scienter, the injured man could not have recovered. This seems a direct authority that, apart from scienter, the occupier, though not a third party, can recover in trespass for any damage suffered by him. *Manton v. Brocklebank* (10) was the case principally relied on by the defendant. But the all-important distinction between that case and the present is that in the former there was no trespass.

D No doubt was thrown by LORD STERNDALÉ, M.R., on either *Lee v. Riley* (5) or *Ellis v. Loftus Iron Co.* (1). True, he said ([1923] 2 K.B. 221) that those cases decided that, if the plaintiff had an action in trespass, the act of the horse in kicking another was not so alien to horse nature as to make the resulting damage too remote, and I have already said that those judgments do not appear to me to proceed on what is, or is not, the natural disposition of horses, but merely

E on the fact that the trespassing horse did damage. The judgment of ATKIN, L.J., seems throughout to emphasise the difference that results where the action is founded in trespass from one where negligence which involves scienter is the cause of action. And this is emphasised by him in *Buckle v. Holmes* (11). The main point for decision there was whether for the purpose of trespass a cat is

F in the same category as a dog. At common law the owner of a dog was not liable for its trespass, and the owner is, therefore, only liable for damage that it may do if scienter is proved. Mere trespass is not enough. This court held that the owner of a cat had the same immunity from liability for trespass as a dog owner. ATKIN, L.J., said ([1926] 2 K.B. 129):

G "I think the conclusion in this case follows from *Manton v. Brocklebank* (10), which makes it clear that one who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following a natural propensity of its kind to do damage in certain circumstances; *unless the animal is one for whose trespasses the owner is liable*".

H I cannot regard any of this passage as an obiter dictum. As a cat is not one of those animals for whose trespasses the owner is liable, there was no liability. Unless he is liable in trespass, the owner will not be liable from the mere fact that the animal does damage, but scienter must be proved.

So far none of these cases appears to me to qualify in any respect what I believe to be the true result of *Lee v. Riley* (5) and *Ellis v. Loftus Iron Co.* (1), but the defendant naturally relied on a passage in the speech of LORD DU PARCQ in *Searle v. Wallbank* (12). It is true that he said ([1947] 1 All E.R. 20):

"... there is a striking contrast between the liability of the owner of cattle

for their trespass on another's land and his liability for any injuries which they may cause to the person of another",

and then quoted *Mason v. Keeling* (13) (12 Mod. Rep. 333). But I feel quite confident that the noble and learned Lord had not in mind facts such as the present. The House was concerned only with the question whether the owner of land abutting on the highway is under a duty to users of the highway to prevent his animals straying thereon unless he knows them to be dangerous, and the dictum that he cited from *Mason v. Keeling* (13) (12 Mod. Rep. 333) dealt only with that matter. Cattle trespass was not before the House. No doubt it may be said to be anomalous that a man can maintain an action of trespass to land without proof of scienter, though for injury to the person apart from trespass to land he must proceed in negligence and prove scienter. But this does not, in my opinion, affect the question whether personal injury to the occupier caused during, and as a consequence of, trespass to land may not be the subject of recoverable damage.

Having, I hope, dealt with at least part of the relevant authorities, I can find nothing that compels me to hold that, if the occupier of a close is injured by a trespassing animal, the damage is too remote, at any rate where the injury is not the result of a vicious attack. How can this be distinguished from *Lee v. Riley* (5)? The action of the heifer was not due to, or characteristic of, vice or ferocity, and the words of ERLE, C.J. (18 C.B.N.S. 734):

"The animal had strayed from its own pasture; and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses"

seem exactly to fit the case if one substitutes strange humans for strange horses. If the heifer had injured a pony or calf belonging to the plaintiff by the same act whereby the plaintiff was injured, clearly the defendant would have been liable. If that damage is not too remote, how can it be if inflicted on the plaintiff herself instead of on her animal? Moreover, I would refer again to the words of BRETT, J., in *Ellis v. Loftus Iron Co.* (1) (L.R. 10 C.P. 13), cited earlier in this judgment. Suppose, then, a trespasser on a dark or foggy night ran into the occupier in his drive, and thereby caused him to fall and injure himself, or a trespasser in a building ran out as the occupier appeared, and collided with him and, without intending to do so, caused him personal injury, it seems to me clear that the trespasser would be liable for the injury as part of the damage for the trespass. I leave open the question whether it follows that, if a trespassing animal attacks the occupier, he can recover, though I incline to the opinion that he can. I do not think that question has ever yet arisen in a cattle-trespass case, and it does not arise here. In many cases it would be impossible to say with certainty whether the injuries were caused by vice, or playfulness, or mere accident.

I would, however, mention one other matter as it was raised during the argument. The reason why the owner of land or premises adjoining the highway has no remedy if cattle being driven along the highway stray into them, unless negligence in the drover is proved, depends on the doctrine of volenti. By occupying premises on the highway he takes the risk: see per ATKIN, L.J., in *Manton v. Brocklebank* (10) ([1923] 2 K.B. 231), and *Tillett v. Ward* (14).

I would allow the appeal, and, accordingly, it is necessary to consider the question of damages. The provisional assessment of £500 in addition to special damage by the learned judge is, I confess, so small and inadequate that I can only think that, after the time which elapsed between hearing and judgment, he must have forgotten the really grievous injuries that this old lady sustained, and may have mislaid the medical reports. It is truly amazing, as her doctor said, that she survived. I need not recapitulate her injuries or the crippled condition in which she is left. Her suffering must have been, indeed, severe, and pain continues. Moreover, she has to have the services of a nurse-companion, which is a considerable expense to her, and will continue. I think the judge

must have put the damages so low on account of her age, but it is now over two and a half years since the accident and she is still alive. To the special damage of £700 I would add £1,500, and she must have the costs here and below.

SINGLETON, L.J.: At night-time on Oct. 8, 1951, the defendant's cattle escaped from his land and trespassed on the premises of the plaintiff. She and her man went out to prevent damage being done so far as it was possible. One
A or more of the beasts came into collision with the plaintiff, knocked her down and trampled on her so that she was seriously hurt. She brought an action against the defendant claiming damages. Her case was heard by CROOM-JOHNSON, J., at the Norwich Assizes on June 12, 1953. At a later date he heard argument in London, and on Oct. 14, 1953, he gave judgment in favour of the defendant. The plaintiff appeals to this court. Her claim is based on cattle trespass; there
B was an alternative claim for damages for negligence, but that was not seriously argued in view of the findings of fact of the learned judge.

In *Read v. J. Lyons & Co., Ltd.* (15) VISCOUNT SIMON said ([1946] 2 All E.R. 474):

C “The pasturing of cattle must be one of the most ordinary uses of land, and strict liability for damage done by cattle enclosed on one man's land if they escape thence into the land of another is one of the most ancient propositions of our law. It is, in fact, a case of pure trespass to property, and thus constitutes a wrong without any question of negligence.”

The right to recover damages in such a case is in the occupier by virtue of his occupation (though there may be a right in the owner of the land in certain
D circumstances). The liability is limited to the reasonable and natural consequences of the cattle escaping. It is in the nature of cattle to eat that which appeals to them, to whomsoever it belongs. And it is natural that, if they trespass on the land of another, they will knock down, or trample upon, and so damage, some of the growing crops or vegetables thereon. It follows that, in the normal case of cattle trespass, the damages which are recovered are those arising from injury
E to crop and shrubs, or to the soil. There is no reported case in which a plaintiff, suing for damages for cattle trespass, has recovered damages in respect of personal injuries. It may be said that there is some authority to the contrary in the statement of LORD DU PARCQ in *Searle v. Wallbank* (12) ([1947] 1 All E.R. 20):

F “My Lords, it is a commonplace of our law that there is a striking contrast between the liability of the owner of cattle for their trespass on another's land and his liability for any injuries which they may cause to the person of another. The man whose cattle stray into his neighbour's field, and consume or damage what belongs to that neighbour, is liable to make good the loss although no negligence be proved against him. He is under no such liability for a trespass to the person by an animal which
G does not belong to an untamed and dangerous species unless it has, to his knowledge, some vicious or mischievous propensity. We are here dealing with ancient doctrines of the common law.”

The case which was then under appeal was one in which a cyclist had been injured through colliding with a horse on the highway, and thus the words of LORD DU PARCQ which I have quoted were not strictly relevant to the question
H before the House.

The submission on behalf of the defendant was based to some extent on the decision in *Cox v. Burbidge* (6). That, again, was a case arising on a highway. The defendant's horse kicked a child who was playing on the road. It was held that the defendant was not liable. In the course of his judgment, ERLE, C.J., said (13 C.B.N.S. 436):

“To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff.

But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it . . . The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible."

A

And WILLIAMS, J., said (*ibid.*, 438):

"If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass."

B

Counsel for the defendant further submitted that the injury done to the plaintiff was not the natural or ordinary result of the trespass, and that, in any event, the damage was too remote. The claim of the plaintiff can be put simply. It is: "I was injured through the defendant's cattle trespassing on my land. The damage which I suffered was the natural result of the trespass, and I am entitled to recover in respect of it." It is necessary to look into the decided cases in order to see whether there is support for this claim.

C

In *Lee v. Riley* (5), through the defendant's neglect to repair his fence, his mare strayed in the night-time into an adjoining field and so into a field of the plaintiff's in which there was a horse. The defendant's mare kicked the plaintiff's horse, as a result of which the horse had to be destroyed. It was held that the defendant was responsible for the mare's trespass, and that the damage was not too remote. ERLE, C.J., was of opinion that the case was to be governed by a totally different principle from that stated in *Cox v. Burbidge* (6). He said (18 C.B.N.S. 734):

D

"It is plain that the defendant's mare was trespassing on the plaintiff's close; and I think it is equally clear upon the evidence that the defendant's mare did inflict upon the plaintiff's horse the injury which was the cause of its death; the question is, whether or not the damage was too remote."

E

BYLES, J., and MONTAGUE SMITH, J., based their judgments on negligence. KEATING, J., said (*ibid.*, 735):

F

"I also think the plaintiff is responsible for the consequences of the trespass committed by his mare, and that the damage was not too remote. I see nothing that can fairly be found fault with in the summing-up of the learned judge."

G

Thus, as early as 1865 damages were awarded in respect of trespass of this kind for something other than damage to crops or to the land. The decision in *Ellis v. Loftus Iron Co.* (1) was to the like effect. LORD COLERIDGE, C.J., said (L.R. 10 C.P. 12):

"That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were: they were the natural and direct consequence of the trespass committed."

H

KEATING, BRETT and DENMAN, JJ., all agreed that an action lay on the ground of trespass.

In *Bradley v. Wallaces, Ltd.* (9) the claim against the third party to an indemnity failed on the ground that the case was covered by the decision in

Cox v. Burbidge (6), but it is right that I should refer to two of the judgments. SIR HERBERT COZENS-HARDY, M.R., said ([1913] 3 K.B. 633):

A "So far as trespass is concerned, if a horse, pursuant to its natural instincts, eats a neighbour's hay, or in any other respects indulges its ordinary natural instincts, the owner may be liable, but otherwise not. The damage in the present case does not naturally flow from the trespass and is not an ordinary consequence of the trespass. It is too remote."

KENNEDY, L.J., assuming trespass, said (*ibid.*, 637):

B "What is the legal result? That, if the horse did damage to the respondents, the owners of the land, the appellants would have to pay for it; not that injury done by the horse, not known by his owners to be vicious, kicking a third party on the premises, is, because the horse is a trespassing horse, an actionable wrong for which that third party can sue."

The case of *Buckle v. Holmes* (11)—the cat and the pigeons case—is helpful by reason of a passage in the judgment of ATKIN, L.J. ([1926] 2 K.B. 129, 130):

C "I think the conclusion in this case follows from *Manton v. Brocklebank* (10), which makes it clear that one who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following a natural propensity of its kind to do damage in certain circumstances; unless the animal is one for whose trespasses the owner is liable. When the owner is liable for the animal's trespasses it may be material to consider whether the damage it does is the result of a normal propensity. For this damage D the owner is liable; but for damage resulting from an abnormal propensity not known to him he is not in my opinion liable, though he would of course be liable for the ordinary consequences of the trespass."

The result of the authorities to which I have referred seems to me to be that, in a case of cattle trespass, the damage is not confined to damage to the land. E The occupier has a right of action and may recover damages which are the reasonable and natural consequences of the trespass. The plaintiff had gone out of her house to prevent damage if possible. She did nothing improper or negligent, nor did her man. He said that the cattle all seemed to be quiet. A witness, who was called on behalf of the plaintiff and who had some knowledge of cattle, said: "It was dark; the surroundings of a garden would be unusual to the animal, F and I think all the animals would be upset and the one which had got away from the others would be particularly upset." There was no reason to attribute any vicious or unusual propensity to any of the cattle. They were later found in another field grazing peaceably. The defendant said of the incident: "I would say it was clumsiness, not panic." CROOM-JOHNSON, J., said that he was unable to find that in any sense the heifer attacked the plaintiff; it came up G against her and knocked her down. He added:

"I find there was no negligence by anybody, but what happened was the ordinary natural thing which must sometimes happen in such circumstances."

This finding gives considerable support to the case for the plaintiff. If a number of cattle trespass on land and do damage, the owner of the cattle is responsible H for the damage reasonably and naturally resulting therefrom. If they eat crops or vegetables, damages are recoverable therefor, and the same applies in respect of vegetables trampled on or knocked down. What is the difference in principle between the knocking down of vegetables or plants and the knocking down of the occupier who owns the vegetables? The occupier has a cause of action in respect of the damage naturally flowing from the trespass, and if he, or she, happens to be in the garden at night-time when the trespass takes place and is knocked down and injured, I see no reason for saying that the damage is not the

natural result of the trespass. I cannot see that it is too remote, and in this regard I repeat the learned judge's words:

"... what happened was the ordinary natural thing which must sometimes happen in such circumstances."

Nor do I think that the position is altered by reason of the fact that the cattle had been on the plaintiff's ground for a short time before she was hurt. She and her man had gone out to prevent damage so far as possible. It was natural that they should do so. It is what one would expect. Neither of them did anything unusual or anything to excite the animals. The cattle (or some of them) may have got excited, but I prefer the view of their owner: "I would say it was clumsiness, not panic." That, again, is something which one might well expect, and the accident which followed was the sort of thing "which must sometimes happen in such circumstances."

At one time I felt that, if we allowed the appeal, we should be extending the law, but on full examination of the authorities I have reached the conclusion that the plaintiff is entitled to succeed on the principle stated by ATKIN, L.J., in *Buckle v. Holmes* (11) ([1926] 2 K.B. 129, 130), which summarises the position. I would allow the appeal. It may seem odd to some that the plaintiff is entitled to recover, whereas, if her man had been injured, he would, in the absence of negligence, have had no cause of action. The right of action arises, as I have said, from the occupation of land.

I agree that the amount provisionally assessed as general damages is much too low, having regard to the injuries, and I would increase it from £500 to £1,500, so that the judgment in favour of the plaintiff should be for the sum of £2,200.

HODSON, L.J.: The plaintiff, a lady of eighty-three years of age, lived in a cottage at Hardingham, Norfolk. In a neighbouring field the defendant kept some heifers and bullocks. At 7.30 in the evening on Oct. 8, 1951, some of these animals trespassed on the plaintiff's land, having entered through a shed by raising the topmost of two rails fixed in iron staples and stepping over the lower rail. In the course of the trespass the plaintiff suffered severe personal injuries, inflicted by one or more of the beasts. The learned judge found that there was no evidence of negligence on the part of the defendant in allowing the cattle to escape, and I do not think there is any ground for disturbing that finding of fact.

The question to be decided on this appeal is whether the plaintiff can succeed in trespass, the learned judge having decided that she could not do so, apparently, on the ground that the animals were *mansuetæ naturæ* and not proved to have a fierce disposition. The proposition for which the plaintiff contends is that, the defendant's cattle having escaped on to her land, and while there having acted in accordance with their normal propensity, she is entitled to any damage so caused to her as occupier of the land. She conceded that, if the injury had been caused by a savage attack, she could not have succeeded in an action of trespass, because she would then have had to prove *scienter*. This she could not do, as she maintained throughout that the beasts were of placid disposition. The actual damage was caused by one or more of the beasts knocking her down in the darkness and subsequently treading on her as she was trying to get them out of her drive. The defendant's contention is that no damages for personal injuries can be recovered in an action of cattle trespass.

The historical origin of cattle trespass, which is one of the oldest grounds of civil liability known to English law, dates back to the fourteenth century. The essence of cattle trespass, it has been said, is a depasturing and trampling down. (cf. DOCTOR AND STUDENT, dial. 1, ch. 9, and NOY'S MAXIMS, ch. 44.)

"Every man is bound to make recompense for such hurt as his beasts

shall do in the corn or grass of his neighbour, though he know [knew] not that they were there."

A The law on this subject is quite separate from the law as to scienter, which may be said to be a branch of the law of negligence, but the two things have been dealt with together in some of the authorities (e.g., *Cox v. Burbidge* (6)) under the heading of liability of owners of domestic animals for damage done by them, with the result that it seems sometimes to have been assumed that in no case could damage be recovered for personal injuries inflicted by an animal mansuetae naturae without proof of scienter.

B Although there is no authority which decides that personal injuries cannot be recovered in cattle trespass, there are dicta to this effect, notably in the speech of LORD DU PARCQ in *Searle v. Wallbank* (12) ([1947] 1 All E.R. 20). The actual decision in that case was that the owner of land adjoining the highway is under no duty to a member of the public, as opposed to the owner of the soil of the highway, to prevent his domestic animals, not known to be dangerous, from straying on the highway.

C LORD DU PARCQ's speech contains a close study of the topic, and there are passages adverse to the contentions of the plaintiff. In particular, I have in mind the passage read by SINGLETON, L.J. (*ibid.*), which is followed by a reference to the dicta of HOLT, C.J., and TURTON, J., in *Mason v. Keeling* (13). LORD DU PARCQ continued (*ibid.*):

D "The present case is only distinguishable from that supposed by HOLT, C.J., in that the horse in the illustration did a vicious act, whereas the horse with which we are concerned may have been only heedless or clumsy, but I take this to be an immaterial distinction. As was said by ROMER, L.J. (as he then was), in *Deen v. Davies* (16) ([1935] 2 K.B. 293), it would be strange if the owner of a horse which strays on the highway were to be free of liability if his horse kicked a passenger, but liable if the passenger were injured 'merely by the horse trotting along the highway in the natural manner.' My Lords, no such paradoxical conclusion is to be drawn from the authorities. The law was accurately stated by BLACKBURN, J., in *Smith v. Cook* (3) (1 Q.B.D. 82), when he said that the owner of animals '... not of mischievous nature ... is entitled to suppose that they will not injure anyone until he has had actual knowledge to bring him to a contrary opinion.' I would add that, if an animal's owner knows that it has shown F a tendency to run into cyclists or other passengers on the highway, it cannot avail him to say that it was not vice, but a frolicsome disposition, or, perhaps, mere blundering which caused the harm."

G The paradox referred to by LORD DU PARCQ is present here, for the plaintiff does not contend that she could recover if the behaviour of the animals had been vicious, and it is not wholly satisfactory to make the decision as to liability turn on the disposition of an animal. It may be, however, that the paradox can be resolved by eliminating the distinction between vicious and non-vicious acts in cases of cattle trespass provided the damage caused is direct.

H There is good authority for the view that the measure of damage in cattle trespass may include wrongs other than those of depasturing. The earliest case is *Anderson v. Buckton* (4). This was an action for cattle trespass in the usual form alleging as a matter of aggravation that the cattle that trespassed were diseased and infected the cattle of the plaintiff. The plaintiff recovered, it being held that an action on the case would have lain for the bare infecting of the plaintiff's cattle without any allegation of *clausum fregit*.

The next case of importance is not a case of cattle trespass at all, but is important as being one in which the court later laid down its view as to the nature and extent of the action of cattle trespass. I refer to *Cox v. Burbidge* (6),

a decision of the Court of Common Pleas consisting of ERLE, C.J., WILLIAMS, WILLES and KEATING, JJ. WILLIAMS, J., said (13 C.B.N.S. 438):

"If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognisable by law. For instance, if a man's cattle, or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences."

Before leaving this case I would draw attention to some of the words of WILLES, J. He said (*ibid.*, 439):

"As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact."

In using these words he was not dealing with cattle trespass at all but with the scienter rule. In other words, he was not contemplating a placid domestic animal which in the course of a trespass on the land of another had done damage to the person of that other.

The next case of importance is *Lee v. Riley* (5), much relied on by the plaintiff. Here, again, the injury was not to growing crops but to the horse of the plaintiff inflicted by the defendant's mare which had trespassed on to the plaintiff's land. The court was not unanimous in treating the action as one of cattle trespass simpliciter, some members basing liability on negligence, but in *Ellis v. Loftus Iron Co.* (1), where the trespassing animal was a stallion which kicked the plaintiff's mare while she was on the plaintiff's land, the liability was fairly and squarely put in cattle trespass. The question was there treated as being one of remoteness of damage, and the damage was held not to be too remote. If that is the correct view, the action of the beasts in this case in knocking down and treading on the plaintiff in the course of their moving about her property in the dark caused damage which is no more remote than the damage inflicted on the plaintiffs in *Ellis v. Loftus Iron Co.* (1) and in *Lee v. Riley* (5).

Since the decision in *Re Polemis & Furness, Withy & Co.* (17) no question of foreseeability arises, although this might otherwise have caused difficulty in considering remoteness of damage. The fact that the plaintiff did not leave the beasts to wander about her land without attempting to remove them does not seem to me to affect the question of remoteness so as to make the cause of the injury her own intervention rather than the trespass of the cattle. She did no more than take the natural and appropriate steps as best she could to deal with the trespassing cattle and was injured in the process.

There are dicta on which the plaintiff is entitled to rely in several recent cases. I have in mind as an example *Manton v. Brocklebank* (10), in which the proposition sought to be advanced was that the owner of a tame animal is liable (apart from negligence or cattle trespass) for damages caused by the animal in following its natural propensities. The proposition was negatived by the court, but LORD STERDALE, M.R., after discussing the cases of *Lee v. Riley* (5) and *Ellis v. Loftus Iron Co.* (1), said ([1923] 2 K.B. 223):

"As I have pointed out, when a cause of action, whether in trespass or negligence, has once been established, the defendant may well be liable for

any damage produced by acts not alien to the nature of the animal and cannot say such damage is too remote."

I believe that to be a correct statement of the law as applicable to the facts of this case. For these reasons I agree that the appeal be allowed.

A On the question of damages I agree that the amount provisionally awarded as general damages by the learned judge is so much too low that this court should interfere. Although the plaintiff had reached an advanced age at the time of the injury and had been partly incapacitated in an earlier accident, she has suffered greatly and is now in a position where she has to have someone to look after her by way of a nurse-companion, whereas previously she was able to look after herself. This factor cannot, I think, have been taken into consideration at the trial. I would raise the figure of general damages to £1,500, which with B the special damages will make a total of £2,200 damages. *Appeal allowed.*

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Hood, Vores & Allwood*, Dereham, Norfolk (for the plaintiff); *Berrymans*, agents for *Hill & Perks*, Norwich (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

C

PRACTICE NOTE.

GUNNER v. GUNNER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), February 1, 2, 3, 4, 5, 1954.]

D *Divorce—Practice—Particulars—Cruelty—No particulars of general allegation given or requested—Admissibility of evidence of specific act.*

AS TO ADMISSIBILITY OF EVIDENCE OF A SPECIFIC ACT OF CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 962; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 308, 309, Nos. 2553-2565.

Case referred to:

E (1) *Jewell v. Jewell*, (1862), 2 Sw. & Tr. 573; 6 L.T. 369; 164 E.R. 1119; 27 Digest, Replacement, 308, 2557.

The husband filed a petition for dissolution of the marriage on the ground of the wife's desertion. By her answer the wife denied the desertion and cross-prayed for a decree of dissolution on the ground of cruelty and desertion, alleging, inter alia: "That the [husband] who is a man of foul and abusive language has neglected the [wife] and treated her with cruelty". No particulars of this allegation were included in the petition, nor were any particulars asked for by the husband. During the hearing the wife in evidence referred to a specific allegation of neglect. It was submitted on behalf of the wife that, as no particulars had been asked for, she might give evidence of specific occurrences under the F general charge.

G

BARNARD, J., referred to *Jewell v. Jewell* (1), and rejected the submission, saying that the wife should have given notice of such an allegation. His LORDSHIP, however, gave leave, no objection being taken on behalf of the husband, to give notice at the hearing of the allegation as follows:

H "That in or about the month of June, 1946, at a time when the [wife] was confined, the [husband] gave the maidservant presents to the distress of the [wife]."

Wacher for the husband.

Syms for the wife.

Solicitors: *Robert Mossop, Privett & Co.*, Woking (for the husband); *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis, Sutton* (for the wife).

A.T.H.

R. v. JURA.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Slade and Gerrard, JJ.),
March 8, 1954.]

Criminal Law—Weapon—Having offensive weapon in public place without reasonable excuse—Air rifle carried lawfully, but used for unlawful purpose—Prevention of Crime Act, 1953 (c. 14), s. 1.

The appellant while in a public shooting gallery in the company of a woman, having been given an air rifle to fire at a target, in a moment of anger, turned and fired at the woman and wounded her. He was convicted of, without reasonable excuse, having with him in a public place an offensive weapon, contrary to the Prevention of Crime Act, 1953, s. 1 (1).

HELD: as the appellant had the air rifle for firing at a target in the shooting gallery he could not be said to have it without "reasonable excuse" so as to constitute the offence charged, although he used it for an unlawful purpose, and, therefore, the conviction must be quashed.

FOR THE PREVENTION OF CRIME ACT, 1953, s. 1, see HALSBURY'S STATUTES, Second Edn., Interim Service, 1953, p. 67.

APPEAL against conviction.

The appellant, Stanislaw Jura, was convicted before OLIVER, J., on Dec. 15, 1953, at the West Riding of Yorkshire Assizes of (inter alia) "carrying an offensive weapon . . . without lawful authority or reasonable excuse in a certain public place", contrary to the Prevention of Crime Act, 1953, s. 1, and was sentenced to eighteen months' imprisonment.

G. Baker for the appellant.
Snowden for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was tried before OLIVER, J., at the West Riding Assizes on an indictment containing four counts. On the first count he was charged with shooting with intent, namely, that he shot at a woman with intent to maim or disable her. On that count he pleaded Not Guilty, the jury did not agree on a verdict, and the learned judge discharged them from doing so. On the second count he was charged with a common assault on the woman, the jury convicted him of that, and he was given six months' imprisonment on that count. On the third count he was charged with possessing firearms with intent to endanger life. On that, the jury quite rightly acquitted him. On the fourth count he was charged

"with carrying an offensive weapon . . . without lawful authority or reasonable excuse in a certain public place",

the offensive weapon being an air rifle. On that he was convicted on a direction by the learned judge, and was sentenced to eighteen months' imprisonment. The appellant appeals against his conviction on that count.

The appellant, while in company with a woman, went to a shooting gallery in a public park of the type one sees at fairs where people discharge rifles at various objects. In a moment of anger he turned and fired the air rifle at the woman and hit her on the hip. It was a very slight wound, and, as the jury could not agree on the first count, the learned judge discharged them from giving a verdict on that count and dealt with the matter as a common assault. He then directed the jury as to the fourth count in these words:

"There was an Act passed this very year (the Prevention of Crime Act, 1953) and it was passed primarily to deal with those young gentlemen who are often referred to as 'cosh boys'. It was intended to deal, *prima facie*, with them, but the language is quite wide enough to cover this case. This is a charge of being, without lawful excuse, in a public place, namely, Lister

Park, in possession of an offensive weapon, namely, an air rifle. There again we come back to exactly the same position. If this was an accident, pure fortuity, then he is not unlawfully in possession of an air rifle. His possession only becomes unlawful if, in your opinion, he turned the rifle deliberately upon the woman. Then immediately his possession of it becomes unlawful and he is in possession of an offensive weapon in a public place ”.

- A With respect to the learned judge, I do not think that that direction can be upheld because the long title of the Prevention of Crime Act, 1953, is:

“ An Act to prohibit the carrying of offensive weapons in public places without lawful authority or reasonable excuse ”.

Section 1 (1) says:

- B “ Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable—(a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding £50, or both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine not exceeding £100, or both ”.

- C The appellant was not carrying this rifle without lawful excuse because he was at a shooting gallery where for the payment of a few pence people could amuse themselves by firing at a target and was carrying the rifle for that purpose. He had an obvious excuse for carrying the rifle. He made use of the rifle in a way which was unlawful, for which he might have been convicted of a felony.
- D If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment for doing that, but the Act of 1953 is meant to deal with a person who, with no excuse whatever, goes out with an offensive weapon, it may be a “ cosh ”, or a knife, or something else, without any reasonable excuse.
- E If, with all respect to the learned judge, his direction were right in this case, it would mean that anybody who was found in possession of a shotgun going to a shooting party and used his gun for an unlawful purpose would be guilty of an offence under this Act. He would be guilty of an offence under the Offences against the Person Act, 1861, but not under the Act of 1953.

- F In my opinion, there is no evidence that this man was carrying the weapon without reasonable excuse, and, therefore, the learned judge ought to have directed the jury to acquit on that count. Consequently, on this count the conviction will be quashed.

Conviction on one count quashed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); W. H. Leatham, town clerk, Bradford (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

In the Estate of COPE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), February 24, 1954.]

Probate—Grant—Revocation of grant—Allegations that administrators swore false Inland Revenue affidavit.

On July 22, 1953, letters of administration of the estate of an intestate were granted to the respondents. On a motion by the applicant for revocation of the grant on the grounds that the respondents had failed to make a full disclosure of the intestate's assets in the Inland Revenue affidavit, and had shown as a liability a debt due to one of the respondents, which debt was disputed by the applicant,

HELD: whatever remedy the applicant might have under s. 25 of the Administration of Estates Act, 1925, on an application for an order for an inventory, there was no suggestion of any defect in the title of the respondents or of any supervening incapacity, and, accordingly, there was no ground on which the court could revoke the grant.

AS TO REVOCATION OF GRANT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 286-290, paras. 510-518; and FOR CASES, see DIGEST, Vol. 23, pp. 242-251, Nos. 2941-3087.

Cases referred to:

- (1) *In the Goods of Bradshaw*, (1887), 13 P.D. 18; 57 L.J.P. 12; 58 L.T. 58; 52 J.P. 56; 23 Digest 245, 2998.
- (2) *In the Goods of Covell*, (1889), 15 P.D. 8; 59 L.J.P. 7; 61 L.T. 620; 23 Digest 246, 3002.
- (3) *In the Goods of Loveday*, [1900] P. 154; 69 L.J.P. 48; 82 L.T. 692; 23 Digest 245, 2996.
- (4) *Birch v. Birch*, [1902] P. 130; 71 L.J.P. 58; 86 L.T. 364; 23 Digest 245, 2993.
- (5) *In the Goods of Galbraith*, [1951] 2 All E.R. 470n.; [1951] P. 422; 2nd Digest Supp.
- (6) *Re Taylor*, [1950] 2 All E.R. 446; *sub nom. In the Goods of Edwards-Taylor*, [1951] P. 24; 2nd Digest Supp.

MOTION for revocation of a grant of letters of administration of the deceased's estate.

On July 22, 1953, letters of administration were granted to the respondents, Alfred Cope and Dora Stein, a brother and a sister of the deceased. The applicant applied for revocation of the grant and prayed that a grant should be made to a named chartered accountant. In his affidavit in support of the application the applicant stated, *inter alia*, that the respondents had not disclosed in the Inland Revenue affidavit certain specified assets of the deceased and had shown as a liability a debt due from the deceased to the respondent, Cope, which debt he, the applicant, disputed. The respondent, Cope, filed no affidavit in reply. The respondent, Stein, filed an affidavit in which she stated, *inter alia*, that no caveat had been entered.

Crispin for the applicant.

Seuffert for the respondents.

COLLINGWOOD, J.: This is a motion for the revocation of letters of administration, granted to the respondents on July 22, 1953. The applicant also asks that letters of administration *de bonis non* should be granted to a named chartered accountant.

It was conceded by counsel for the applicant that the facts of this case were not directly covered by any of the grounds for revocation set out in *TRISTRAM AND COOTE'S PROBATE PRACTICE*, 19th ed., p. 336. Counsel submitted that those grounds were not exhaustive, but were only examples, and that other cases could

be found, of which the present is one, in which it would be proper, in the special circumstances of those cases, to revoke the letters of administration already granted and make a new grant in substitution. In support of that contention I was referred to a number of cases. In *In the Goods of Bradshaw* (1) a grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, and could not be found. A personal representative of the estate being required in an action in the Chancery Division, the court revoked the grant to the creditor without citing him, and made a new grant to the sole next of kin of the deceased.

In *In the Goods of Covell* (2) an administrator, who was also one of the residuary legatees, having partly administered the estate, left his home, and though several years had elapsed no trace of him could be discovered. The court revoked the grant made to him and made a fresh grant de bonis non to another residuary legatee. That, again, was a case of an administrator, though this time a residuary legatee, having absconded.

In *In the Goods of Loveday* (3), where also the administrator had disappeared, it was held that the practice by which a grant of administration may be revoked and a fresh grant made in the absence of the holder of the outstanding grant, was not confined to cases where administration had been taken by creditors. In that case an intestate had died, leaving a widow and six children by a former marriage, and the widow, who obtained administration, could not be found, and the court, on the application of the children, revoked the grant and directed administration de bonis non in favour of one of their number. SIR FRANCIS JEUNE, P., said ([1900] P. 155):

"Of course it may be said that creditors who apply for grants stand in a somewhat different position from residuary legatees or next of kin, because, inasmuch as they are specially appointed by the court, the court might substitute another administrator in their place upon their failure to carry out the administration. But, in my opinion, the fact of the first administrator being a creditor ought not really to make any difference in regard to revocation. After all, the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient. If the court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and if it turns out that the person so appointed will not or cannot administer, I do not see why the court should not revoke an inoperative grant and make a fresh grant. Therefore I accede to the present application".

Those words must be read with regard to the facts of that case, and when the learned President spoke of the previous grant having turned out to be abortive or inefficient he was dealing with a case of an administrator disappearing for a time, as in the case of *Bradshaw* (1).

In *Birch v. Birch* (4) the ground for revocation was the fraud in putting forward the document for probate in the very beginning. It was held that, if any person who is interested, directly or indirectly, in the establishment of a testamentary document is guilty of a fraud in putting forward that document for probate, that fraud affects the whole litigation. Where, therefore, the plaintiff, in an action against executors, claimed, on the ground of fraud, to revoke a probate granted in solemn form, and the defendants moved to dismiss the action as res judicata, the court refused to stay the proceedings, although it was not suggested that the executors, to whom probate had been granted, were cognizant of the alleged fraud, and although the person, against whom the plaintiff now made the charges, was not a party to the former suit.

In *In the Goods of Galbraith* (5) it was held that the court had power to revoke probate granted to executors and to make instead a grant of letters of administration de bonis non to another person. In that case the two surviving executors of the will and codicil of the deceased had become unable properly to carry out their duties by reason of their infirmities. Accordingly, application was made on motion to the court for probate to be revoked and for a grant to the applicant of letters of administration de bonis non. KARMINSKI, J., said ([1951] 2 All E.R. 470):

"The application is a novel one in that there appears to be no reported case in which both executors have been removed in this way, but in the present case there is the clearest evidence that both the surviving executors are of advanced age and suffering from such a degree of physical and mental infirmity as makes a continuance of their duties impossible. For reasons due to conditions in the Argentine, the estate has not yet been wound-up, and I have to consider the object of the court in looking after the estate, in looking after the proper representation, and, not least, in looking after the interest of the parties beneficially interested".

That correctly states the duty of the court, but, again, the statement must be read in the light of the circumstances of the case, namely, that both the executors were of advanced age and suffering from such a degree of physical and mental infirmity as to make a continuation of their duty impossible. No such suggestion is made in the present case.

The last case to which I was referred was *Re Taylor* (6). That was not a case of revocation. The proposed grantee of letters of administration was shown to be under-developed both mentally and physically, and in those circumstances a grant was made to a stranger in order to protect the interests of the residuary legatee who was a daughter of the deceased.

In my opinion, none of those cases covers the present one. There is no suggestion in the present case that there is any defect in the title of the grantees of the letters of administration, or any supervening incapacity. There may be, on the evidence that has been put forward, a prima facie case for an inventory and an account under s. 25 of the Administration of Estates Act, 1925, but, in my opinion, it is not a case in which the court can order revocation of the grant.

Application dismissed.

Solicitors: *Saunders, Sobell, Greenbury & Leigh* (for the applicant); *Paisner & Co.* (for the respondents).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

KNIGHT AND ANOTHER v. OLIVE AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 4, 1954.]

Rent Restriction—Sub-tenancy—Paddock outside Rent Acts—Sub-letting with part of tenant's own dwelling-house subject to Acts—Right of landlord to recover possession of paddock—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).

The tenant of a paddock of less than two acres in extent sub-let it along with rooms in a farmhouse which he owned to a sub-tenant who thereby became entitled to the protection as against the tenant of the Rent Restrictions Acts in respect of the whole holding as a dwelling-house within the Acts. The tenant subsequently sold the farmhouse to a third party, subject to the sub-tenancy of the rooms. After due notice to quit, the landlords brought an action for possession of the paddock against the tenant (who did not resist the claim) and the sub-tenant.

HELD: as the paddock, when let by the landlords to the tenant, was not subject to the Rent Restrictions Acts, the tenant could not, by sub-letting it with a dwelling-house of his own within the meaning of the Acts, bring it within the protection of the Acts as against the landlords, and the landlords were, therefore, entitled to possession.

Cow v. Casey ([1949] 1 All E.R. 197), applied.

Semle, on the tenant's sale of the farmhouse, the paddock was no longer let together with the rooms within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and so the sub-tenant was no longer entitled to the protection of the Acts in respect of the paddock.

AS TO THE POSITION OF SUB-TENANTS UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 333, para. 399; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 711-714, Nos. 7974-7994.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3 (1) and the INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 15 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13) p. 1048 and p. 1019.

Case referred to:

(1) *Cow v. Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565; 31 Digest, Replacement, 713, 7984.

APPEAL by landlords against an order of His Honour JUDGE SHOVE at Sleaford County Court, dated Dec. 1, 1953, dismissing, so far as it applied to the sub-tenant, an action by the landlords for possession of a paddock brought against the tenant (against whom judgment was given) and sub-tenant, on the ground that the paddock had become subject to the Rent Restrictions Acts, through its having been sub-let by the tenant together with rooms in a farmhouse so that they together constituted a dwelling-house within the meaning of the Acts.

Jellinek for the landlords.

The sub-tenant appeared in person.

JENKINS, L.J.: This is an appeal by the plaintiffs, John Edwin Peter Knight and Robert Field Knight, from an order of His Honour JUDGE SHOVE delivered at Sleaford County Court on Dec. 1, 1953, dismissing, as against the second defendant, Mr. Tyree, the respondent in this appeal, a claim for possession of a certain paddock of which the plaintiffs were the owners, the first defendant, Mr. Olive, was the tenant, and the second defendant was the sub-tenant holding under Mr. Olive. In 1942 the first defendant was the tenant of the paddock, which belonged to a Mr. Midgeley, and he also owned a farmhouse within a few

hundred yards of it. He let rooms in the farmhouse and sub-let the paddock to the sub-tenant. Inasmuch as the rooms in the farmhouse were within the protection of the Rent Restrictions Acts, and the paddock was let together with the rooms within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, there was no doubt that, as between the tenant and the sub-tenant, the whole subject-matter of the letting, the rooms and paddock, constituted a dwelling-house to which the Rent Restrictions Acts applied.

In 1946 the plaintiffs bought the paddock from Mr. Midgeley, and thus became the landlords of the tenant in respect of it. In 1951 a Mr. Dobney bought the farmhouse from the tenant, subject to the tenancy of the sub-tenant. In January, 1952, an apportionment was made of the rent payable to Mr. Dobney in respect of the rooms and the rent payable to the landlords in respect of the paddock. The paddock rent was apportioned at 7d. a week, and the rent of the rooms in the farmhouse at 6s. 5d. a week. I need say no more about that apportionment, for the learned county court judge held that it did not affect the result in this case, and it was not relied on here by counsel for the landlords.

In February, 1952, Mr. Dobney gave notice to the sub-tenant to quit the rooms in the farmhouse. It was not for him to give any notice in respect of the paddock, in which he had no interest. On the expiration of that notice in March, 1953, he took proceedings for possession of the rooms. Those proceedings failed, because it was held (and it is difficult to see how there could have been any other result) that the sub-tenant's tenancy of the rooms was protected by the Rent Restrictions Acts. On Dec. 7, 1951, the landlords gave the tenant and sub-tenant notice to quit the paddock, then held from them by the tenant on a yearly tenancy. That notice expired on Apr. 6, 1953, and the present proceedings were instituted in the Sleaford County Court on Sept. 1, 1953.

Section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act; or (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

By s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939:

"Subject to the provisions of para. (a) of the last preceding sub-section, the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house . . ."

The paddock here was less than two acres in extent, and, therefore, under the provisions of that sub-section, being let together with the dwelling-house, it was to be treated as part of the dwelling-house. By s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord

on the same terms as he would have held from the tenant if the tenancy had continued."

A The question was whether, in view of the fact that the tenant had let to the sub-tenant the rooms in the farmhouse together with the paddock, the sub-tenant could claim the protection of the Acts in respect of the paddock as against the landlords, even though the interest of the tenant of the paddock had been determined. The tenant did not resist, and could not have resisted, the claim for possession of the paddock. As a result of the notice to quit and the issue of proceedings for possession, his interest was clearly determined, and the learned county court judge found no difficulty in giving judgment against him. But he held that the position of the sub-tenant was different and that he was a protected tenant by virtue of the provisions I have read. He, accordingly, B dismissed the landlords' claim for possession against the sub-tenant and the present appeal has resulted.

The learned county court judge said in his written judgment (which he delivered later, being dissatisfied with his extempore judgment):

C "A further point was taken on behalf of the landlords. It was suggested that, after the service of the notice to quit the rooms, they were no longer let and consequently could not be let together with anything else. I did not accede to that proposition. If it were sound, it would apply to every case of a protected tenancy that comes before a court, for in none of such cases could the premises be said to be let as a separate dwelling. A tenant of D protected premises is entitled, after a notice to quit, to remain in possession on terms the same as those on which he held under his contractual tenancy. Likewise, a sub-tenant, after the determination of the head tenant's interest, holds of the head landlord on the same terms as he would have held of the head tenant if the tenancy had continued. If, therefore, the rooms and the paddock were still let together after the severance of the reversion, the sub-tenant was entitled to continue in possession of them on the same terms after the notice to quit the rooms and after the determination of the tenant's interest E in the paddock. In my opinion, the sub-tenant was entitled to the protection of the Rent Restrictions Acts in respect of the paddock, and, since the landlords did not put forward with regard to it any ground on which an order for possession could be made, I considered that the action must fail. I am aware that the late Judge GAMON, in a case which came before him, expressed an opinion contrary to that which I formed, but he found in favour F of the tenant on another point. For the reasons which I have given I felt, with all respect to his memory, unable to take the same view as he did."

In his extempore judgment he said:

G "I do not think that the subsequent giving up of possession or submitting to judgment as to the field by the tenant really affects the position, because the present landlords must be in the same position as the tenant was in if the premises are within the Rent Restrictions Acts. If they are within the Rent Restrictions Acts, then the present landlords step into the shoes of the tenant and the sub-tenant holds on the same conditions as he held from the tenant."

H With respect to the learned county court judge, I find myself unable to accept his conclusion. As I have said, there is no doubt that, as between the tenant, who was the owner of the farmhouse and the tenant of the paddock, and the sub-tenant, the rooms in the farmhouse, together with the paddock, constituted a dwelling-house to which the Rent Restrictions Acts applied. Therefore, so long as the tenant's interest in both rooms and paddock continued, the sub-tenant was entitled as against the tenant to the protection of the Acts in respect of both. But, in my judgment, when the tenant had sold the farmhouse to Mr. Dobney, and, therefore, got rid of his interest in the rooms, it was hardly possible to say

that the rooms in the farmhouse and the paddock were still let together within the meaning of the Acts. The rooms were held by the sub-tenant under a contractual tenancy from Mr. Dobney, which became a statutory tenancy when the notice to quit expired. The paddock was held by the sub-tenant, until the tenant was ejected, under a contractual sub-tenancy from the tenant. That, however, may, perhaps, be no more than a way of putting the argument based on the provisions of the Law of Property Act, 1925, relating to the severance of a reversion, which was not relied on before us (though argued and rejected in the county court). The decisive point, in my judgment, is that the landlords never had any interest whatever in the farmhouse. That had nothing to do with them. The only tenancy, so far as they were concerned, was the tenant's tenancy of the paddock, subject to which they had purchased the paddock. That was a tenancy wholly outside the provisions of the Rent Restrictions Acts, because no dwelling-house entered into the case at all. It was simply a letting of a paddock. In my view, it would be contrary to all principle to hold that, where a landlord lets to a tenant a field or a paddock with no dwelling-house at all connected with it, the tenant can, by letting that paddock together with a dwelling-house of his own, turn the tenancy under which he holds the paddock into a tenancy to which the Rent Restrictions Acts apply.

Authority for my view on that point is to be found in *Cow v. Casey* (1), a decision of this court, in which the headnote reads ([1949] 1 All E.R. 197):

"In 1942, the plaintiff demised to S.-R. Ltd. for a term of three years from Sept. 29, 1942, a dwelling-house to which the Rent Restrictions Acts did not apply. On the expiration of the term S.-R. Ltd., held over as yearly tenants, and in 1944 they assigned their yearly tenancy to F.A. Ltd., that tenancy being terminable by six months' notice expiring on Sept. 29 in any year. The defendant was employed by F.A., Ltd. who sub-let a flat in the premises to him on a weekly tenancy at a rent of 30s. per week. The rateable value of the flat brought it within the Rent Restrictions Acts. On Dec. 23, 1947, the plaintiff served on F.A. Ltd. a notice to quit expiring on June 24, 1948, and, in spite of the fact that it was bad, the company accepted it, vacated the house and thereby surrendered the tenancy. On June 14, 1948, F.A. Ltd. served the defendant with a notice to quit on June 26, 1948, i.e., two days after the company was due to leave the premises. On a claim for possession of the flat the defendant contended that, on the surrender of the head lease, he became a tenant of the plaintiff as head lessor, with two days of his contractual tenancy to run and thereafter as statutory tenant, and, therefore, was entitled to claim the protection of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).

HELD: (i) the whole of the dwelling-house being outside the scope of the Rent Restrictions Acts, after June 26, 1948, the defendant was a trespasser and his tenancy was not protected by s. 3 (1) of the Act of 1933.

(ii) section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is limited to a case where the tenant is tenant of a dwelling-house to which the Acts apply, and, as F.A. Ltd. was a tenant of a dwelling-house to which the Acts did not apply, the defendant was not to be deemed to become the statutory tenant of the plaintiff."

That case thus raised in a somewhat different form the question involved in the present case. The property let by the head landlord seeking possession was not a dwelling-house to which the Acts applied. The immediate tenant, having sub-let a part of that property in such circumstances as to make the Acts apply to that letting as between the tenant in occupation and his immediate landlord, and the sub-tenant having claimed the protection of the Acts as against the superior landlord, it was held that a tenant of premises outside the protection of the Acts could not bring them within the protection of the Acts so as to bind his

landlord by sub-letting a part of the premises which, taken by itself, was of such a rateable value as to be within the protection of the Acts. LORD GREENE, M.R., said (*ibid.*, 198):

A "The defendant argues that the effect of his sub-tenancy was that on the surrender of the head lease on June 24, 1948, he became in direct relation as tenant with the plaintiff as his landlord. On that date, he says, he was a tenant of the plaintiff in occupation with two days of his contractual tenancy to run, and that entitles him now to claim against the plaintiff the protection of the Rent Restrictions Acts, his flat being clearly within the scope of the Acts. In my opinion, that argument is completely misconceived. At common law, it is true, he had two days' occupation to which he was entitled as against the superior landlord. On the expiration of those two days at common law he became a trespasser. What possible ground is there for his claiming the protection of the Rent Restrictions Acts? The defendant says that s. 3 (1) of the Rent, etc., Restrictions (Amendment) Act, 1933 protects him";

B and his Lordship then referred to that section and continued (*ibid.*):

C "He contends that this flat is a dwelling-house to which the Rent Acts apply, that an order for the recovery of possession of that dwelling-house is being sought against him and that it is not open to the court to make such an order by virtue of s. 3 (1). That appears to me to be a complete misconception of the true position. What is being sought is recovery of possession of part of the dwelling-house which was demised by the plaintiff. That dwelling-house is not one to which the Rent Acts apply. It is a mere accident that only part of that dwelling-house is occupied, the reason being that the tenant of the rest of it has moved out. Test the matter in this way. Suppose the head tenant had surrendered by deed, and afterwards refused to move out and an action had to be brought to eject him. That would have been an action against a head tenant and his sub-tenant for the recovery of possession of the whole house, which is not a dwelling-house to which the Rent Acts apply. In that case the Acts would have had nothing to do with the case. It cannot make any difference that the head tenant is not a defendant because he has vacated the house. What the plaintiff is trying to do is to get possession of the whole of his house, and occupying a corner of it is a person who at common law is a pure trespasser. It seems to me impossible to say that in those circumstances s. 3 (1) applies. I am not sure whether reliance is placed on s. 15 (3) of the Rent Act, 1920, which deals with sub-tenancies, but, in my opinion, it is equally impossible to rely on that sub-section. [His Lordship read the sub-section and continued:] That sub-section deals with a case where there is a dwelling-house to which the Acts apply occupied by a tenant, whom I will call the head tenant, whose tenancy is determined. It would cover, therefore, a case where the head tenancy is determined by a surrender, but the sub-section is clearly limited to a case where the head tenant whose tenancy is determined is tenant of a dwelling-house to which the Rent Acts apply. Here the company was not a tenant of a dwelling-house to which the Acts apply. It was tenant of a dwelling-house to which the Acts did not apply."

H It seems to me that the present is an a fortiori case. In *Cow v. Casey* (1) the whole of the premises in question were demised by one landlord to one tenant, and the question was whether a holding protected by the Rent Restrictions Acts could be carved out of the entire premises. In the present case the question is whether a tenant of a mere paddock, a piece of open land with no building on it whatever, can bring that paddock within the protection of the Rent Restrictions Acts to the detriment of his landlords by the expedient of letting it along with a rent-restricted dwelling-house held under an entirely different title with which

the landlords of the paddock have had nothing whatever to do. In my judgment, it is plain that this question must be answered in the negative.

LORD GREENE, M.R., pointed out in *Cow v. Casey* (1) that s. 15 (3) did not protect the occupying tenant in the circumstances of that case. In my judgment, it is equally plain that this sub-section cannot avail the sub-tenant here. The sub-section provides:

“Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.”

A

B

To relate the provisions of that sub-section to the present case, one must take the tenant to have been Mr. Olive. But Mr. Olive was not the tenant of a dwelling-house, and never had been. He was the tenant of a paddock and had at one time been the owner of a farmhouse. Therefore, the provisions of s. 15 (3) can have no application. The tenant could never have claimed the benefit of the Rent Restrictions Acts in respect of the paddock, and it follows that, on the determination of his interest, there was no protection in respect of the paddock to which it was possible for the sub-tenant to succeed. The case is, on its facts, a complicated one, and cases in which the Rent Restrictions Acts are concerned are seldom, if ever, free from difficulty. But, giving the matter the best consideration I can, and for the reasons given, I am of opinion that the learned county court judge was in error in holding that the sub-tenant was entitled to the protection of the Acts in respect of this paddock, and, accordingly, the appeal should be allowed and judgment for possession should be entered against the sub-tenant.

C

D

SINGLETON, L.J.: I agree. I wish that argument had been addressed to the court on behalf of the sub-tenant, but, unfortunately, he has rather a poor opinion of lawyers because one once made a mistake. It was quite impossible for him to argue his case, as we have seen. I agree with the order proposed.

E

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Cunliffe & Airy*, agents for *Ernest H. Godson & Co.*, Sleaford, Lincs. (for the landlords).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

WRIGHT v. WRIGHT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), February 10, 11, 1954.]

Divorce—Maintenance of wife—Injunction to prevent husband dealing with property—Application for injunction before determination of wife's applications to vary secured and unsecured maintenance.

- A *Injunction—Husband and wife—Maintenance—Injunction to prevent husband dealing with property pending hearing of applications to vary secured and unsecured maintenance.*

On May 21, 1941, a decree nisi of dissolution of the marriage was made in favour of the wife, and on July 16, 1941, she applied for an order for maintenance. On Nov. 11, 1946, an order for maintenance, part to be secured and part unsecured, was made in her favour. On Apr. 29, 1953, the

- B the wife filed notice of an application to vary that part of the order relating to unsecured maintenance. On Sept. 16, 1953, the husband, who had re-married, swore an affidavit in which he stated that his employment would finish on Mar. 10, 1954, that in or about April, 1954, he expected to receive payment of a sum of money out of a provident fund, and that it was his intention to devote part of this money "to the purchase of a home for myself and my [present] wife and to utilise the balance to purchase a joint annuity . . . for my [present] wife and myself." On Feb. 2, 1954, the wife filed notice of an application to vary the part of the order relating to secured maintenance. On an application by the wife for an injunction to restrain the husband, pending the hearing of her applications, from carrying out the intentions expressed in his affidavit,

- D **HELD:** the wife's right to an injunction was restricted to the enforcement of her existing maintenance order, and the court had no power to grant an injunction to ensure that the husband retained property until the determination of her rights in regard to a future order, and therefore, the application would be dismissed.

- E AS TO INJUNCTION TO RESTRAIN DEALINGS WITH PROPERTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 757, para. 1195; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 683, 684, Nos. 6529-6543.

Cases referred to:

- (1) *Scott v. Scott*, [1950] 2 All E.R. 1154; [1951] P. 193; 27 Digest, Replacement, 84, 632.
- F (2) *Newton v. Newton*, (1885), 11 P.D. 11; 55 L.J.P. 13; 27 Digest, Replacement, 684, 6533.
- (3) *Noakes v. Noakes & Hill*, (1877), 4 P.D. 60; 47 L.J.P. 20; 39 L.T. 47; 27 Digest, Replacement, 641, 6038.
- (4) *Sidney v. Sidney*, (1867), 17 L.T. 9; 27 Digest, Replacement, 626, 5869.
- G (5) *Burmester v. Burmester*, [1913] P. 76; 82 L.J.P. 54; 108 L.T. 272; 27 Digest, Replacement, 626, 5872.
- (6) *Jagger v. Jagger*, [1926] P. 93; 95 L.J.P. 83; 135 L.T. 1; 27 Digest, Replacement, 626, 5873.
- (7) *Fanshawe v. Fanshawe*, [1927] P. 238; 96 L.J.P. 133; 137 L.T. 496; 27 Digest, Replacement, 684, 6535.

- H APPLICATION by the wife for an injunction to restrain the husband from dealing with property and assets pending the disposal of applications by her for the variation of provisions for maintenance in orders dated Nov. 11, 1946, and May 31, 1949.

On May 21, 1941, the wife obtained a decree nisi on the ground of the husband's adultery. On July 16, 1941, she filed notice of application for maintenance. On Nov. 26, 1945, the decree was made absolute, and, on Nov. 11, 1946, an order was made by the registrar for the maintenance of the wife for £100 per annum

secured for her life and a further £500 unsecured for the joint lives of the parties. A deed was settled by conveyancing counsel to secure the payment of the £100. On Jan. 19, 1949, the wife filed notice of application to vary the amount, and on May 31, 1949, the registrar made an order varying the maintenance, so far as the unsecured sum was concerned, to £620 per annum as from Jan. 19, 1949, but he refused to order the security to be increased. On Apr. 29, 1953, the wife filed a notice of application for a further variation of the unsecured maintenance. On July 29, 1953, the application was adjourned by the registrar for the filing of further affidavits by the husband and an interim order was made at the rate of £1,350 per annum. On Sept. 16, 1953, the husband swore an affidavit in which he referred to an account with a provident fund in Malaya which, he stated, stood on Dec. 31, 1952, at £16,306, and which on Dec. 31, 1953, would have become £17,020, and he stated that this included contributions from himself and from his employers and was the amount which he expected to receive in or about April, 1954, a month after his retirement from his employment which would finish on Mar. 10, 1954. In the affidavit he said:

"It is my intention when I receive payment out of the provident fund to devote about £2,500 to the purchase of a home for myself and my [present] wife and to utilise the balance to purchase a joint annuity of £600 per annum for my [present] wife and myself. Any small balance I intend to invest in government stocks."

On Jan. 22, 1954, the wife's application for variation was again adjourned for filing further affidavits and an interim order was made reducing the amount of the unsecured maintenance to £850 per annum as from that date. On Feb. 2, 1954, the wife filed notice of application to vary the secured provision for maintenance, and on the same date she filed notice of application for an injunction to restrain the husband, pending the hearing of the application, from carrying out the intentions expressed by him in his affidavit. During the course of the hearing, counsel for the wife applied to amend the summons to cover the application for variation of the unsecured maintenance.

Fairweather for the wife.

John Latey for the husband.

COLLINGWOOD, J., stated the facts and continued: Counsel for the wife submitted that, as she has an order in her favour for the secured payment of £100 a year, and, further, an order for interim maintenance at the rate of £820 a year, and thus has an order which gives her the right to be paid out of the property of the husband, she is entitled to an injunction to preserve that property. He referred to *Scott v. Scott* (1). Counsel for the husband submitted that there was no power to grant an injunction in the circumstances of this case, as so to do would be to grant it quia timet before the right to relief had been established.

In *Scott v. Scott* (1) the parties were still married, and there was an application by the wife for maintenance under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, now s. 23 (1) of the Matrimonial Causes Act, 1950. Before the determination of the summons the wife alleged that her husband was realising all his assets with a view to emigrating with them, and she applied for an injunction to restrain him from removing the assets out of the jurisdiction. **WALLINGTON, J.**, refused to grant an injunction on the ground that he had no jurisdiction to do so before any order contemplated by s. 5 (1) had been made. The wife appealed, and **SOMERVELL, L.J.**, after reading s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, and stating the facts, said ([1950] 2 All E.R. 1155):

"Unaided by authorities I would have said that the decision of **WALLINGTON, J.**, that he had no jurisdiction to grant an injunction before any order as contemplated by s. 5 (1) had been made was plainly right. The general principle of our law, that an injunction of this kind cannot be granted quia

timet before some right to relief has been established, is well known, and, therefore, reading s. 5 of the Act of 1949 by itself and notwithstanding the fact that sub-s. (2) gives the court the power to secure the payments where an order under sub-s. (1) has been made, I would have said that, if the legislature had intended that a wife should be entitled to the safeguard for which the wife in the present case is applying—which (as counsel for the wife submitted) may be a very important one in some cases—it would have expressly so provided. We are, however, not unaided by authorities. It has been held that an injunction of this kind cannot be granted under statutory provisions which, I agree, were different, but which seem to me for this purpose to be analogous. In *Newton v. Newton* (2) the headnote is: ‘The court will not, in order to protect a wife’s right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony has been made.’ In a considered judgment SIR JAMES HANNEN, P., overruled *Noakes v. Noakes and Hill* (3), in which he had previously given a decision in a contrary sense. After examining the authorities, he considered the matter in the light of the principle and said (11 P.D. 13): ‘. . . I come to the conclusion that as it has been decided that the Judicature Act [1873, s. 25 (8), repealed and replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45] does not give any enlarged powers to the court in this respect, it is not competent for a court, merely quia timet, to restrain a respondent from dealing with his property. The case would be different, of course, if the circumstances were the same as in *Sidney v. Sidney* (4). In that case that decision would be binding on me.’ In *Sidney v. Sidney* (4) a decree absolute of marriage had been made in the wife’s favour and the court had ordered permanent maintenance to be secured to her. On an application to MALINS, V.-C., an injunction was granted for her benefit to restrain the husband from dissipating his property for the purpose of putting it out of the control of the court. SIR JAMES HANNEN, P., said (11 P.D. 12) in *Newton v. Newton* (2): ‘It is to be observed that in that case [*Sidney v. Sidney* (4)] there was, what there is not in this case, a subsisting order for the payment of the annuity.’ The principle laid down in *Newton v. Newton* (2) was followed by SIR SAMUEL EVANS, P., in *Burmester v. Burmester* (5), and by this court in *Jagger v. Jagger* (6), although in the latter case there were also other grounds on which SCRUTTON, L.J., and SARGANT, L.J., thought that the matter could be decided. In *Jagger v. Jagger* (6) SCRUTTON, L.J., said ([1926] P. 102): ‘I am not aware of any statutory or other power in the court to restrain a person from dealing with his property at a time when no order against him has been made.’ ”

BIRKETT, L.J., agreed with that judgment.

In *Sidney v. Sidney* (4) an order for permanent alimony was made and a direction given to the husband to furnish abstracts of title to various properties, or, alternatively, to furnish a draft conveyance in order that it might be submitted to conveyancing counsel for their consideration. The husband did not comply with either of the orders, and the court granted an injunction and a receiver, holding it had jurisdiction to protect the property for the benefit of the wife. *Sidney v. Sidney* (4) was referred to in *Newton v. Newton* (2), where, on an application for alimony pendente lite, the court held that it could not, before an order was made, restrain the husband from removing property out of the jurisdiction. SIR JAMES HANNEN, P., said (11 P.D. 12):

“ In support of the application two cases were cited, the one of *Sidney v. Sidney* (4), decided by MALINS, V.-C., in 1867, and the other, a case decided by myself, *Noakes v. Noakes & Hill* (3) in the year 1878. With regard to the first of these cases, *Sidney v. Sidney* (4), it was one in which the decree absolute for a dissolution of marriage had been pronounced, and the court

had ordered permanent maintenance to the amount of £245 a year to be secured to the petitioner, and a reference to one of the conveyancing counsel of the Court of Chancery to settle a proper instrument to be executed by the respondent so as to carry out the order, and an application was afterwards made to MALINS, V.-C., to restrain the husband from dissipating his property for the purpose of putting it out of the control of the court. It is to be observed that in that case there was, what there is not in this case, a subsisting order for the payment of the annuity. The application therefore to the Vice-Chancellor was for the purpose of enforcing that order, and it was similar to, though it was not actually, the process in execution of the order which had already been made by this court. In that it is distinguished from the present case."

He then refers to the case of *Noakes v. Noakes & Hill* (3), and said (*ibid.*, 13): "I therefore dissolve the injunction . . ." *Newton v. Newton* (2) was followed by *Burmester v. Burmester* (5), in which the same principle was applied to permanent maintenance.

In *Jagger v. Jagger* (6) HILL, J., held that, although the Divorce Court had power to restrain a respondent husband by injunction from parting with his property in order to defeat the claim of the petitioning wife to alimony or permanent maintenance which the court had already ordered, it had no power to set aside an assignment of his property made by him in consideration of a second marriage, even if the result might be to defeat the claim of the petitioner to maintenance not yet actually ordered. The Court of Appeal upheld that decision. There is one passage in the judgment of HILL, J., to which counsel for the wife directed attention, where the learned judge said ([1926] P. 96):

"Upon the making of the interim order on July 1, 1925, I think an injunction might have been granted, but none was applied for, and on July 23, 1925, the property was assigned and the power of the court to act by injunction was gone."

In *Fanshawe v. Fanshawe* (7) it was held that the court would interfere by way of injunction to restrain a husband from dealing with his property so as to defeat an order for costs or alimony pendente lite when the amount of the latter had been fixed and an instalment of it was already due and in arrear, but would not so restrain him in respect of instalments of alimony to become due at a future date.

In the present case the wife is applying for new orders in substitution for existing orders. To succeed in her pending applications for variation she must, it is conceded, bring herself within the proviso in s. 28 (1) of the Matrimonial Causes Act, 1950, in view of the date of the original order. She may, or she may not, succeed in obtaining the variations for which she asks. In my opinion, what she is seeking to do is to preserve the status quo in regard to her husband's property until such time as the order for which she asks is made. It is true that she has an order of the court, but I think that her right to an injunction is restricted to the enforcement of that order. She has no right to an injunction to ensure that the husband shall retain property which he now has until the time for the determination of her rights in regard to a future order, and, in my opinion, on the authorities to which I have referred, the court has no power to grant the injunction asked for.

Application dismissed.

Solicitors: *Strong & Co.* (for the wife); *John Bartlett & Son* (for the husband).
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

NOTE.

KNIGHT AND ANOTHER v. DEMOLITION & CONSTRUCTION CO., LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), February 2, 3, 24, 1954.]

A *Building—Demolition—Negligence—Collapse of wall killing workmen.*

APPEAL by the defendants from an order of PARKER, J., dated June 22, 1953, and reported [1953] 2 All E.R. 508.

- B The defendants, a firm who specialised in demolition work, were engaged in demolishing three blocks of gas retorts on the premises of the South-Eastern Gas Board. The blocks consisted of nine arches, and the retorts, which were in two vertical columns of five each, were surrounded by brickwork. The method of demolition, as described by the learned judge, was that a cable was inserted through one of the top retort tubes, the two ends of the cable being joined to a winch, situated at right angles to the end wall, the pull of which, when set in operation, caused the arch to collapse. The resultant debris would be piled against the wall of the next arch, and workmen were sent in to clear it away before the next arch was demolished. On Apr. 4, 1951, the work had proceeded as far as the last two arches of the second block. The outer wall of the last arch but one was pulled down, and on Apr. 6 two workmen were sent in to clear the debris and to demolish the transverse wall. The adjoining wall of the last arch collapsed killing the two workmen. In an action by their widows for damages
- C for negligence and/or breach of statutory duty, PARKER, J., held that there was on the part of the defendants a breach of duty at common law and a breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 79 (7).
- D

Beney, Q.C., and *Jukes* for the defendants.

C. N. Shawcross, Q.C., and *Castle-Miller* for the plaintiff, Knight.

Gardiner, Q.C., and *Dare* for the plaintiff, Ransom.

- E THE COURT OF APPEAL, affirming the decision of PARKER, J., found that the removal of one arch automatically deprived the adjacent arch of its lateral support and caused instability. They held that the instability produced in the last arch when the other arch was removed and the potential danger it constituted were never appreciated by the defendants who had failed to take
- F such precautions as an appreciation of the position would have shown to be desirable in the interests of their employees, and, therefore, they were guilty of a breach of their common law duty of care. In view of the court's decision on the issue of negligence the question of breach of statutory duty was not dealt with.

Solicitors: *J. F. Coules & Co.* (for the defendants); *Darracotts & Tringhams* (for the plaintiff, Knight); *Hepburns* (for the plaintiff, Ransom).

P.P.

SCLATER *v.* HORTON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
January 19, 20, March 2, 1954.]

Agriculture—Agricultural holding—Rent—Arbitration—Date of appointment of arbitrator—Date of alteration of rent—Agricultural Holdings Act, 1948 (c. 63), s. 8 (1).

The landlord's agent served on the tenant of an agricultural holding to which the Agricultural Holdings Act, 1948, applied, a notice, dated Sept. 26, 1949, under s. 8 (1) of the Act demanding a reference to arbitration of the question what rent should be payable as from Sept. 29, 1950. A second notice dated Sept. 26, 1952, was served by the landlord, demanding arbitration as to rent payable from Sept. 29, 1953. On the same day the landlord applied to the Minister for the appointment of an arbitrator. On Oct. 24, 1952, an arbitrator was appointed, and the question arose from what date any alteration of the rent should take effect.

HELD: a reference under s. 8 (1) to arbitration of the question what rent should be payable by the tenant of a holding must take place before the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of demanding the reference; the notice dated Sept. 26, 1949, of a demand for arbitration became ineffective when no arbitrator had been appointed before Sept. 29, 1950; and, therefore, any alteration of the rent could only take effect as from Sept. 29, 1953, being "the next ensuing day on which the tenancy could have been determined by" notice to quit given at the date of the second demand for a reference, namely, Sept. 26, 1952.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 34.

APPEAL by the landlord from an order made by His Honour JUDGE ARCHER at Lewes County Court on Oct. 19, 1953.

By an agreement in writing dated June 30, 1938, the landlord let to the tenant a holding known as Double Barns Farm from Sept. 29, 1938, to Sept. 29, 1939, and thereafter from year to year determinable by either party on Sept. 29 in any year by twelve months' notice in writing. In September, 1949, the landlord's agents served on the tenant a notice, dated Sept. 26, 1949, as follows:

"As agents for and on behalf of the landlord we hereby give you notice in accordance with the Agricultural Holdings Act, 1948, s. 8 (1), that it is desired to refer to arbitration under the said Act the question of what rent should be payable in respect of the holding of which you are tenant as from the next ensuing day [Sept. 29, 1950] on which the tenancy could have been determined by notice to quit if such notice had been given today."

On Aug. 14, 1950, the landlord's agents and the tenant agreed that, in the event of a failure between the parties to reach agreement as to the rent and if an arbitrator were appointed, the award should operate from Sept. 29, 1950, and this agreement was confirmed by the tenant by a letter dated August, 1950. In September, 1952, the landlord's agents served on the tenant the following notice dated Sept. 26, 1952:

"Please take notice that we hereby demand a reference to arbitration under the [Agricultural Holdings Act, 1948] of the question what rent shall be payable in respect of the said holding as from the next ensuing day [Sept. 29, 1953.] on which the tenancy thereof could be determined by notice to quit given at the date of this demand."

On Sept. 26, 1952, the landlord also applied to the Minister of Agriculture and Fisheries for the appointment of an arbitrator. On Oct. 24, 1952, the Minister appointed an arbitrator

"for the purpose of settling the claims, questions or differences between

the landlord and the tenant of the holding . . . [namely] the rent to be paid for the said holding as from the next ensuing date at which the tenancy could have been terminated by notice to quit given by . . . the landlord of the said holding, at the date of the demand for arbitration made by him to the . . . tenant”.

- A On Nov. 27, 1952, the landlord and the tenant appeared before the arbitrator by their respective agents. On behalf of the landlord it was contended, inter alia, that the arbitrator had jurisdiction to hear and determine the question what rent should be payable in respect of the holding as from Sept. 29, 1950, and that the notice dated Sept. 26, 1952, did not cancel the notice dated Sept. 26, 1949. By letter dated Dec. 6, 1952, the arbitrator informed the landlord and the tenant that he had come to the conclusion that he was required to issue awards in accordance with his appointment, the rents awarded to accrue as from Sept. 29, 1950. The arbitrator, thereupon, stated a Case for the opinion of the court on the question, inter alia, from what date the rent which he should find properly payable should take effect. On this question, the county court judge answered:

- C “This is a matter of contract with which the arbitrator is not concerned. The arbitrator should fix the rent to take effect as from Sept. 29, 1953.”
The landlord appealed.

Binney for the landlord.

C. J. S. French (with him *Cripps*) for the tenant.

Wingate-Saul as amicus curiae.

- D **SIR RAYMOND EVERSHED, M.R.**, stated the facts and continued: The Agricultural Holdings Act, 1948, s. 8, provides:

- E “(1) Subject to the provisions of this section, the landlord or the tenant of an agricultural holding may, whether the tenancy was created before or after the commencement of this Act, by notice in writing served on his tenant or landlord demand a reference to arbitration under this Act of the question what rent should be payable in respect of the holding as from the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of demanding the reference, and on a reference under this sub-section the arbitrator shall determine what rent should be properly payable in respect of the holding at the date of the reference and accordingly shall, as from the day aforesaid, increase or reduce the rent previously payable or direct that it continue unchanged . . . (3) A reference to arbitration under sub-s. (1) of this section shall not be demanded in such circumstances that any increase or reduction of rent made in consequence thereof would take effect as from a date earlier than the expiration of three years from any of the following dates, that is to say . . . (b) the date as from which there took effect a previous increase or reduction of rent . . .”

- G Three dates are referred to in sub-s. (1) as regards each of which it is important to come to a clear conclusion. The first is the date of the demand for a reference to arbitration. The second is “the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of” the demand, which I will call the “termination date”. The third is the date of the reference. In stating them in that order I am not, of course, indicating their chronology, but stating the order in which the dates appear in the sub-section. The demand which is set up in the present case is that contained in the notice of Sept. 26, 1949, and I will assume (though I do not so decide) that that document was a demand within the sub-section. If that is so, then the “termination date”, being “the next ensuing day on which the tenancy could have been determined by notice to quit given” on Sept. 26, 1949, is Sept. 29, 1950. The third date is the date of the reference. What is meant by “the reference”? Counsel for both parties have

conceded that the date of the reference is the date of the effective appointment of an arbitrator—who might, be it observed, be an arbitrator appointed by the Minister. It will, therefore, be seen that since the arbitrator was appointed (and since he accepted his appointment he was effectively appointed) on Oct. 24, 1952, the date of the reference is substantially later than both the date of the “demand” and the “termination date”.

Counsel for the landlord says that there is no express language in this sub-section which indicates that the date of the reference should bear any particular relation to the “termination date” unless it be, as the result of sub-s. (3), that the reference must be within three years after the “termination date”, and he says that, in the absence of express language, the court cannot hold that there is any specific limit of time applicable. I do not agree with that argument. True though it is that unlike other sections there is no express reference to time in sub-s. (1), I think that the necessary and inevitable implication of the language used is that the “termination date” must be after the date of the reference. If the contention of counsel for the landlord were well founded, certain remarkable consequences would follow. If he is right, the arbitrator in the present case is required to fix the rent as operative from Sept. 29, 1950, but by reference to the facts as they were at the date of the reference in 1952. During the whole period covered by this case it is notorious that rents have been rising. If his argument were right, the rent will be fixed by reference to a date when the circumstances were quite different from those which existed when the new rent is to be treated as having taken effect. Counsel for the landlord contends that this is not an extravagant or unfair result, but that, since the rent is fixed for a period of three years, any one date within the three years is as fair or unfair as any other. I cannot accept that. The normal and fair date at which a rent is fixed is the date when it begins to operate. I should have thought it plain that the sub-section is contemplating the rent to be fixed by reference to a fair commencing date. Then, by sub-s. (3), the legislature has said that that rent is to remain stable for three years at least, at the end of which time the matter can be reviewed and a new rent, if fairer than the old one, then fixed.

But I also ask myself this question: If counsel for the landlord is right, what happens when the award is made and the contractual rent increased *ex post facto* to the extent of up to three years?—and it may be more than three years if counsel for the tenant is not entitled to claim the three years’ limit under sub-s. (3). Assuming that the landlord would be able to sue for unpaid rent for the preceding three years, I am not satisfied what the cause of action would be. If rent had been paid in accordance with the contract, the tenant would be entitled to be released from his obligations under the contract. More difficult still would be the situation if the decision went the other way and the arbitrator reduced the rent. By what means would the tenant be able to recover an over-payment? Again, I am not at all clear what the cause of action would be. With all respect to counsel for the landlord, I am satisfied that s. 71 of the Act does not provide the answer. If Parliament intends, as it sometimes does, that a party to a contract shall be entitled to recover something notwithstanding the contractual obligations or notwithstanding what in fact has been paid, Parliament invariably states so in clear terms. Counsel for the tenant has observed that if after three years the contractual rent which he has paid—and on which he has based his accounts—is suddenly to be altered, what is the effect as regards his returns for income tax?

Finally, counsel for the tenant has observed that, if a landlord, having made a request, can delay the effective award for three years, or, perhaps, longer, the tenant is effectually prevented from exercising the corresponding right to demand a reference to arbitration, for, under sub-s. (3) (b), he cannot require a review to take effect earlier than the expiration of three years from the date on which there took effect a previous increase or reduction, and, plainly, an increase or reduction

cannot be said to have taken effect until the award in respect of it has been pronounced.

- These are arguments mainly, perhaps, *ab inconvenienti*, but I think they are not insignificant. They are not, however, the whole matter. I think counsel for the tenant is entitled to point to the use of the tenses in sub-s. (1). The first point made by him is that the question which may be referred is the question: "What rent *should be payable* . . . as from the next ensuing day". *Prima facie*, A those are words of futurity. Instances could, no doubt, be given in which in a statute or other contexts the future "should be" covers also the future perfect "should have been", but in the present case it is to be noted that in the next line the future perfect is stated thus: "on which the tenancy could have been determined". Parliament was, therefore, using these tenses, I think, with care. If counsel for the landlord were right, I should have expected the formula to be B "what rent should be or have been payable". A similar point occurs a few lines further down—"and on a reference under this sub-section the arbitrator shall determine what rent *should be* properly payable in respect of the holding". Finally (and I am not sure that this is not the strongest instance) the sub-section continues: "and accordingly shall, as from the day aforesaid, increase or reduce the rent previously payable or direct that it *continue* unchanged"—not "that it C continue or be deemed to have continued", which strictly should have been said if the argument of counsel for the landlord were right. I think the result of adding to the arguments *ab inconvenienti* these implications from the tenses used is to produce a clear conclusion that in this sub-section Parliament intended that the "termination date" should follow the reference. More than that for present purposes I need not say. In the result, in my opinion, the "demand" of Sept. 26, D 1949, in the present case has ceased to be of any effect.

- For those reasons I think that the county court judge correctly answered the question submitted to him by the arbitrator, and that this appeal should be dismissed. I add only that without doubt it is not open in this court to either party to argue that the appointment of the arbitrator in the circumstances was and is not effective to determine what rent should be payable in respect of E the holding as from Sept. 29, 1953, and the arbitrator should find that rent by reference to the facts as he finds them at the date of the reference, which seems to me to be Oct. 24, 1952.

- DENNING, L.J.: Before the war a landlord could evict an agricultural tenant from his farm after serving on him one year's notice to quit. Now he cannot evict him without the consent of the Minister of Agriculture and Fisheries. F The eviction of a farmer is prohibited, but an increase of rent is not. A landlord can increase the rent to a proper rent, but he has to give one year's notice beforehand. The year's notice must be given for the same day as formerly he would have given the tenant notice to quit. The parties must then within the year either agree on the increased rent, or refer the question to arbitration.

- On the true construction of the Agricultural Holdings Act, 1948, I am in full G agreement with SIR RAYMOND EVERSHED, M.R., that the reference under s. 8 (1) must take place within that year, by which I mean that the arbitrator must be appointed and must accept his appointment within that time. If the arbitrator is not appointed within the year, then the landlord loses his right to increase the rent. But if the arbitrator is appointed within the year, then the arbitrator has to fix the new rent. He must fix it as at the date of the reference, which H means, I think, as at the date of his appointment. He must make his award within six weeks of his appointment unless the Minister extends the time. This means that he will in practice fix the new rent before the new year begins, so that the parties will know where they stand before the first payment of the new rent falls due. The rent having been fixed in that way, under s. 8 (3) it is fixed for the next three years. If either side at the end of the three years wishes to alter the rent, he must give the appropriate one year's notice beforehand. Unless the

Act is given the interpretation which I have stated, great difficulties would ensue which SIR RAYMOND EVERSHED, M.R., has pointed out. The difficulty which strikes me most would arise in the case of a reduction of rent. If it were open to an arbitrator to reduce the rent two or three years after it had accrued due, it would mean that the tenant would have paid the rent, but would not be able to recover the excess because there is no provision in the Act for the repayment of any excess. That is one of many difficulties which has led me to the conclusion that Parliament must be treated as contemplating that the reference should be made within the year. I agree that the appeal should be dismissed accordingly. A

ROMER, L.J.: I also agree. Both the landlord and the tenant are in agreement that the words "the date of the reference" in s. 8 (1) of the Agricultural Holdings Act, 1948, mean the date of the effective appointment of the arbitrator, either by agreement, or, in default of agreement, by the Minister, and I think they are right in that view. The landlord says that the date of the appointment may be at any time during the three years' period with which, in effect, the section is dealing, while the tenant says that it must be before "the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of demanding the reference". Whichever it is, the date of the reference is, perhaps, the most vital date for the purposes of the section because it is according to the values which prevail on that date that the rent for the next period is to be assessed and fixed. I should have thought that that date would be prior to the time from which the new rent was to operate, and not afterwards, partly because that is the ordinary conception to which people subscribe in fixing the rent of tenancies for a term of years, and partly because, once the view is taken that the date of the reference (and, therefore, the date of fixing the rent) may be after the three years' period has started, it follows that it might be at any time during that period, or even possibly after the three years' period has expired. Counsel for the landlord says that that would lead to a fair result and that it may well have been in the contemplation of the legislature because the arbitrator, if he were appointed late during the three years' period, would be better equipped to fix the rent for that period as a whole than if he started off at the beginning, and counsel argues that anyhow there is no ideal way, when there are constantly fluctuating rents, of fixing a fair rent for the whole period. I do not agree. Where, as in the present case, rents are rising, it will obviously be to the advantage of the landlord to have the date of the reference fixed as late as possible during the three years' period so that an artificial rent will be fixed which would operate from the beginning of the period. If, on the other hand, the date of the reference (and, therefore, the date of fixing the rent) is at or just before the beginning of the new period, that new period will start with a rent which presumably is fair and proper at that time. That seems to me to be the contemplation of the legislature. I am fortified in this view when I consider both the difficulties, to which SIR RAYMOND EVERSHED, M.R., referred, which result from the acceptance of the landlord's argument and also the language of sub-s. (1) itself to which my Lord has drawn attention. D E F G

Accordingly, I think that as a matter of necessary implication from the wording of sub-s. (1), the date of the reference must be within the year after the demand in writing has been served, and, therefore, cannot be held to be at some later date after the period started. I agree, therefore, that this appeal fails.

Appeal dismissed. H

Solicitors: *Adams* (for the landlord); *Nye & Donne*, Brighton (for the tenant); *Solicitor, Ministry of Agriculture & Fisheries.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

EALES v. DALE AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
March 2, 3, 1954.]

Rent Control—Premium—Excessive price of furniture—Price exceeding “reasonable price of articles”—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 3 (1) (b).

A The first defendant was the landlord of a dwelling-house containing three floors, each floor being let separately as a furnished flat to which the Rent Restrictions Acts applied. When the second floor flat became vacant the plaintiff desired to become a tenant of that flat unfurnished, and was willing to purchase the furniture, which belonged to the second defendant, the wife of the landlord. On Oct. 17, 1951, the plaintiff and the second
B defendant together made an inventory of the furniture, priced each item, and agreed a price of £500. On Jan. 28, 1952, the plaintiff and the first defendant agreed that, if the tenancy was determined prematurely, the plaintiff would be entitled to a rebate of £150. The plaintiff alleged that a reasonable price for the furniture was £180, and claimed, under s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, the sum of £320 as being
C the excess of the price over “the reasonable price of the articles” within the meaning of s. 3 (1) (b).

HELD: “the reasonable price” in s. 3 (1) (b) was not necessarily the market value, though the latter was an important element in determining the former; whether or not the price was reasonable was a question of fact depending on the relevant, but without regard to extraneous, circumstances, e.g., the desire of the prospective tenant to obtain the tenancy; in the
D circumstances the price was reasonable and the plaintiff’s claim failed.

Per DENNING, L.J.: “The reasonable price” within s. 3 (1) (b) of the Landlord and Tenant (Rent Control) Act, 1949, means the price which is reasonable between the parties for the articles as they are, fitted and situate in the premises, without regard to extraneous circumstances such as the desire of the tenant to obtain a tenancy. It is not the price which
E would be realised if the articles were removed from the premises and sold in an auction room. It is the price which one would reasonably expect to be agreed between an incoming tenant who was ready to take over the articles and an outgoing tenant who was ready to leave them there. The incoming tenant would, no doubt, have regard to the expense to which he would be
F put if he had to buy the articles and fix them himself, making, of course, an allowance for depreciation. The outgoing tenant would have regard to the fact that, if he had to take them out, they would fetch very little. It is obvious that, as between a willing outgoing tenant and a willing incoming tenant, there is room for a good deal of latitude in the ascertainment of the figure, but, if a price were put on the articles which was more than the
G replacement cost, that could not be a “reasonable” price.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 3 (1) (b), see HALSBURY’S STATUTES, Second Edn., Vol. 13, p. 1099.

APPEAL by the plaintiff against an order of His Honour JUDGE REID at West London County Court, dated Oct. 1, 1953.

H By her particulars of claim dated Mar. 26, 1953, the plaintiff claimed from the first defendant, under s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, the sum of £320 on the ground that, as a condition of the grant to the plaintiff of a tenancy of a flat to which the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied, the first defendant required her to purchase certain furniture for the sum of £500; that a reasonable price for the furniture was £180; and that the balance of £320 was a premium within the meaning of s. 3 (1) (b) of the Act. The county court judge dismissed the

plaintiff's claim on the ground that the price of the furniture was not unreasonable.

Boydell for the plaintiff.

D. P. F. Wheatley for the defendants.

SIR RAYMOND EVERSHED, M.R.: The facts as stated by the county court judge are as follows. At all material times the first defendant has been the statutory tenant of a house, 55, Warwick Gardens. He and his wife, the second defendant, live in the basement, and above were three flats which were all let furnished. The plaintiff was the tenant of an unfurnished flat at 57, Warwick Gardens, next door, which was equipped with her own furniture, and when the defendants' second floor flat became vacant, she suggested to the second defendant that she should move there. The second defendant demurred. The flat was furnished, and she said she could not let it unfurnished. However, the plaintiff was persistent, and ultimately, on Oct. 17, 1951, the two ladies met at the flat at No. 55 and made an inventory of the furniture there. When it was completed the second defendant produced such receipts as she had for the price of the articles comprised in it, and, with the assistance of these receipts and of further inspections of particular items, all the items in the inventory were priced. Both ladies then signed and dated it. The county court judge was satisfied that the plaintiff had full opportunity to discuss and criticise the prices.

It seems to me on the findings of the judge that the facts are not the kind of mischief which s. 2 and s. 3 of the Landlord and Tenant (Rent Control) Act, 1949, were designed to remedy. The plaintiff had the advantage of being advised by a solicitor throughout. The defendants were not pressing her to come in. The solicitor advised the plaintiff against her moving and buying this furniture, but she had made up her mind, and nothing would dissuade her. The case contemplated by Parliament is, I think, illustrated by s. 3 (2) of the Act, which says:

"Where after the commencement of this Act any such purchase as is mentioned in para. (a) of the last foregoing sub-section [s. 3 (1) (a)] is required as therein mentioned, the price demanded shall, at the request of the person on whom the demand is made, be stated in writing . . ."

It is also to be noted that by s. 2 (6) a person requiring a premium as a condition of the granting of a tenancy commits a criminal offence, and, if the conditions in s. 3 (1) are satisfied, the payment in the present case is deemed to be a premium. Section 3 (1) reads:

"Where—(a) whether before or after the commencement of this Act the purchase of any furniture, fittings or other articles has been required as a condition of the grant . . . of a tenancy . . . and (b) the price exceeds the reasonable price of the articles, the excess shall be treated, for the purposes of the foregoing provisions of this Act . . . as if it were a premium required to be paid as a condition of the grant . . . of the tenancy."

Counsel for the defendants contended that there had been no requirement, but I think in the circumstances there plainly was, and I am going to proceed on that footing. The vital phrase is that which is contained in s. 3 (1) (b), namely, "the price exceeds the reasonable price of the articles". Counsel for the plaintiff argued that the use of the definite article "the" led to the conclusion that by "the reasonable price" was meant some single standard which must be treated as being the reasonable price, and that, if it were exceeded, whatever the circumstances which gave rise to the excess, then the Act was brought into operation, and he illustrated that contention by suggesting that, if two parties arrived at a price for a desk which the parties reasonably thought was the work of the master, Chippendale, and if later it was found that it was not a genuine antique, the "reasonable price" would be the reasonable price for the article having regard to what it was in fact, so that the excess figure which had been arranged, on the mistake of both parties as to the antiquity of the article, would

be a premium. I cannot accept that view. I think that by the phrase "the reasonable price of the articles" is meant the price which in all the relevant circumstances was the reasonable price for the parties to have agreed. If that be said not to carry the matter further, I think that, at any rate, it is clear that Parliament did not intend to fix or to indicate some single immutable figure. Thus, I agree with the learned judge that if the articles had a market value according to the ordinary use of that phrase, such a market value, though it would have a strong influence in deciding whether the price was reasonable, would not necessarily be conclusive. In the course of his judgment the learned judge said:

"In my judgment 'reasonable price' in s. 3 (1) (b) is not necessarily synonymous with market value, and while, no doubt, the latter is an important element in determining the former, yet in doing so I must also consider the other circumstances of the case".

I agree, subject only to this, that the circumstances of the case must be relevant, that is to say, they do not, I think, include matters foreign to the furniture itself, such, for example, as the situation of the flat or the strong desire of the prospective tenant to get that flat in that area. Questions of that kind, I think, are not relevant to the price of the articles. But, on the other hand, take two illustrations used in the argument. It is relevant that the articles are there in the flat, for a carpet fitted into a room may be worth more as a carpet for that room than if it were taken out and sold for use elsewhere. Again, the furniture, if of a particular kind, may be desirable to a particular tenant, or, again, parties may be ignorant of the value of particular items, and may, dealing with each other fairly, arrive by mutual consent at some method of fixing the value which on some future investigation proves to be wrong. In arriving at a conclusion in this matter these are circumstances legitimate to be taken into account. The truth is, in my judgment, that what is "reasonable" within s. 3 (1) (b) is a question of fact for the judge, just as is the word in other places in this legislation. I can find nothing in the judgment which satisfies me that the learned judge made any error of principle in considering whether or not, as a fact, these figures which the plaintiff and the second defendant worked out item by item were reasonable. In my judgment, and on the findings as I understand them, he did not take into account circumstances that were extraneous to the subject-matter to be considered. Therefore, *prima facie*, if the judge found that this was a reasonable price in all the relevant circumstances, that is a matter of fact which we should not disturb.

[HIS LORDSHIP then dealt with an allegation by the plaintiff that on Jan. 28, 1952, an interview took place between the plaintiff, her then solicitor, and the first defendant at which the solicitor told the plaintiff that, if the first defendant were to die, she would lose her tenancy, and it was then agreed that the furniture was worth about £350, that if the plaintiff lost her tenancy she should have a rebate, and that there should be inserted in the draft memorandum of the tenancy a provision to the effect that, if the tenancy was terminated prematurely, there should be a rebate of £150. Eventually the rebate clause was deleted from the memorandum. HIS LORDSHIP continued:] It seems to me that this court cannot say that the judge was not entitled to find that, notwithstanding this incident, the price of £500 for the furniture in situ was not proved to him to be unreasonable having regard to all the facts, including the significant fact found by the learned judge that these two ladies, the plaintiff and the second defendant, deliberately went through this furniture item by item and priced the items according to the evidence of value which was available to them. I have, therefore, reached the conclusion that we should not disturb the judge's finding, and the appeal will be dismissed.

DENNING, L.J.: "The reasonable price" within s. 3 (1) (b) of the Landlord and Tenant (Rent Control) Act, 1949, means, I think, the price which is reasonable between the parties for the articles as they are, fitted and situate in the premises, without regard to extraneous circumstances such as the desire of the tenant to obtain a tenancy. It is not the price which would be realised if the articles were removed from the premises and sold in an auction room. It is the price which one would reasonably expect to be agreed between an incoming tenant who was ready to take over the articles and an outgoing tenant who was ready to leave them there. The incoming tenant would, no doubt, have regard to the expense to which he would be put if he had to buy the articles and fix them himself, making, of course, an allowance for depreciation. The outgoing tenant would have regard to the fact that, if he had to take them out, they would fetch very little. It is obvious that, as between a willing outgoing tenant and a willing incoming tenant, there is room for a good deal of latitude in the ascertainment of the figure, but, if a price were put on the articles which was more than the replacement cost, that could not be a "reasonable" price. In the present case the parties together made an inventory of the articles. They based their figures on the cost prices, presumably with some allowance for depreciation. I do not think that anyone could say that that was not the reasonable price as between them. The difficulty arises because the judge said that "the market value" would not exceed £350, but what that phrase means in this context I do not know. If it means the realisable value if the goods were taken out and sold in an auction room, that would not be the right test under s. 3 (1) (b). I do not think that this reference to "market value" is sufficient to outweigh the fact that the parties freely fixed the prices without any feeling of constraint or compulsion. I agree that this is not a case in which this court should interfere, and that the appeal should be dismissed.

ROMER, L.J.: I agree, and I respectfully adopt what my brethren have said as to the meaning of the phrase "the reasonable price of the articles" in s. 3 (1) (b) of the Landlord and Tenant (Rent Control) Act, 1949. It is plain that the price for the furniture which was agreed between the plaintiff and the second defendant came within the definition which my brethren have indicated. If the matter had rested there, the plaintiff would have had a hopeless case, but, luckily for her, in the course of the trial the solicitor who had advised her gave some evidence which, although in complete contradiction of the evidence which she herself had given on the same point, provided her with a case without which she would have had nothing to argue about, as I think. I agree that the explanation, accepted by the judge, of the conversation at the solicitor's office was not that the parties were agreeing that the furniture was worth only £350 (which would lead to the conclusion that the additional £150 was a premium), but that the furniture was worth £500 to her as an incoming tenant of the flat, and £350 if she had to move out and sell the furniture.

Appeal dismissed.

Solicitors: *Galbraith & Best* (for the plaintiff); *How, Davey & Lewis* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HENRY v. TAYLOR. TERMER AND OTHERS v. SAME.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Morris, L.JJ.), February 26, 1954.]

Rent Control—Excessive rent—Recovery—Amount recoverable—“Payment of any sum in excess of the rent so entered”—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 4 (1) (a).

A Tenants of furnished rooms for which a rent was entered in the register kept by the local authority under the Furnished Houses (Rent Control) Act, 1946, s. 3 (1), paid for their rooms sums in excess of the registered rent. On a claim by the tenants under s. 4 (2) of the Act for the repayment to them of the total rents paid by them,

B HELD: “payment of any sum in excess of the rent” entered on the register in s. 4 (1) (a) of the Act meant payment of any sum over and above the registered rent; that was the amount of the “payment . . . made . . . in contravention of the foregoing sub-section” referred to in s. 4 (2); and, therefore, under s. 4 (2) the tenants were entitled to recover, not the full amount of the rent paid by them, but only such amount of it as was in excess of the registered rent.

C FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1088.

Case referred to:

(1) *Mauray v. Durley Chine (Investments), Ltd.*, [1953] 2 All E.R. 458; [1953] 2 Q.B. 433.

D APPEAL by the landlord against an order made by CROOM-JOHNSON, J., and dated Nov. 26, 1953.

E By her statement of claim the tenant, Veronica Henry, claimed repayment of the full amount of the rent paid by her to the landlord in respect of premises for which a rent had been registered pursuant to the Furnished Houses (Rent Control) Act, 1946, s. 3 (1). By their statement of claim dated July 23, 1953, the tenants, Jean Termer, Audrey Ingram, and Daphne Graham, likewise claimed repayment of the full amount of the rent paid by them to the landlord in respect of premises for which a rent had been registered. On Nov. 12, 1953, the two actions were consolidated. The landlord agreed that the rent charged was in excess of that registered, and repaid the amount he had received in excess of the registered rent, but he denied that the tenants were entitled to recover the total rent paid. CROOM-JOHNSON, J., held that the landlord was liable to repay the full amount received, and gave judgment for the tenants. The landlord appealed.

Borders for the landlord.

de Ferrars for the tenants.

G SIR RAYMOND EVERSLED, M.R.: It will assist towards a clear statement of my reasoning if I take an imaginary tenant and suppose that in respect of the subject-matter of his tenancy there had been registered a rent of 20s. per week and that the landlord had demanded and received rent at the rate of 25s. per week, 5s. in excess of the registered amount. The question which has arisen in these actions is whether, the landlord having demanded and having received 25s., the tenant could recover, not merely 5s. but 25s. That depends H on the construction of s. 4 of the Furnished Houses (Rent Control) Act, 1946, which gives to the tenant who has been overcharged in respect of rent a statutory right of recovery.

That section, as amended by the Landlord and Tenant (Rent Control) Act, 1949, s. 12 (4), reads as follows:

“(1) Where the rent payable for any premises is entered in the register . . . it shall not be lawful to require or receive—(a) on account of rent for those

premises in respect of any period subsequent to the date of such entry . . . payment of any sum in excess of the rent so entered . . . (2) Where any payment has been made or received in contravention of the foregoing sub-section [sub-s. (1)], the amount thereof shall be recoverable by the person by whom it was made."

It is, then, necessary to ask whether or not there has been a payment "in contravention of the foregoing sub-section". What does that phrase mean? So far, I think, the answer is not difficult. A payment "in contravention of the foregoing sub-section" is what is described as "on account of rent . . . payment of any sum in excess of the rent" entered on the register. I should be disposed to think that the strict construction of those words is payment of the whole amount of 25s., being a sum, in excess of the rent registered, which was paid "on account of rent". But I think it is, alternatively, permissible to construe this language by reading s. 4 (1) (a) to mean "on account of rent . . . payment of any sum over and above (that is, in addition to) the registered rent," namely, the 5s. rather than the 25s. If that is the meaning of s. 4 (1) (a), it necessarily follows that the payment made "in contravention of the foregoing sub-section" was the payment of the additional 5s. only.

Those being the two views and the sub-section being, I think, equivocal in the language which is used, which construction should be preferred? CROOM-JOHNSON, J., adhered to what I have called the strict construction, but, with all respect to him, I have reached the opposite conclusion. In my judgment, the right answer is that for which counsel for the landlord contended, namely, that the phrase "payment of any sum in excess of the rent" means in its context payment, not of a sum greater than, but of a sum over and above, or in addition to, the registered rent. I am led to that conclusion by two considerations. First, it is a well-known maxim of the construction of statutes that the court should prefer a construction which appears more consonant with justice and reason and tends against anything likely to lead to an absurd result. If counsel for the tenants is right, it will follow that a tenant who has overpaid can recover, not merely the overpayment, but the whole of the rent paid. What will be the effect of that? Counsel for the tenants was disposed to concede that, since in the event supposed the tenant would have occupied the premises without paying any rent at all, and, indeed, occupied under an unlawful contract, he would be unable to resist an application for possession. I am not saying that that is correct. Another possible view would be that the tenant, having recovered the full sum paid, would then be liable to be sued under the contract of tenancy for the proper rent, which would result in the tenant recovering the excess previously paid by him. Either alternative seems to me to be an extravagant conclusion to flow from the sub-section as counsel for the tenants has construed it. I would add this further observation. I follow perfectly that a rent which has been registered should be well known to the landlord. He may (but not necessarily will) have been a party to the application to the rent tribunal. Certainly he will not be able to plead ignorance of what the tribunal has fixed. Counsel for the tenants contends that Parliament deliberately put a severe sanction on adherence by landlords to the appropriate rent as fixed by the tribunal. That is an intelligible view for Parliament to have taken, but there is no doubt that the sanction or penalty attached would be exceedingly severe. As I have already explained, if counsel for the tenants is right, a tenant who over a substantial period, as happened in the present case, overpaid would, throughout that period, have occupied rent free. I should have expected that, if Parliament had intended for the first time to impose so severe a penalty, it would have made the intention plain, as could have been done by drafting sub-s. (2) as follows: "Where any payment has been made in contravention of the foregoing sub-section [sub-s. (1)], the whole amount of the rent shall be recoverable by the person who has made the payment". It is not to be forgotten that there is another penalty available

against the landlord, for, under s. 9 (1), a landlord who has received an excessive rent may be, as, indeed, the landlord in this case was, fined as for a criminal offence. To impose this further penalty on the landlord and to give to the tenant, as it seems to me, an unjustifiable advantage, is, I think, an extravagant conclusion.

The second consideration concerns other relevant sections, both of this Act and of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. So far as the Act of 1946 is concerned, I have already mentioned s. 9 (1) which provides that a person who requires or receives any payment in contravention of s. 4 shall be guilty of an offence, and that, without prejudice to any other method of recovery, the court by which he is found guilty may order the amount paid to be repaid. Counsel for the landlord relied on that to support his view of the construction of s. 4, but for my part I do not think s. 9 (1) carries the matter any further. The amount which the court may order under s. 9 (1) to be paid is the payment made in contravention of s. 4 and thereby you are thrown back on the construction of s. 4 (1) (a). But assistance is derived from the Act of 1920. Four sections are relevant. Sections 1 and 14 relate to increases of rent in respect of premises not being furnished houses. Section 1 reads:

“ . . . where the rent of any dwelling-house to which this Act applies . . . has been . . . increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall . . . be irrecoverable from the tenant . . . ”

Section 14 (1) provides the correlative right of the tenant, and reads:

“ Where any sum has . . . been paid on account of any rent . . . irrecoverable by the landlord . . . the sum so paid shall be recoverable from the landlord . . . who received the payment . . . ”

The formulae used in those two sections make it, I think, plain that the tenant can recover from the landlord, not the full amount of the excessive rent, but only so much of it as is in excess. Similarly, s. 9 and s. 10 deal with furnished houses, and are more, therefore, in *pari materia* with the sections under review in the present case. Section 9 deals with the civil rights of the parties and s. 10 with the penalty. Section 9 (1), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, provides:

“ Where . . . it is proved to the satisfaction of the county court . . . that the rent charged is yielding . . . a profit in excess of the normal profit . . . the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum . . . shall be repaid to the tenant ”.

By s. 10, as amended by s. 3 (1) of and sched. I to the Act of 1939 and s. 10 (2) of the Rent and Mortgage Interest (Restrictions) Act, 1923, it is provided that where the rent charged yields a profit which, having regard to the circumstances of the case, is extortionate.

“ then, without prejudice to any other remedy . . . the landlord shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order that the rent so far as it exceeds the amount permitted by the last preceding section of this Act [s. 9] shall be irrecoverable and that the amount of any such excess shall be repaid to the tenant . . . ”

It is true, as counsel for the tenants observed, that in s. 4 of the Act of 1946 the formulae have been altered; he argues that they have been deliberately altered so as to create for the first time a right in the tenant to recover, not merely the overpayment, but the whole rent paid including, but not limited to, the amount of the excess. If such an alteration had been intended, I think that Parliament would have said so more clearly, but it is to be noticed that Parliament in this complex legislation which has covered a long period of years has not been

consistent in the formulae which it has chosen. The formulae in s. 1 of the Act of 1920 are not the same as the formulae in s. 9 (1), though the effect is substantially the same. In s. 9 (1) the phrase is used "the amount of any payment of rent in excess of such sum . . . shall be repaid". That is substantially the same as in s. 4 (1) (a) and s. 4 (2) of the Act of 1946. True, in the former case it is used in a context which makes plain its limited significance and is not the same context as we have to consider in the present case, but it does seem to me to show that the phrase "payment of rent in excess of" may equally mean either the total payment which is excessive or such amount of the total payment as constitutes the excess. The draftsman of the Act of 1946 may well have had s. 9 (1) of the Act of 1920 in mind when drafting the statute of 1946, but, however that may be, I think the Act of 1920 tends to show that the use of the language in the Act of 1946 should not be treated as intentionally and deliberately meaning that for which counsel for the tenants has contended.

Although the matter is a short question of construction, it is not easy to deal with it without elaboration, which may in the end confuse. It is, of course, a question of reading the language used in its context, and arriving at a conclusion as to what is meant. As I have tried to show, I think the phrase "payment of any sum in excess" in s. 4 (1) (a) means payment of such sum as constitutes an overcharge to the extent that it is greater than the rent registered, in other words, on my hypothetical figures, 5s. and not 25s. For these reasons I think this appeal should be allowed.

DENNING, L.J.: Where there is a fair choice between a literal and a reasonable interpretation, the reasonable interpretation should always be chosen. Applying that rule here, it seems to me plain that the amount which the tenant can recover is only the amount of the excess. He cannot recover the proper rent. Even when a landlord stipulates for an excessive rent, the tenancy is not void. The landlord is liable to a penalty imposed by the criminal courts under s. 9 (1) of the Act of 1946, and in addition he has to repay the excess, but he does not suffer the additional penalty of forfeiting the proper rent. I agree that the appeal should be allowed.

MORRIS, L.J.: I agree.

Appeal allowed.

Solicitors: *F. R. Earle* (for the landlord); *S. H. White* (for the tenants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re CHURSTON SETTLED ESTATES. FREEMANTLE AND
ANOTHER v. CHURSTON (BARON) AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 14, 15, 19, 20, 1954.]

Power of Appointment—Special power to appoint—Joint power—Exercise with consent.

A By a re-settlement dated May 24, 1895, it was provided, inter alia, that the settled estates should remain and be held to such uses and on such trusts and in such manner generally as A and B from time to time, during the life of C with C's consent in writing, by deed revocable or irrevocable should jointly appoint. By a deed dated Mar. 22, 1898, A and B, with the consent of C, directed and appointed that the settled estates should be held on such uses and trusts and in such manner generally as C, A and B should from time to time or at any time by deed revocable or irrevocable jointly appoint, and, in default, as C and the survivor of A and B should in like manner jointly appoint. In 1910 A died, and in 1923 B and C made a joint appointment on certain uses. The question arose whether the limitations affecting the settled estates by virtue of the said appointment and subsequent appointments were void as transgressing the rule against perpetuities, and it was agreed that that depended on whether the instrument exercising the relevant power of appointment must be read into and be deemed part of the re-settlement.

B

C

D HELD: (i) the original joint power of A and B to appoint with the consent of C was a special power and, therefore, the instrument by which it was exercised must (as was agreed in the event of the power being special) be read into the re-settlement.

(ii) the joint power of (in the events) B and C was likewise a special power with similar consequences.

Re Watts ([1931] 2 Ch. 302), followed.

Dicta of JAMES, L.J. (1877) (2 Ex.D. 412), in *A.-G. v. Charlton* and of LORD SELBORNE (1879) (4 App. Cas. 446) in *Charlton v. A.-G.*, applied.

E Statement in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 2, p. 1049, disapproved.

DAVIDSON'S PRECEDENTS AND FORMS IN CONVEYANCING, 3rd ed., vol. 3, p. 1042, criticised.

F AS TO GENERAL OR SPECIAL POWERS, see HALSBURY, Hailsham Edn., Vol. 25, p. 511, para. 926; and FOR CASES, see DIGEST, Vol. 37, pp. 384-386, Nos. 3-13.

Cases referred to:

- (1) *Re Watts*, [1931] 2 Ch. 302; 100 L.J.Ch. 353; 145 L.T. 520; Digest Supp.
- (2) *Re Dilke. Re Dilke's Settlement Trusts*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 Digest 416, 256.
- (3) *Re Phillips*, [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178; Digest Supp.
- G (4) *A.-G. v. Charlton*, (1877), 2 Ex.D. 398; 46 L.J.Ex. 750; 37 L.T. 211; *affd.*, *H.L. sub nom. Charlton v. A.-G.*, (1879), 4 App. Cas. 427; 49 L.J.Q.B. 86; 40 L.T. 760; 37 Digest 110, 428.

H ADJOURNED SUMMONS to determine whether, on the true construction of a re-settlement dated May 24, 1895, the settled estates were held (subject to certain prior charges and incumbrances) (a) on such trusts and in such manner generally as the present Lord Churston and the defendants, Eric John Wykeham Ellis, Alastair Urquhart and Rowland Marriott, should by deed jointly appoint and in default of and subject thereto on trust for the present Lord Churston during his life or until forfeiture and after his death on trust for the defendant, John Francis Yarde-Buller, during his life or until forfeiture with divers remainders over, or (b) on trust for the present Lord Churston for a beneficial and indefeasible estate in fee simple in possession, or (c) on some other and if so what trusts.

By a re-settlement dated May 24, 1895 (hereinafter called "the principal deed") and made between the Right Honourable John Baron Churston, of the first part, the Right Honourable Barbara Baroness Churston, of the second part, the Honourable John Reginald Lopes Yarde Buller, of the third part, Frederick John Blake, of the fourth part, and Sir Morton Edward Manningham Buller and Sir Thomas George Freahe, of the fifth part, after reciting that the Churston settled estates thereby re-settled then stood limited to the use of Frederick Blake during the life of John Baron Churston in trust for Barbara Baroness Churston (hereafter called "Lady Churston") and subject thereto to the use of John Reginald Lopes Yarde Buller in fee simple, Frederick John Blake as to the life estate of John Baron Churston and by direction of Lady Churston thereby conveyed and Lady Churston as to the life estate thereby conveyed and confirmed and John Baron Churston confirmed and John Reginald Lopes Yarde Buller as to the remainder in fee simple expectant on the determination of the life interest granted and conveyed to the parties of the fifth part (hereafter called "the original trustees") settled estates to be held in fee simple on certain declared uses. It was provided that the estates conveyed remain and be on such uses and trusts and in such manner generally as John Baron Churston and John Reginald Lopes Yarde Buller should from time to time or at any time (but during the life of Lady Churston only with her consent in writing) by deed or deeds revocable or irrevocable jointly appoint and in default of appointment to declared uses during the joint lives of John Baron Churston and John Reginald Lopes Yarde Buller, with remainder as therein mentioned during the lives of Lady Churston and John Baron Churston, with remainder to John Reginald Lopes Yarde Buller for life, with remainder to his first and other sons successively according to seniority in tail male, with remainders over. The original trustees or other trustees for the time being of the principal deed were appointed trustees for all purposes of the Settled Land Acts, 1882 to 1890.

John Baron Churston, Lady Churston and John Reginald Lopes Yarde Buller were the grandfather, grandmother and father, respectively, of the present Lord Churston, the first defendant.

By a deed dated Mar. 22, 1898, made between John Baron Churston and John Reginald Yarde Buller, of the first part, Lady Churston, of the second part, and the original trustees and the Honourable Sir Henry Yarde Buller, of the third part, John Baron Churston and John Reginald Lopes Yarde Buller, in exercise of the joint powers of appointment vested in them by the principal deed and with the consent of Lady Churston appointed that the settled estate comprised in the principal deed should go and remain to such uses and on such trusts and in such manner generally as Lady Churston, John Baron Churston and John Reginald Lopes Yarde Buller should from time to time or at any time by deeds revocable or irrevocable jointly appoint, and, in default of and subject to any such appointment, as Lady Churston and the survivor of John Baron Churston and John Reginald Lopes Yarde Buller should in like manner appoint, and, in default of and subject to any such appointment, to certain uses during the lives of John Baron Churston, Lady Churston and John Reginald Lopes Yarde Buller, with remainder to the uses by the principal deed limited which followed the limitation to the use of John Reginald Lopes Yarde Buller for life therein contained. The trustees were to be trustees under the Settled Land Acts, 1882 to 1890.

On Nov. 30, 1910, John Baron Churston died, whereupon John Reginald Lopes Yarde Buller became Baron Churston (hereinafter called "the late Lord Churston").

By a deed dated Aug. 16, 1923, made between Lady Churston and the late Lord Churston, of the one part, and Sir Henry Yarde Buller and Sir Mervyn Edward Manningham Buller as trustees, of the other part, Lady Churston and the late Lord Churston in exercise of the power contained in the deed of Mar. 22, 1898, jointly appointed that the estates should go and remain to such uses and

on such trusts and in such manner generally as Lady Churston and the late Lord Churston should from time to time or at any time by deed or deeds revocable or irrevocable jointly appoint, and in default of and subject to any such appointment as the late Lord Churston and Sir Henry Yarde Buller if (as happened) they both survived Lady Churston should from time to time by deed or deeds revocable or irrevocable executed after the death of Lady Churston jointly appoint and in default of and subject to any such appointment to the use of Sir Henry Yarde Buller and Sir Mervyn Edward Manningham Buller for a term of ninety-nine years if the late Lord Churston should so long live on the trusts therein declared and subject thereto to the use of the late Lord Churston for life. Lady Churston died on Oct. 1, 1924.

A By a vesting deed dated July 21, 1926, made between Sir Henry Yarde Buller and Sir Mervyn Edward Manningham Buller, as trustees, of the one part, and the late Lord Churston, of the other part, the settled estates were vested in the late Lord Churston in fee simple on the trusts and subject to the powers and provisions on and subject to which the same ought to be held. The trustees were appointed trustees for all purposes of the Settled Land Act, 1925.

B By a deed-poll dated Dec. 13, 1927, the late Lord Churston and Sir Henry Yarde Buller, in exercise of the power conferred by the deed of Aug. 16, 1923, C appointed that the property then subject to the joint power should go, remain and be held on such trusts and generally in such manner as the late Lord Churston, Sir Henry Yarde Buller, Montague Ellis and Cecil Montague Jacomb Ellis should from time to time by deed or deeds revocable or irrevocable jointly appoint, and in default of, and subject to, any such appointment as the late Lord Churston and the survivors of Sir Henry Yarde Buller, Montague D Ellis and Cecil Montague Jacomb Ellis should in like manner jointly appoint, and, in default, on the trusts and subject to the powers and provisions on and subject to which the estates were held before the execution of these presents other than the joint power of appointment conferred on the late Lord Churston and Sir Henry Yarde Buller by the deed of Aug. 16, 1923. Both Montague Ellis and Cecil Montague Jacomb Ellis were alive at the date of the principal E deed. Sir Henry Yarde Buller died on Mar. 15, 1928.

By a deed-poll dated Mar. 11, 1930, the late Lord Churston, Montague Ellis and Cecil Montague Jacomb Ellis, in exercise of the joint power of appointment vested in them by the deed of Dec. 13, 1927, appointed that the property then subject to the joint power should (subject to such appointments as might thereafter be made in exercise of the joint power) after the death of the late F Lord Churston be held on such trusts and in such manner generally as the defendant, the Right Honourable Richard Francis Roger Baron Churston (the eldest son of the late Lord Churston and hereafter called "the present Lord Churston"), and Montague Ellis and Cecil Montague Jacomb Ellis should from time to time by deed or deeds revocable or irrevocable (to be executed after the death of the late Lord Churston) jointly appoint, and in default on trust for the present Lord Churston for life (on protective trusts) and on his death for his G first and other sons successively according to seniority in tail male with remainder on trust for the Honourable John Reginald Henry Yarde Buller (second son of the late Lord Churston) for life (on protective trusts) with remainders over. Provision was made for the tenants for life to appoint jointures and portions.

H By a deed-poll dated Mar. 13, 1930, the late Lord Churston, Montague Ellis and Cecil Montague Jacomb Ellis, in exercise of the powers conferred on them by the deed of Dec. 13, 1927, appointed and declared that after the death of the late Lord Churston the Churston settled estates should be charged with an annual sum for John Reginald Henry Yarde Buller on protective trusts for his life.

The late Lord Churston died on Apr. 19, 1930, and thereupon the present Lord Churston, who was born on Feb. 12, 1910, became entitled to the barony. By a

vesting assent dated Aug. 20, 1931, the trustees assented to the vesting in the present Lord Churston in fee simple of the estates comprised in the vesting deed of July 21, 1926, on the trusts contained in the settlement therein mentioned and the deed of Mar. 11, 1930.

By an appointment and charge dated Jan. 4, 1933, which was an appointment made in consideration of a marriage shortly after solemnised, the present Lord Churston, in exercise of a power conferred on him under the deed of Mar. 11, 1930, appointed that all the real estate subject to the trusts of the principal deed and the deed of Mar. 11, 1930, be held by the trustees for a term of eight hundred years to raise certain portions for the younger children of the marriage. The marriage was dissolved on Dec. 10, 1943, and there was issue thereof, the second defendant, John Francis Yarde Buller, born on Dec. 25, 1934, and the Honourable Nicole Yarde Buller, born Mar. 11, 1936. A

By an appointment dated July 15, 1940, the present Lord Churston, Montague Ellis and Cecil Montague Jacomb Ellis, in exercise of the joint power of appointment vested in them by the deed of Mar. 11, 1930, appointed the property subject to the power to be held on the trusts declared in the deed on Mar. 11, 1930, but with certain modifications therein set out, namely, that after the death of the present Lord Churston the property should be held on such trusts and in such manner generally as Montague Ellis, Cecil Montague Jacomb Ellis and the fourth defendant, Alastair Urquhart, or the two survivors of them should during the minority of the second defendant (the eldest son of the present Lord Churston) from time to time by deed or deeds revocable or irrevocable (to be executed after the death of the present Lord Churston) jointly appoint, but if the second defendant should be living such power not to be exercised without his consent in writing and in default on certain trusts. On Feb. 5, 1942, Cecil Montague Jacomb Ellis died. B

By an appointment dated May 26, 1942, the present Lord Churston and Montague Ellis, in exercise of the joint power of appointment vested in them by the deed of Mar. 11, 1930, appointed that the property subject to the power should be held on such trusts and in such manner generally as the present Lord Churston and Montague Ellis, the fourth defendant (Alastair Urquhart), the fifth defendant (Rowland Marriott) and Henry Francis Chappe Donnell (which last four persons are hereafter called "the nominated persons") should from time to time by deed or deeds revocable or irrevocable jointly appoint, and in default of and subject to such appointment as the present Lord Churston and the three survivors, or two survivors, or the last survivor, of the nominated persons should jointly appoint, and in default on the trusts contained in the deed of Mar. 11, 1930, as modified by the deed of July 15, 1940, but subject to further modifications, and to the intent that after the execution of the present appointment the joint power of appointment by the deed of Mar. 11, 1930, conferred on the present Lord Churston and Montague Ellis should be no longer exercisable. It was provided that the third defendant, Eric John Wykeham Ellis, should be substituted one of the nominated persons in certain events (which happened). On Oct. 7, 1948, Montague Ellis died, and on July 10, 1949, Henry Francis Chappe Donnell died. C

The plaintiffs were the present trustees for the purposes of the Settled Land Act, 1925, of the principal deed and subsequent deeds of Mar. 22, 1898, and Mar. 11, 1930. E

On May 7, 1953, the present Lord Churston executed a disentailing assurance. The deed recited that a doubt had arisen whether for the purposes of considering and applying the rule against perpetuities the joint power of appointment contained in the principal deed was a general power or a special power and whether the deed of Mar. 11, 1930, or any subsequent deed was operative to cut down or prejudicially affect the estate in tail male which was (in the events which happened) limited to the present Lord Churston by the principal deed F

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and that if he were now tenant in tail male in possession of the estate now subject to the trusts of the present deed he desired to disentail.

J. V. Nesbitt for the trustees.

Russell, Q.C., and *E. I. Goulding* for the first defendant, Lord Churston, claiming to be entitled to a beneficial and indefeasible estate in fee simple.

Milner Holland, Q.C., and *G. C. D. S. Dunbar* for the second defendant, who was concerned to uphold the validity of the appointments.

A *M. J. Fox* for the third, fourth and fifth defendants, whose interests were similar to the interest of the second defendant.

ROXBURGH, J.: By a re-settlement made on May 24, 1895, of certain estates it was provided inter alia that the hereditaments and premises should remain and be to such uses and on such trusts and in such manner generally as John Baron Churston, who was the grandfather of the present Lord Churston, and John Reginald Lopes Yarde Buller, who was the father of the present Lord Churston, from time to time or at any time (but during the life of Lady Churston, who was the grandmother of the present Lord Churston, only with her consent in writing) by deed or deeds revocable or irrevocable should jointly appoint. There were other uses declared in default of appointment. By a deed dated Mar. 22, 1898, those persons on whom that joint power of appointment had been bestowed, with the consent of Lady Churston, directed and appointed that the settled estates should be held on such uses and on such trusts in such manner generally as the said Lady Churston, the said John Baron Churston and the said John Reginald Lopes Yarde Buller should from time to time or at any time by deeds revocable or irrevocable jointly appoint, and uses were declared in default of appointment. On Nov. 30, 1910, John Baron Churston died, and thereupon John Reginald Lopes Yarde Buller became Lord Churston. By a deed dated Aug. 16, 1923, and made between the said Lady Churston, the then Lord Churston and certain other parties, Lady Churston and Lord Churston in exercise, as the deed states, of the said power contained in the said deed dated Mar. 22, 1898, made a joint appointment of the settled estates on certain uses.

E The question is whether certain limitations affecting the settled estates infringe the rule against perpetuities. It is common ground that the answer to that question depends on whether appointments under the powers which I have mentioned have to be read back into the original settlement for the purpose of applying the rule against perpetuities or not. So far counsel in their very helpful argument have agreed, and I, therefore, need not set out all the limitations or further discuss them. There are two further areas of agreement. I mention them before I plunge into the not well-lighted seas. First of all, it is common ground that if the powers of appointment are what are commonly known as special powers in which the field of dispositivees is plainly limited, then the instrument exercising the power has to be read back into the instrument creating the power for the purpose of applying the rule. On the other side of the troubled area is the other area of common ground. If the power of appointment is a general power in the ordinary acceptation of the term under which A has the power to appoint the property to whomsoever he pleases, then the instrument exercising the power need not be read back into the original settlement for the purpose of applying the rule. But I have to deal with two powers which are not in the normal acceptation of the term either special or general, and the question which I have to determine, and I must deal with each of them separately, at any rate up to a certain point, is whether they more nearly approximate to normal special powers or to normal general powers. I think that, if BENNETT, J., had not decided *Re Watts* (1) in the manner in which he did, I should have felt bound to reserve my judgment.

H It will be remembered that the two powers I have read differ in this respect—the first one is a joint power of appointment with the consent of a person who is

not a donee of the power, and the second one is a joint power of appointment without any additional consent. In my judgment, the first of those powers cannot possibly be distinguished from the power in *Re Watts* (1), except in a manner detrimental to the case advanced on behalf of the second defendant. The only difference is that in *Re Watts* (1) A had the power with the consent of B, whereas in our case A and B have the power with the consent of C, and that cannot make it better from the point of view of the second defendant.

I consider, therefore, that, in regard to the first power, the matter is covered A by that decision which is binding on me. But counsel has pressed me hard about the decision of BENNETT, J., in *Re Watts* (1), and I think I ought, in deference to his argument, to refer to it in my judgment. In *Re Watts* (1) the facts were these. A marriage settlement contained a clause empowering the wife at any time during the life of her mother by deed to revoke (with the consent of her mother) the trusts declared by the settlement, and to appoint and declare B (with the consent of her mother) any new or other trusts, powers and provisions concerning the premises to which such revocation should extend. BENNETT, J., held that that power was a special power. There certainly is a serious difficulty in accepting all the reasoning of BENNETT, J. For some reason, which I have not appreciated, he thought it necessary to distinguish a decision by the Court of Appeal in *Re Dilke. Re Dilke's Settlement Trusts* (2), and a decision by MAUGHAM, C J., in *Re Phillips* (3). I have been unable to discover why either of those cases solves the present problem, but if it was necessary for BENNETT, J., to distinguish them, I cannot recognise the force of the grounds of distinction which he felt able to find. He said that in interpreting the language used in the settlement one must have regard to the fact that it is a settlement made in consideration of marriage. I must confess that I cannot think why. I cannot think that for D the purpose of applying the rule against perpetuities a power to appoint as A thinks fit with the consent of B can have a different effect according to whether it is in a marriage settlement or in any other settlement. Again, BENNETT, J., says ([1931] 2 Ch. 306):

"It is also material, in interpreting the language used in the instrument, E to have regard to the fact that the power of revocation and new appointment is restricted in point of time to the lifetime of Mary Abbott [the mother]".

There, again, with all respect, I cannot agree. That, of course, shows that the power is limited in duration, but a power to A to appoint to anybody he thinks fit during the life of B would be a general power of the common kind, though it could not be exercised after the death of B; by the terms of its creation it would F thereupon cease to be a power at all. Likewise, a power to A to appoint to anybody he might think fit during a period of twenty-one years would appear to me to be a general power of the common kind, though obviously it could not be exercised after the expiration of the term of twenty-one years. Certain cases on which counsel for the second defendant relied seem to me to fall into the same group. Suppose that there was a power to appoint by will only. A power to G appoint by will only is, of course, not a power to appoint at any time. That is quite clear. The power can be exercised at any time, but the operation of its exercise cannot take place until the death of the person having the power. On his death, if the power is to appoint to anybody whom the donee thinks fit, it is a general power of the common kind. The limitation "by will" is not a limitation on the nature of the power, but is a limitation on the point of time H at which it becomes operative. So that I cannot accept the distinction which BENNETT, J., drew. He said that regard must also be had to the fact (*ibid.*) of

"... her consent in writing being given both to the exercise of the power of revocation and to the exercise of the power of new appointment".

Again, I cannot appreciate the bearing of that. The two things are different. I, therefore, cannot say that I can see any real ground of distinction on those

facts between *Re Watts* (1), and *Re Dilke* (2) and *Re Phillips* (3). As far as I can make out, neither *Re Dilke* (2) nor *Re Phillips* (3) really threw any particular light on the question. That is not the whole of the judgment of BENNETT, J., but it is, I think, the part which led Mr. FARRER astray in the learned note which is to be found, and is expressly attributed to him, in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 2, p. 1049. Mr. FARRER first of all says:

- A "A power to two or more to appoint as they think fit is a general power for the purpose of the rule."

He cites no authority for that, and before the end of this judgment I shall be compelled to say that I cannot accept that undocumented dictum. Mr. FARRER continues (*ibid.*):

- B "A power to X to appoint generally but with the consent of Y, will be general or special for the purpose of the perpetuity rule, according to whether on the true construction Y has merely a bare veto on an appointment, or is under duty to consider the beneficial interests which X proposes to appoint, and the interests of those who take in default of appointment; if he has such duty the power is special."

- C I must confess that that distinction, which, no doubt, is based on the part of the judgment of BENNETT, J., to which I have already referred, is one that is, as far as I can see, without any authority to support it. BENNETT, J., goes on in his judgment ([1931] 2 Ch. 306):

- D "It seems to me that it would not be right to hold that, upon the terms of the powers contained in the marriage settlement which I have to construe . . . [the daughter] was in substance the owner of the property, and consequently free to deal with it in any way she pleased."

That seems to me to be the fundamental basis of the decision, and that seems to me to be in accordance with authority. Therefore, far be it from me to suggest that the decision was wrong, but right or wrong, I am bound by it.

- E Counsel for the second defendant, while arguing that the first power of appointment might escape the net of the decision of BENNETT, J., really based his main submission on the proposition that at any rate it did not cover the second of the two powers, and as a matter of decision that is, undoubtedly, true. Therefore, I have to try to spell out of the authorities if I can the true underlying principle of the distinction which is clearly recognised and admitted. In my judgment, it is correctly stated by BENNETT, J., in the passage that I have read (*ibid.*):

- F "... was in substance the owner of the property, and consequently free to deal with it in any way she pleased."

One must put in the words "in substance" or "practically", because even a person having a general power of appointment is not quite in the same position as an owner. True he can give to anybody he likes in his lifetime. True he

- G can dispose of the property by will without referring to the power at all provided that he makes a residuary gift, but he may make a will which contains no residuary gift, or more probably, he may make no will at all, and in those circumstances the property will go as in default of appointment. So, as I have said, it is not absolutely true that even a person having a common general power of appointment is in quite the same position as an owner. Still, I think that the basis of the

- H doctrine is that he is treated as though he were for all practical purposes the owner. Ought that to be applied to a joint power of appointment or to a power of appointment to which the consent of somebody is required? It would be very strange if, while the decision of BENNETT, J., stood, a joint power of appointment were held to be equivalent for all practical purposes to ownership because in the case of each of those powers consent of another person is required, and I cannot see that it makes any difference whether the consent required is that of a

person not a donee of the power or whether it is the consent of one of the donees of the power. A joint power of appointment is very much further away from ownership than is a general power of appointment vested in an individual. It is quite true that joint donees of a power of appointment may make the property their own, and counsel says, if that is so, why should it be necessary for them to go through the formal step of doing so. They certainly did not in this case; on the contrary, they purported to be exercising the power, not to be dealing with property which they had made their own. But, says counsel, why should one draw a distinction?

I think counsel for the first defendant was right when he said that, if they do make the property their own, some very different consequences may ensue. I need not investigate the question of estate duty, but if there had been an antecedent agreement for valuable consideration it might operate to sever, and in bankruptcy there might be questions, and all sorts of different consequences might ensue. I do not consider the question whether in fact they do so, for it is not necessary in this case, but such consequences might ensue. It is not a distinction without a difference.

I might have felt more difficulty about the case than I do but for what I think I ought to describe as dicta of great authority, one in the Court of Appeal and the other in the House of Lords, in *Charlton v. A.-G.* (4). I say at once that this is not a decision on the point that I have to decide, but the court had to consider a problem not unlike that which I have to consider, though, admittedly, a different problem. According to the headnote (2 Ex.D. 398):

"S., tenant for life in possession, and W., his eldest son, tenant in tail in remainder, of certain estates, by deed of Mar. 22, 1854, barred the entail, and settled the estates to such uses as they should jointly appoint."

In default, by certain trusts for certain uses. It was held in the Court of Appeal by three members of the court, one dissenting, that the successions—this was a succession duty case—were derived from the donors of the power and not from the persons exercising the joint power of appointment. In the course of discussing the question, JAMES, L.J., said (*ibid.*, 412):

"A joint power of appointment is, in my opinion, an entirely different thing in intention and practical operation from a general and absolute power of appointment in one individual. In the latter case it is really and practically the equivalent of property—when exercised the property becomes assets. In the other case, it is what it purports to be—a form of remoulding a settlement according to the exigencies of the family."

That is a dictum of quite general application.

LORD SELBORNE in the House of Lords in his speech says something which starts by being restricted to taxation, but before its conclusion becomes of quite general application also. He says (4 App. Cas. 446):

"If, however, the substance of the first branch of the section [of the Succession Duty Act, 1853] is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation."

So far it is obviously limited to taxation. Then he says (*ibid.*):

"That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds: the one donee having, and the other not having, an interest to be displaced by its exercise."

Then comes something which, I think, is of general application (*ibid.*):

"Nothing could well be conceived more unreasonable, in a practical point of view, than to treat a joint power like that now in question, in a

family settlement, as equivalent in substance to joint property in the two donees”.

- I take great comfort from those passages for two reasons. First of all, it has been pointed out by counsel for the second defendant and conceded by counsel for the first defendant that, if my decision is right, then there is in that well-honoured book of precedents by DAVIDSON, PRECEDENTS AND FORMS IN CONVEYANCING, 3rd ed., vol. 3, p. 1042, a precedent which infringes the rule against perpetuities. The precedent has disappeared sub silentio; it is not to be found in any modern book of precedents. On the other hand, no explanation of its disappearance has ever been offered. Even so, but for this passage I might have been loth to assume that in the course of time the precedent had been buried by conveyancers themselves, but the precedent in DAVIDSON exactly fits that description given by LORD SELBORNE, and I have no doubt whatever that, having regard to what is said there, if he had been asked to consider the relevant precedent in DAVIDSON he would have said that it infringed the rule against perpetuities. Secondly, while this is not a decision on the question which I have to determine, it is a decision on what seems to me to be a very similar question. After all, what is the underlying broad principle of the rule against perpetuities? It is that property should not be tied up beyond a certain period of time. If the property ceases to be tied up, or, in other words, if it is at home in a beneficial owner, then the mischief of the rule is avoided. Therefore, it seems to me only reasonable to suspect that the reason why a general power of appointment in the ordinary sense starts a new settlement and has not to be read back into the original settlement is because the property is treated as being at home in the donee of the general power, though it is not quite strictly accurate to say that it is at home; or, in other words, that the test really is: Is there somebody who for all practical purposes can be treated as the owner? If that is the test, the next question is: Can a joint donee of a power be for all practical purposes treated as an owner? It seems to me that both JAMES, L.J., and LORD SELBORNE repudiated that conception, and, in those circumstances, I certainly would not be prepared to differ from the decision of BENNETT, J., in *Re Watts* (1), or to try to draw some distinction between the case which he decided and the case of the joint power of appointment. They are different, but, in my judgment, no distinction should be drawn between them.

Order accordingly.

Solicitors: *Ellis, Peirs & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

LLOYDS BANK, LTD. v. MARGOLIS AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), February 26, 1954.]

Bank—Charge to secure account—Legal charge—Payment under charge to be made on demand—Limitation of action on charge—Accrual of cause of action—Limitation Act, 1939 (c. 21), s. 4 (3), s. 18 (4).

On Sept. 16, 1936, a bank took a legal charge (subject to a prior mortgage) secured on a farm owned by A as security for A's overdraft on current account. The charge provided that A "hereby covenants with the bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due owing or incurred from or by [A] to the bank or for which [A] may be or become liable to them on any current or other account or in any manner whatever . . . together with interest . . . (such interest being computed both before and after any such demand . . .)". A as beneficial owner thereby charged the farm with the payment to the bank of the money, liabilities and interest thereby covenanted to be paid by him. On Sept. 19, 1936, the legal charge was registered as a land charge. On June 24, 1938, A contracted to sell the farm to B. On Dec. 19, 1938, the bank gave notice in writing to A pursuant to the legal charge requiring repayment of the money due on his banking account. In 1944 by a vesting order the farm was vested in B subject to incumbrances. On Nov. 29, 1950, the bank issued an originating summons to enforce its security on the farm by foreclosure or sale. It was objected that the claim was statute-barred because in the case of advances made before the date of the charge time ran from the date of the charge, and as regards subsequent advances time ran from the dates of the advances.

HELD: the true construction of the legal charge was that the making of a demand was a condition precedent to recovery of the money secured thereby, and, therefore, time ran from the date of the demand and the claim was not barred.

HELD, further: the legal charge was collateral security and, therefore, even if no demand was necessary to the bringing of an action on a direct present debt payable on demand, in the present case a demand would be necessary.

Rule stated by CHITTY, J., in *Re Brown's Estate* ([1893] 2 Ch. 304), and dictum of DENNING, L.J., in *Barclays Bank, Ltd. v. Beck* ([1952] 1 All E.R. 553), applied.

AS TO WHEN TIME BEGINS TO RUN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 603-607, 660-663, paras. 757-761, 846-848; and FOR CASES, see DIGEST, Vol. 32, pp. 328, 329, 337, 338, 409, Nos. 142-152, 213-219, 875-878.

Cases referred to:

- (1) *Re Brown's Estate*, [1893] 2 Ch. 300; 62 L.J.Ch. 695; 69 L.T. 12; 32 Digest 338, 219.
- (2) *Brighty v. Norton*, (1862), 3 B. & S. 305; 32 L.J.Q.B. 38; 7 L.T. 422; 122 E.R. 116; 12 Digest, Replacement, 488, 3662.
- (3) *Norton v. Ellam*, (1837), 2 M. & W. 461; 6 L.J.Ex. 121; 150 E.R. 839; 32 Digest 329, 148.
- (4) *Birks (Berks) v. Trippet (Trippet)*, (1666), 2 Keb. 126 (84 E.R. 80); 1 Wms. Saund. 28, 32 (85 E.R. 32); 1 Sid. 303 (82 E.R. 1121); 1 Digest 56, 461.
- (5) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; Digest Supp.
- (6) *Barclays Bank, Ltd. v. Beck*, [1952] 1 All E.R. 549; [1952] 2 Q.B. 47; 3rd Digest Supp.

ADJOURNED SUMMONS dated Nov. 29, 1950, under R.S.C. Ord. 55, r. 5A, to enforce by foreclosure or sale a legal charge dated Sept. 16, 1936, made between the third defendant, George John Lyster, of the one part, and the plaintiff,

Lloyds Bank, Ltd., of the other part. The bulk of the land charged was, at the date of the issue of the summons, vested in the second defendant, Reginald George King, but small areas thereof were vested or thought to be vested respectively in the first and the third defendants. The facts appear in the judgment.

Sir Lynn Ungood-Thomas, Q.C., H. A. Rose and Owen Swingland for the plaintiff, Lloyds Bank, Ltd.

A *Wigglesworth* for the first and second defendants, Morris Margolis and Reginald George King.

The third defendant, George John Lyster, did not appear.

UPJOHN, J.: This is an originating summons issued by Lloyds Bank, Ltd., to enforce by foreclosure or sale a legal charge dated Sept. 16, 1936, between the third defendant, George John Lyster, and the bank, whereby a farm known as B Winterslow Farm was charged with repayment of the sums due on the third defendant's overdraft with the bank.

The facts are a little complicated. The legal charge, as I have said, was executed on Sept. 16, 1936. It was registered pursuant to the Land Charges Act, 1925, on Sept. 19, 1936. It was a second mortgage, being subject to a mortgage to the Agricultural Mortgage Corporation to secure £7,200. Nearly C two years later, on June 24, 1938, the first defendant, Mr. Morris Margolis, contracted with the mortgagor, the third defendant, to purchase the mortgaged premises for £10,000 free from incumbrances. There is some little doubt whether that contract excluded some $7\frac{1}{2}$ acres from the whole premises, but I propose to ignore that. The farm was a large one of some 950 acres, and substantially D the contract extended to the whole of that farm. The date fixed for completion was Sept. 29, 1938, but completion did not take place on that day, for reasons which I shall mention in a moment. The contract between the first defendant and the third defendant was registered pursuant to the Land Charges Act, 1925, s. 10 (1), as an estate contract on Oct. 14, 1938. On Dec. 19, 1938, the bank gave notice to the third defendant, demanding repayment of the moneys due on his E banking account. The notice was in writing and it demanded £3,188 14s. 7d., together with interest from June 30, 1938, amounting to £93 17s. 11d.

As there was still £7,200 due to the Agricultural Mortgage Corporation and there was over £3,000 due to the bank, the purchase money was insufficient to discharge those two mortgages, and the third defendant could not complete the sale. On Dec. 13, 1938, the first defendant took action against the Agricultural F Mortgage Corporation to prevent them from selling the property, as they were threatening to do, in exercise of their powers as mortgagees. The result was, putting it shortly, that on Dec. 23, 1938, the first defendant took a transfer to himself of that first mortgage on payment to the Agricultural Mortgage Corporation of £7,211 7s. 5d.

The first defendant instituted proceedings for specific performance against G the third defendant and he obtained an order for specific performance on May 2, 1939. The accounts and inquiries duly proceeded, in the absence of the third defendant, who has not been heard of since about 1939. On Dec. 19, 1944, the first defendant obtained an order in the action vesting the farm in him expressly subject to the two mortgages, i.e., the former Agricultural Mortgage Corporation mortgage then vested in the first defendant and subject H to the legal charge in favour of the bank, it being recited that the amount due thereunder was in excess of the purchase price. The first defendant, by the order, undertook to indemnify the third defendant against any liabilities under the incumbrances, but only to the extent of the amount of the purchase money and interest payable after deducting costs.

On Mar. 2, 1950, the first defendant contracted to sell Winterslow Farm to the second defendant, Mr. Reginald George King, and on Sept. 27, 1950, the farm was duly conveyed to Mr. King, discharged from the first mortgage but

expressly subject to the bank's legal charge. Therefore, leaving out of account the odd few acres of land which I have already mentioned, the position in 1950 was that the second defendant was the beneficial owner in possession subject to the bank's legal charge. The first defendant has agreed to indemnify the second defendant against the bank's legal charge if that remains enforceable, but I am not directly concerned with that.

On Nov. 29, 1950, the bank issued a summons, the summons which is before me, claiming to enforce their mortgage. The amount now due is, of course, very substantial. The amount due for principal is £2,684 and for interest £1,954. The defendants say that the legal charge is no longer enforceable against the defendants or any of them, because the remedy is barred by the Limitation Act, 1939, and that is really the whole point I have to consider.

I must now turn to the legal charge and read the relevant clauses. I can start with the operative part, cl. 1 of which provides:

"The mortgagor [the third defendant] hereby covenants with the bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due owing or incurred from or by the mortgagor to the bank or for which the mortgagor may be or become liable to them on any current or other account or in any manner whatever (whether alone or jointly with any other person and in whatever name style or firm) together with interest to date of repayment commission banking charges law and other costs charges and expenses (such interest being computed both before and after any such demand according to the usual mode of the bank with current accounts and that notwithstanding any account hereby secured may from any cause cease to be carried on as an ordinary banking account and so that interest shall be payable at the rate so provided as well after as before any judgment obtained hereunder) "

Clause 2 provided:

- (i) The mortgagor as beneficial owner hereby charges by way of legal mortgage all and singular the property mentioned or described in sched. I hereto with the payment to the bank of the principal money liabilities interest and other money hereby covenanted to be paid by the mortgagor subject to a prior charge particulars of which are set out in sched. II hereto.
- (ii) In favour of a purchaser the principal money hereby secured shall be deemed to have become due on the day on which demand for payment thereof is made by the bank and the statutory power of sale as hereby extended shall be exercisable from and after that date which date (without prejudice to the equitable right to redeem) shall be the redemption date "

I do not think I need refer to any other clause except cl. 8, which provides that the total amount recoverable is not to exceed £4,000 exclusive of interest at the current rate from six months prior to the date of demand for repayment of the moneys and liabilities thereby secured.

This is an action for foreclosure or sale, and by the Limitation Act, 1939, s. 18 (4), it is provided:

"Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action "

Turning, then, to s. 4, I need only read the relevant part of sub-s. (3):

"No action shall be brought by any . . . person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person "

I have to determine what is the date on which the right to bring a foreclosure action first accrued to the bank. The rival contentions are these. The bank says that the time runs for twelve years from demand. That was Dec. 19, 1938,

and, therefore, they are just in time. The defendants, however, say that the time runs, in the case of advances made before the date of the deed, from the date of the deed, and in the case of subsequent advances, it runs from the date of the subsequent advances, and, as no claim is made to any advance made after Oct. 14, 1938, when the bank received notice of the contract between the first defendant and the third defendant, all of those sums have become irrecoverable, and, therefore, there is no debt in respect of which an action to foreclose can be brought.

I turn back to cl. 1 of the legal charge, and, apart from all authority, it seems to me that the construction of this clause is too plain to admit of argument. It expressly provides that the covenant between the mortgagor and the bank is to pay to the bank "on demand" all money and liabilities which were then or at any time thereafter might be due. I do not see how that can be construed, purely as a matter of construction, as anything else than a covenant to pay on demand, and, therefore, *prima facie*, it seems to me that the plaintiffs' claim is right. But what is said by counsel for the defendants is that the authorities show that where there is a covenant to pay on demand, it is not necessary, or it is not a condition precedent to the issue of a writ, that there should be a demand, but in fact time runs from the date of each advance. He referred me to *Re Brown's Estate* (1). In that case the mortgagee agreed to lend and did lend to the mortgagor, Alfred Brown, £3,000 on the security of certain property. In the mortgage deed Alfred Brown and his father, John Brown, entered into a joint and several covenant that they would, on demand, pay to the said Mr. Perry, his executors, administrators and assigns, £3,000. That was in 1867. No demand was made against the father's estate, John Brown having died, till July, 1889, and it was held that the mortgagee could come in and prove his claim against the father's estate without, of course, disturbing dividends already distributed. It was argued that it was unnecessary to make a demand, and that, therefore, the time ran from the execution of the mortgage. CHITTY, J., said ([1893] 2 Ch. 304):

"Now, for those interested in the testator's estate it is said that the meaning of the words 'on demand' is the same as that which has been attributed to them in promissory notes and the like. The law is quite settled that, with regard to the promissory note payable on demand, no demand is necessary before bringing an action; and indeed the Statute of Limitations begins to run from the making of the note".

He then refers to certain cases and considers whether the fact that the time runs from the date of the promissory note is part of the law merchant or whether it is part of the general law. After considering *Brighty v. Norton* (2) and *Norton v. Ellam* (3), he continues his judgment as follows beginning with a quotation from the judgment of PARKE, B., in *Norton v. Ellam* (3) (4 M. & W. 464):

" 'I entertain no doubt at all on this point' that is about the Statute of Limitations running from the date of the note. 'It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action'. That is a general proposition and not one based upon the law merchant; and, without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought. I think the distinction which I have mentioned, is sufficiently pointed out in *Saunders' argument in Birks (Berks) v. Trippet (Tripett)* (4), which was accepted by the whole of the court, the judges having been apparently

somewhat impatient at the learned counsel labouring his argument to the extent he did ”.

He then considers the construction of the instrument and comes to the conclusion that on its true construction it meant what it said; it was a payment on demand, and, therefore, no demand having been made against the father's estate until 1889, time did not run until that date. I find the judgment a little difficult to follow, for this reason. The learned judge came to a construction of the joint and several covenant in the case of John Brown. If the passages I have read meant that the learned judge, had it been necessary to determine the matter, would have given a different construction to those very same words in the case of the same covenant by Alfred Brown, I would respectfully disagree with him. As he pointed out, it is always a question of construction in each case.

In my judgment, where there is the relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge which provides that the money which is then due or is thereafter to become due is to be paid “on demand”, that means what it says. As between the customer and banker, who are dealing on a running account, it seems to me impossible to assume that the bank were to be entitled to sue on the deed on the very day after it was executed without making a demand and giving the customer a reasonable time to pay. It is, indeed, a nearly correlative case to that decided in *Joachimson v. Swiss Bank Corpn.* (5), where the headnote was this ([1921] 3 K.B. 110):

“Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent ”.

In this case the agreement has provided quite clearly what is to be done before the bank can sue. They must demand the money.

Counsel for the plaintiff also submits, and I think rightly, that if necessary the case is concluded in his favour on the ground that this legal charge is a collateral security, and, therefore, it falls within the rule stated by CHITTY, J., in *Re Brown's Estate* (1). I agree with that submission. I think it is clear that where there is a banker's charge, a charge in the ordinary form as between a banker and a customer, to secure a running account, that must be treated as a collateral security. I need only refer to the judgment of DENNING, L.J., in *Barclays Bank, Ltd. v. Beck* (6). The question there was whether by the execution of a charge under the Agricultural Credits Act, 1928, there was a merger of the simple contract between the bank and its customer. It was held that there was no merger. DENNING, L.J., said ([1952] 1 All E.R. 553):

“The distinction is clearly shown by considering the difference between a mortgage debt to a building society and a charge to a bank to secure a running account. The mortgage debt to a building society is created under and by virtue of a deed and is a specialty debt from its commencement, but a future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it which includes a covenant under seal. The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment ”.

I think on that ground, too, the plaintiff succeeds, but I prefer to rest my judgment on the broader ground which I have already discussed. Accordingly, there must be an order to enforce the security.

Order accordingly.

Solicitors: *Cameron, Kenn & Co.* (for the plaintiff); *Woodcock, Ryland & Co.* and *Darley, Cumberland & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor, Devizes* (for the first and second defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

FRANCE v. PARKINSON.

[COURT OF APPEAL (Somervell, Birkett and Morris, L.JJ.), March 4, 5, 1954.]

*Highway—Negligence—Collision at cross-roads—Roads of equal status—
—Inference that both drivers equally to blame—Car hired from plaintiff
by driver—Plaintiff's right to recover full damages from defendant.*

A On May 19, 1951, the plaintiff's and the defendant's motor cars were in collision at cross-roads, both roads being of equal status. The collision took place in the middle of the cross-roads, and each car was on the right side of its road. At the time of the accident the plaintiff's car was being driven by X to whom the plaintiff had hired his car. In a claim by the plaintiff for damages for negligence against the defendant,

B HELD: in the absence of special circumstances, where there was a collision at cross-roads, both roads being of equal status, the inference to be drawn was that both drivers had been equally negligent; the plaintiff was in the position of an innocent passenger; and, as he could establish negligence on the part of the defendant, he was entitled to recover full damages.

Case referred to:

C (1) *Baker v. Market Harborough Industrial Co-operative Society, Ltd.*, (1953), 97 Sol. Jo. 861.

APPEAL by the plaintiff from an order of CROOM-JOHNSON, J., dated Dec. 3, 1953.

D In the early hours of May 19, 1951, the plaintiff's and the defendant's motor cars were in collision at cross-roads, the roads being of equal status. From the evidence of a police officer who arrived after the accident it appeared that the cars collided in the middle of the cross-roads which were described as "spacious", and that each car was on the right side of its road. At the time of the accident the plaintiff's car was being driven by one calling himself Fitzgerald, to whom the plaintiff had hired the car and who disappeared immediately after the accident. The plaintiff was unable to trace him, and could not, therefore, E call him as a witness. At the trial, the police officer, who gave evidence on behalf of the plaintiff, said that the defendant made the following statement: "I was coming along the road and we met in the middle". After the plaintiff had concluded his case, alleging negligence on the part of the defendant, counsel for the defendant submitted that there was no case to answer and called no evidence. F The learned judge held that the plaintiff had not proved negligence against the defendant and gave judgment for the defendant. On appeal, counsel for the plaintiff submitted that, the cars having collided in the middle of the cross-roads, the inference to be drawn was that both drivers were to blame, but that the plaintiff was in the position of an innocent passenger and was entitled, therefore, to full damages as against the defendant.

G *P. M. O'Connor* for the plaintiff.
Croom-Johnson for the defendant.

H **SOMERVELL, L.J.:** The plaintiff's claim was for damage to his motor car which was involved in a collision with the defendant's motor car in the early hours of May 19, 1951, at the cross-roads where Tower Bridge Road crosses Abbey Street, London. The crossing is some twenty yards across from east to west and rather less from north to south. Neither of the roads, which were of equal status, had a "slow" sign or "halt" sign. The plaintiff had hired his car to a man calling himself Fitzgerald who disappeared after the accident. The plaintiff was, therefore, unable to call him at the trial. The plaintiff called a police officer who was on the scene after the accident happened and from whose evidence it is reasonably plain that both cars were on the right sides of their roads, and that they collided where the two roads meet. The policeman, when asked whether the defendant made a statement to him, said: "Yes, the

defendant said, 'I was going along the road and we met in the middle' ". The defendant elected to call no evidence, the learned judge dismissed the plaintiff's claim, and the plaintiff appeals.

The type of problem which arises here arose in a recent case, *Baker v. Market Harborough Industrial Co-operative Society, Ltd.* (1). In that case there had been a head-on collision between two vehicles, both drivers had been killed, and the two widows sued the employers of the deceased drivers. One case came before ORMEROD, J., who held that the plaintiff had not proved her case. The other case came before SELLERS, J., who held that the balance of probabilities was that both were to blame, and he awarded the widow fifty per cent. of her damages. We held that that was right, reversing ORMEROD, J., on that point. Each case turns on its own facts, but I would have said that in the case of a collision at cross-roads where both roads were of equal status, in the absence of special circumstances the balance of probabilities was in favour of both drivers having been negligent. Particularly I should say that was so here, having regard to the position of the cross-roads in the present case and also the statement made to the police officer by the defendant. It is possible, of course, that a man who is driving very slowly, and keeping a careful look out, may suddenly be run into by a car travelling at, say, seventy miles an hour, but, if that had happened, the statement made to the police officer would have been on different lines.

Counsel for the defendant sought to raise in this court the question whether it was the hirer who was driving the car—whether it might not have been delivered back to the plaintiff and been driven by one of his servants. We ruled that that point could not be taken, and the case proceeded on the basis that the car was being driven by the hirer. In those circumstances it is not disputed that the plaintiff was in the same position as a passenger, and, therefore, even if the driver of the car had been negligent, so long as the plaintiff can establish some negligence on the defendant's part he could claim all his damages. I think, therefore, there was a prima facie case against the defendant on which the court should have found him negligent in the absence of any evidence given by him. The damages, I think, have been agreed. Therefore, in my opinion, the appeal should be allowed and judgment entered for the agreed amount.

BIRKETT, L.J.: I agree. Each of these cases must, of course, be decided on its own facts, and the facts, as we know them, have been detailed by my Lord in outline. The principal feature in this case is that at the time when this accident happened these two roads, although unequal in width, could be regarded as of equal status. The cross-roads, as shown on the plan, are very spacious, and in the ordinary way one would think that, if people exercised ordinary care, an accident would not take place there. We only know that a collision did take place between two motor cars at that wide and spacious cross-roads. I should have thought that on those facts there was a prima facie case that both the drivers were negligent. In any event, I am satisfied that there was a prima facie case of negligence against the defendant.

This, as I say, was a spacious crossing. We have heard the evidence concerning the position of the cars and I attach very considerable importance to the fact that the police constable gave evidence that after the accident the defendant said: "I was coming along the road and we met in the middle". The expression used by a defendant immediately after an accident where he has suffered some wrong at the hands of another driver is usually very different from that. The customary thing one hears is: "The man came at a furious rate and gave me no chance". The defendant was available to give evidence and did not do so. If there is, as I think there is, prima facie evidence of negligence on the part of the defendant and he chooses to make no attempt to show he was not negligent, I think an adverse inference must be drawn against him. The plaintiff was strictly in the position of a passenger in the car, and it was enough for him to prove negligence against the defendant even if it were not the whole of the

negligence. I think, in those circumstances, that the plaintiff was entitled to recover the agreed damages against the defendant and the appeal ought to be allowed.

MORRIS, L.J.: I also agree. The car belonging to the plaintiff was involved in a collision at cross-roads and it was established that whoever was driving the plaintiff's car was not driving as the servant or agent of the plaintiff. The facts that were before the court, in my judgment, amounted to very much more than the mere fact that there had been a collision between the two motor vehicles. My Lords have referred to the evidence which was before the court. There was the evidence as to the plan, the nature of the cross-roads, and the damage done to the two motor cars, and of the statement made by the defendant. Although the interrogatories do not give much assistance it might, perhaps, be worth while referring to the eighth interrogatory and the answer to it.

"Q.—Identify the position of your Rover motor car in relation to the said road junction at the moment when you first saw the said Ford motor car. A.—I say that the Rover motor car [i.e., the defendant's car] was very slightly on the junction."

In my judgment, the evidence which was before the court was sufficient to establish a prima facie case that there was negligence in the defendant, and that was sufficient in this case to avail the plaintiff if that prima facie case was never displaced. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

R. v. REITER AND OTHERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Slade and Gerrard, J.J.), March 15, 1954.]

Criminal Law—Obscene publications—Test of obscenity—Comparison with other books.

On the trial of an indictment for publishing an obscene libel the test of obscenity laid down in *R. v. Hicklin* (1868) (L.R. 3 Q.B. 371), is to be applied today. In determining whether or not a book is obscene regard must be had to that book alone. Other books, which have not been the subject of charges, cannot be referred to.

Dicta of the Lord Justice-General (LORD COOPER) in *Galleitly v. Laird. M'Gown v. Robertson* (1953 S.C. (J.) 27), adopted.

Cases referred to:

(1) *R. v. Hicklin*, (1868), L.R. 3 Q.B. 360; 37 L.J.M.C. 89; *sub nom. R. v. Wolverhampton (Recorder)*, 18 L.T. 395; *sub nom. Scott v. Wolverhampton J.J.*, 32 J.P. 533; 15 Digest 748, 8070.

(2) *Galleitly v. Laird. M'Gown v. Robertson*, 1953 S.C. (J.) 16.

APPEALS against conviction and sentence.

The appellants, Julius Reiter, Reginald Herbert Carter, Gaywood Press, Ltd., New Fiction Press, Ltd., and Arc Press, Ltd., were convicted on Jan. 19, 1954, before the Recorder of London and a jury at the Central Criminal Court of publishing an obscene libel. Reiter and Carter were each sentenced to six months' imprisonment, and Gaywood Press, Ltd., New Fiction Press, Ltd., and Arc Press, Ltd., were each fined £2,000.

Christmas Humphreys for the appellants, Reiter and Gaywood Press, Ltd. Howard, Q.C., and *Christmas Humphreys* for the appellants, Carter, New Fiction Press, Ltd., and Arc Press, Ltd.

J. M. G. Griffith-Jones for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellants were convicted before the Recorder of London and a jury of publishing an obscene libel. The indictment contained seven counts relating to seven books.

This appeal is brought entirely on the summing-up of the learned recorder. Let me say at once that the learned recorder's summing-up was, perhaps, to a certain extent, rather more rhetorical than one could have wished, but he evidently felt strongly, and it is very difficult for a judge to control his feelings when he is dealing with stuff such as there is in this appeal. I do not wonder that he spoke strongly. It would have been better if he had reminded the jury in so many words that it was entirely for them to say whether these were obscene libels or not, but he did say more than once that, if they had any doubts about the matter, they should acquit, and they could, of course, have acquitted in respect of some counts and not others. He wrote down for the jury the definition of obscenity and told them to consider the case from that point of view. The classic definition, delivered by COCKBURN, C.J., in the Queen's Bench in 1868, in *R. v. Hicklin* (1), was (L.R. 3 Q.B. 371):

"... the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall".

We are being asked to upset these convictions because something was not said about the standards of today. The learned recorder said, and this court entirely agrees with him, that the law is the same now as it was in 1868, and, indeed, counsel for the appellants (Mr. Howard) has not sought to say differently. If that is the test, the jury today have to consider whether, today, these books have a tendency

"to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall".

When considering whether books have a tendency to deprave and corrupt, everybody's mind goes to the depraving or corrupting of young people into whose hands they may fall. There may be dirty-minded elderly people, no doubt, but it is not to be expected that many elderly people would read this stuff. Younger people would, however, and we are told that these books circulate in the armed forces. The jury have to consider whether or not, looking at these books as a whole, people would be corrupted. I can well understand that, nowadays, novelists and other writers mention things which they would not have mentioned in the reign of Queen Victoria, but it is one thing to discuss a subject and quite another to discuss it and write about it in the way in which these books deal with it. It seems to me idle to contend that these books are not of the tendency which COCKBURN, C.J., described in 1868.

I desire to say a word about a matter of law which arises with regard to this case. It appears that, in the course of the trial, a large number of other books were produced and the jury were asked to look at those other books to decide whether these books were obscene. That seems to me to be absolutely wrong, and in the course of the hearing of this appeal the learned registrar handed to me *Galletly v. Laird. M'Gown v. Robertson* (2), in which matters relating to obscene literature were discussed. They were prosecutions under the Burgh Police (Scotland) Act, 1892, s. 380 (3), and the Glasgow Corporation Order Confirmation Act, 1914, s. 21, but the principles which the court was laying down there are the same as those applicable here. The Lord Justice-General (LORD COOPER), who gave the leading judgment, said (1953 S.C. (J.) 26):

"... I am not dismayed by the idea that the opinion of the magistrate before whom the case is brought is virtually determinative of the question whether the books or pictures libelled are or are not indecent or obscene.

Once it is understood that the emphasis falls to be laid upon the second of the elements defined above, it seems to me to be not only intelligible but inevitable that the character of the offending books or pictures should be ascertained by the only method by which such a fact can be ascertained, viz., by reading the books or looking at the pictures. The book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities; and if in any case the magistrate's decision is challenged, the only method by which an appellate tribunal could determine whether the magistrate was entitled to reach the conclusion which he did would be by examining the book or picture, not with a view to re-trying the case but solely with a view to discovering whether they revealed evidence on which a reasonable magistrate would be entitled to condemn them as indecent or obscene".

A

B

Later on, and I hope that this will be noticed because, in our opinion, it states the law equally in England as it is in Scotland, he says (*ibid.*, 27):

C

D

"The magistrate disallowed cross-examination by the complainer's solicitor and positive evidence tendered for the defence designed to show that books other than those referred to in the complaint circulated freely in Paisley and were available in the local public library, the suggestion apparently being that these other books were not materially different in character from those complained of. I consider that the magistrate's ruling was right. The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books, or listening to the opinions of other people with regard to these other books".

E

From time to time questions have been raised in prosecutions relating to obscene literature as to what the law is with regard to evidence of comparison, and so forth. The opinion of the High Court of Justiciary, as delivered by the Lord Justice-General in the case to which I have just referred, puts the matter, in my opinion, as well as it can possibly be put, and this court desires to adopt every word of it. It will be understood, I hope, in future, where there are these prosecutions, whether they are brought under the Obscene Publications Act, 1857, s. 1, which deals with the sale of obscene literature, or for the offence of publishing an obscene libel, that that is the law, equally in this country as it is in Scotland.

F

G

As I have said, the only possible ground of criticism is that the learned recorder's summing-up put the matter strongly, but we cannot say that there was a misdirection of the jury, though it would have been better if he had used some other expressions than those he did use. But he did leave the matter to the jury, and having, as an appellate court, examined these books in the way the Lord Justice-General says, it seems to me that, if the jury had returned a different verdict, although we could not have interfered with it, we could fairly have said it was a perverse verdict. Accordingly, this appeal is dismissed.

H

With regard to the sentences, the learned recorder took the view that this was a serious case and deserving of a sentence of imprisonment. It is high time that the publication of this stuff should be dealt with in such a way that persons offending in like manner will know the view of the court. We cannot say that the sentences passed by the learned recorder in any way erred in principle, and, therefore, the appeals against sentence are also dismissed.

Appeals dismissed.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the appellants, Reiter and Gaywood Press, Ltd.); *Gerald Samuels & Co.* (for the appellants, Carter, New Fiction Press, Ltd., and Arc Press, Ltd.); *Director of Public Prosecutions.*

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re T. W. CONSTRUCTION, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), March 1, 1954.]

Company—Winding-up—Avoidance of disposition of property after commencement of winding-up—Bank overdraft to enable company to carry on its business—Advances made before and after service of petition—Companies Act, 1948 (c. 38), s. 227.

On Mar. 25, 1952, W., managing director of a limited company, produced to a bank, at which the company had a current account, documentary credits relating to the export of machinery by the company and asked for a temporary overdraft of £1,000, to be cleared by Apr. 15, 1952. The credits were to be collected by L. & Sons and applied in discharge of the overdraft. On Apr. 9, 1952, W. explained to the bank that the credits had been extended to Apr. 26, 1952, and asked for the overdraft facilities to be extended to that date, which the bank agreed to do. For a similar reason, on May 2, 1952, the overdraft was extended until May 15, 1952, and also the amount was increased to £1,200. On May 7, 1952, a petition was presented for the compulsory winding-up of the company. At that date the company was indebted to the bank for £803 11s. On May 9, 1952, the amount of the overdraft debt was increased by a cheque drawn for the payment of wages amounting to £165. On the same day W. informed the bank that he was going abroad on business, and that L. & Sons would be collecting a credit expiring on May 20, 1952, and would be paying to the bank between £1,200 and £1,300. The overdraft facilities were extended until the money should be received through L. & Sons. The petition was advertised on May 13 and May 14, 1952. On May 16, 1952, when the overdraft stood at £1,142 2s. 10d., W.'s co-director obtained permission from the bank to draw a wages cheque for £100, and the cheque was drawn on May 20, 1952. On May 21, 1952, when the overdraft stood at £1,368 8s. 10d., £1,308 6s. 10d. was paid to the credit of the company's account at the bank by L. & Sons. The bank did not become aware of the petition until May 22, 1952. On June 23, 1952, the company was ordered to be wound-up, and the liquidator claimed repayment from the bank of £1,308 6s. 10d. The registrar ordered the bank to repay £803 11s. (being the amount of the overdraft when the petition was presented). On appeal,

Held: on the facts, the overdraft was arranged for the express purpose of enabling the company to continue to carry on its business and its creation was a transaction for the benefit of and in the interests of the company and, therefore, in the exercise of its discretion under the Companies Act, 1948, s. 227, the court would declare that the whole of the payment to the bank was valid, there being no ground for distinguishing between the amount of the debit existing at the date of the presentation of the petition and the amount by which it was increased thereafter.

Dictum of LORD CAIRNS, L.J., in *Re Wiltshire Iron Co. Ex p. Pearson* (1868) (3 Ch. App. 446), applied.

Re Liverpool Civil Service Assn. Ex p. Greenwood (1874) (9 Ch. App. 511) and *Re Civil Service & General Store, Ltd.*; (1887) (57 L.J.Ch. 119), distinguished.

AS TO DISPOSITION OF PROPERTY AFTER COMMENCEMENT OF WINDING-UP, see HALSBURY, 1949 Edn., Vol. 5, p. 714, para. 1156; and FOR CASES, see DIGEST, Vol. 10, pp. 864, 865, Nos. 5834-5841.

FOR THE COMPANIES ACT, 1948, s. 227, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 646.

Cases referred to:

- (1) *Re Steane's (Bournemouth), Ltd.*, [1950] 1 All E.R. 21; 2nd Digest Supp.
- (2) *Re Repertoire Opera Co., Ltd.*, (1895), 2 Mans. 314; 10 Digest 865, 5839.

- (3) *Re Wiltshire Iron Co. Ex p. Pearson*, (1868), 3 Ch. App. 443; 37 L.J.Ch. 554; 18 L.T. 38, 423; 10 Digest 864, 5834.
- (4) *Re Park Ward & Co., Ltd.*, [1926] Ch. 828; 95 L.J.Ch. 584; 135 L.T. 575; Digest Supp.
- (5) *Re Liverpool Civil Service Asscn. Ex p. Greenwood*, (1874), 9 Ch. App. 511; 43 L.J.Ch. 609; 30 L.T. 451; 10 Digest 829, 5403.
- A (6) *Re Civil Service & General Store, Ltd.*, (1887), 57 L.J.Ch. 119; 58 L.T. 220; 10 Digest 865, 5838.

MOTION to discharge an order made on Jan. 27, 1954, by a registrar that Barclays Bank, Ltd., repay to the liquidator of T. W. Construction, Ltd., £803 11s., being part of £1,308 6s. 10d. paid to the credit of the banking account of the company on May 21, 1952, and for a declaration that the payment of the whole sum of £1,308 6s. 10d. to the said bank ought to be treated as valid and that the bank should be at liberty to retain the whole of the said sum.

T. W. Construction, Ltd. (hereinafter called "the company") was incorporated under the Companies Act, 1929, as a private company limited by shares to carry on the business inter alia of dealers in plant and machinery of all kinds. On Apr. 2, 1946, the company opened a current banking account with Barclays Bank, Ltd. On Mar. 25, 1952, the company's account being in credit to the extent of £148 9s. 8d., Mr. Weininger, the managing director of the company, called at the bank, produced to it documentary credits relating to the export by the company of machinery, and requested a temporary overdraft of £1,000, such overdraft to be cleared by Apr. 15, 1952. The said credits were to be collected by Messrs. Leopold Joseph & Sons and applied in discharge of the company's overdraft. On Apr. 4, 1952, the bank confirmed the overdraft. On Apr. 9, 1952, Mr. Weininger informed the bank that the credits had been extended to Apr. 26, 1952, and requested that the overdraft facilities should be extended to that date. On May 2, 1952, Mr. Weininger informed the bank that the credits had been further extended to May 15, 1952, and it was agreed that the company's overdraft be increased to £1,200, such overdraft to be cleared by May 15, 1952.

On May 7, 1952, a petition was presented for the winding-up of the company, and at that date the company was indebted to the bank for £803 11s. On May 9, 1952, the overdraft at the bank was increased by a wages cheque for £165, and on this date Mr. Weininger stated to the bank that he was going to the United States of America on business, and, further, that the machinery, the subject of the documentary credits, would be shipped on May 14, when the bills of lading would become available, and Messrs. Leopold Joseph & Sons would be collecting under a credit expiring on May 20, 1952, and would be paying over between £1,200 and £1,300. On that information the bank agreed to extend the overdraft facilities until the proceeds should be received through Messrs. Leopold Joseph & Sons.

On May 13, 1952, the petition to wind-up the company was advertised in the "London Gazette" and on May 14, 1952, in "The Times" newspaper. On May 16, 1952, Mrs. Humphries, a co-director and secretary of the company, obtained permission to draw a cheque for £100 for wages and on May 20, 1952, that cheque was drawn. On May 21, 1952, £1,308 6s. 10d. was paid to the credit of the company's account at the bank by Messrs. Leopold Joseph & Sons. The bank did not become aware of the petition to wind-up the company until May 22, 1952, when the manager of the branch saw a reference to it in "Stubbs's Gazette". On June 23, 1952, the company was ordered to be wound-up, and on July 31 the respondent was appointed liquidator. On Aug. 6, 1952, a summons was issued by the liquidator for an order that the payment of £1,308 6s. 10d. to the bank since the commencement of the winding-up of the company was void under the Companies Act, 1948, s. 227. On Jan. 27, 1954, the registrar ordered that the bank repay to the liquidator £803 11s., being the amount standing

to the debit of the company's bank account on May 3, 1952, being the last entry before the date of presentation of the petition.

Richmount for the applicant, Barelays Bank, Ltd.

Hallis for the respondent, the liquidator.

WYNN-PARRY, J. (having stated the facts): The relevant section of the Companies Act, 1948, is s. 227, which provides:

"In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

A number of authorities have been referred to, and to them I shall have to refer shortly myself. It may be convenient if I turn in the first place to the recent case of *Re Steane's (Bournemouth), Ltd.* (1), a decision of VAISEY, J. In the course of his judgment in that case, VAISEY, J., said ([1950] 1 All E.R. 25):

"The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion. I have reviewed the facts of the present case somewhat at length because I think that such a review must usually be necessary whenever a case of this nature falls to be decided."

In the older case of *Re Repertoire Opera Co., Ltd.* (2), VAUGHAN WILLIAMS, J., said (2 Mans. 316):

"I have an absolute discretion to validate this transaction or not. If the transaction is one which would be valid under the protective sections of the Bankruptcy Act, that would be a very strong reason for my validating it here. That is what LORD CAIRNS means in *Re Wiltshire Iron Co. Ex p. Pearson* (3)."

With that statement I respectfully entirely agree. VAUGHAN WILLIAMS, J., goes on (*ibid.*):

"The cases on s. 153 [of the Companies Act, 1862, the corresponding section to s. 227 of the Act of 1948] are an adoption by the court of the principle of the protective sections in bankruptcy. It would be very unfortunate if the principles of administration in bankruptcy and in the winding-up of companies were not as far as possible the same."

I have some difficulty in following the reasoning in those two sentences because the protective section in the present Bankruptcy Act, 1914, s. 45, confers no discretion on the court. A transaction to be protected under that section must fulfil the conditions laid down in the section, otherwise it does not obtain the protection, whereas, as VAUGHAN WILLIAMS, J., himself recognised, there was under the section corresponding to s. 227 of the present Act an absolute discretion, as was clearly stated by VAISEY, J., in the passage in his judgment to which I have just referred in *Re Steane's (Bournemouth), Ltd.* (1).

The case to which VAUGHAN WILLIAMS, J., refers is *Re Wiltshire Iron Co. Ex p. Pearson* (3), and the facts can be simply stated by reading from the headnote (3 Ch. App. 443):

"Where a customer of a trading company had bona fide ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition but before the winding-up order:—*Held*, that the disposition of the property was complete before the winding-up order, and the goods ordered to be delivered to the customer."

In the course of his judgment LORD CAIRNS, L.J., said (*ibid.*, 446):

A “Section 153 no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding-up (that is the presentation of the petition) and the order for winding-up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, ipso facto, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company.”

B
C In the later case of *Re Park Ward & Co., Ltd.* (4), ROMER, J., applied *Re Wiltshire Iron Co.* (3), to which I have just referred. In the course of his judgment, having quoted the passage from the judgment of LORD CAIRNS which I have myself quoted, he says ([1926] Ch. 831):

D “If I were to adopt the view put forward by Mr. Clayton, a company would in very few cases be able to obtain the assistance necessary to enable it to carry on business as a going concern. LORD CAIRNS evidently regarded the power given to the court by the section as one given for the benefit and in the interests of the company, so as to ensure that a company which is made the subject of a winding-up petition may nevertheless obtain money necessary for carrying on its business and so avoid its business being paralysed. If, therefore, I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to LORD E CAIRNS, the provision of the section was intended to secure to it.”

That was a case in which between the date of the presentation of the petition and the date of the order for its compulsory winding-up a debenture was issued by the company to secure to the debenture holder the repayment of £1,200 advanced to enable the company to pay wages due to its staff. Apart from the F circumstance that in this case the bank did not go so far as to demand a debenture, the facts appear to me to have a distinct similarity. It is true that only part of the overdraft here was applied in the payment of wages, but it is clear from the evidence, and, to my mind, it is the only possible inference from the facts, that the accommodation arranged was arranged for a limited period G for the express purpose of enabling the company to continue to carry on its business. Therefore, to use the language of ROMER, J., it was a transaction “for the benefit of and in the interests of the company”.

H In the case before VAISEY, J., *Re Steane's (Bournemouth), Ltd.* (1), a debenture was issued to secure moneys which were advanced for the purpose, as stated by VAISEY, J., in his judgment, of keeping the company going or of keeping things going generally. Those three authorities appear to me to govern the present case and to bring it within the benefit of s. 227.

Against that there are said to be two cases to which reference was made. The first is *Re Liverpool Civil Service Assocn. Ex p. Greenwood* (5). That case appears to me to be distinguishable from the present case. In the course of his judgment MELLISH, L.J., said (9 Ch. App. 512):

“I do not mean to express any dissatisfaction with the cases which have been cited by Mr. North, as deciding that all bona fide transactions in carrying

on the ordinary business of a company, which take place between the petition and the winding-up order, and have been completed before the winding-up order is made, should be confirmed. But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors."

The second case is *Re Civil Service & General Store, Ltd.* (6). Apart from the circumstance that the *Wiltshire Iron Co.* case (3) was not cited, it appears to me that that case is clearly distinguishable from the present case. That was a case in which on the same day on which the petition for winding-up was being presented the company agreed to pay a trade creditor who was ignorant of the presentation of the petition £175, being part of a debt of £320 previously due to him, on the condition that he continued to supply the company with goods for a cash payment. The £175 was paid after the presentation of the petition, and also £13 for goods supplied. The winding-up order was subsequently made, and the payment of £13 was allowed, but the £175 was ordered to be repaid. CHITTY, J., in his judgment, states the case as put forward on behalf of the creditors in this way (57 L.J.Ch. 120):

"The argument of the respondents is a somewhat strange one. They say that the part payment of their debt was a condition of their supplying goods, and that they are therefore entitled to treat the transaction as a new and complete transaction."

As the learned judge makes clear, that was the case of the creditor. Small wonder, then, that he goes on to say:

"But to affirm a transaction of that kind under the discretion conferred upon the court by s. 153, would be to exercise such discretion upon a totally erroneous principle."

He further relies on the circumstance that, as he put it,

"... the respondents, at the least, knew at the date of the agreement that the company was in embarrassed circumstances, although they do not seem then to have had knowledge of the presentation of a petition."

Then in the next sentence there is a circumstance stated which would of itself, I think, be sufficient to distinguish that case from the present case:

"When, however, they actually received the two payments of £100 and £75, they were, in my judgment, aware of a petition having been presented. I can only treat the transaction as an attempt to get a preference over other creditors."

Therefore, it appears to me that these two cases do not in any sense govern the present case or stand in the way of the disposition in question being validated.

It appears to me, viewing the evidence as a whole and drawing the inference that I do, that this was a transaction which is directly within the passage which I have read from the judgment of LORD CAIRNS in *Re Wiltshire Iron Co.* (3), and I can myself see no ground for distinguishing between the amount of the debit existing immediately before the presentation of the petition, viz., £803 11s., and the amount by which the overdraft became increased after the presentation of the petition. For these reasons, therefore, I propose to allow this appeal and discharge the order of the registrar.

Order accordingly.

Solicitors: *Durrant Cooper & Hambling* (for the applicant); *Booth & Blackwell* (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

DEAN v. PRINCE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Wynn-Parry, J.), February 3, 4, 5, 8, March 5, 1954.]

Company—Shares—Transfer—Disposition on death—Article of association providing for sale to directors at price certified by auditor as fair value—Auditor acting as expert—Valuation on break-up basis.

A *Valuer—Valuation—Shares of private company—Sale to directors at price certified by auditor as fair value—Grounds for setting aside valuation.*

The nominal capital of a small private company which carried on a light engineering business was £200, divided into two hundred shares of £1 each. The deceased was a director and the chief shareholder, holding one hundred and forty shares. The other two directors each held thirty shares. Article

B 9 (g) of the company's articles of association provided that, if a member died, "his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an arbitrator . . ." One part of

C the factory premises of the company was held on a monthly tenancy, and the other part was vested in the plaintiff (who was also the personal representative of the deceased) for a term of eight hundred years. The plaintiff had contracted to sell that lease to the company for £5,000 payable by annual instalments of £200, a contract which the plaintiff was entitled to terminate in the event of the company's suffering any process of execution, being wound-up, or failing to observe the covenants contained in the

D contract. The company had no right to assign the contract. On Nov. 6, 1951, the deceased died, and on Dec. 6, 1951, the auditor certified that a fair value for his shares, for the purpose of art. 9 (g), was £7 a share. The plaintiff being dissatisfied with the valuation, the auditor let her have the notes on which it was based. The notes showed that the auditor was

E of the opinion that, if the company was regarded as a going concern, the shares were merely of nominal value, and that he made his valuation on the basis that the company was wound-up immediately after the deceased's death and that the assets were sold as so many loose chattels at an auction as soon as possible thereafter. On this basis the machinery was valued at

F £1,785, whereas, according to the evidence, its value to anyone taking over the factory as a going concern would have been £4,800. The auditor disregarded the fact that the shares held by the deceased constituted a majority holding of the company, which would enable the holder to control the method and speed of the disposal of the company's assets, though it did not carry with it an absolute right to control the business, and that a sub-tenant of part of the premises was specially interested in acquiring the shares of the deceased. In an action by the plaintiff for, inter alia, a declaration

G that the auditor's certificate was not binding,

HELD: a valuation could be impeached, not only for fraud but also for mistake or miscarriage of justice, e.g., if the expert made an arithmetical error or took something into account which he ought not to have taken into account or vice versa, or interpreted the agreement wrongly, or proceeded on some erroneous principle; even if the court could not point

H to actual error, nevertheless, if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the court would interfere; but, on the facts, bearing in mind particularly the precarious nature of the company's tenure of its premises, it could not be said that the auditor had erred, and, therefore, his valuation ought not to be disturbed.

Dictum of SIR JOHN ROMILLY, M.R., in *Collier v. Mason* (1858) (25 Beav. 204), applied.

Decision of **HARMAN, J.** ([1953] 2 All E.R. 636), reversed.

AS TO POSITION OF AUDITORS, see **HALSBURY**, 1949 Edn., Vol. 5, pp. 437, 438, paras. 693, 694; and FOR CASES, see **DIGEST**, Vol. 9, pp. 553-556, Nos. 3656-3674.

Cases referred to:

- (1) *Collier v. Mason*, (1858), 25 Beav. 200; 53 E.R. 613; 43 Digest 1047, 46.
- (2) *Pappa v. Rose*, (1871), L.R. 7 C.P. 32; 41 L.J.C.P. 11; 25 L.T. 466; *affd. Exch.*, (1872), L.R. 7 C.P. 525; 41 L.J.C.P. 187; 27 L.T. 348; 1 Digest 268, 14.
- (3) *Finnegan v. Allen*, [1943] 1 All E.R. 493; [1943] K.B. 425; 112 L.J.K.B. 323; 168 L.T. 316; 2nd Digest Supp.
- (4) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329; 3rd Digest Supp.

APPEAL by the defendants from an order of **HARMAN, J.**, dated June 26, 1953, and reported [1953] 2 All E.R. 636.

In an action by the personal representative of a former director of the third defendant, **Dean & Mulhall, Ltd.**, for, inter alia, a declaration that the valuation of the shares in the company, as at the date of the deceased's death, given by the certificate of the auditor in accordance with art. 9 (g) of the company's articles, was arrived at on a wrong basis and was not binding, **HARMAN, J.**, held that the auditor was wrong in making the valuation on the basis that the company was being wound-up, and in failing to take into consideration that the shares of the deceased carried with them a controlling right and that a special purchaser might be found. A preliminary point taken by the defendants before **HARMAN, J.**, that it was not open to the plaintiff to question the auditor's certificate, was decided by **HARMAN, J.**, in favour of the plaintiff, and the point was not taken on appeal.

J. G. Strangman, Q.C., and *D. S. Chetwood* for the defendants.

H. E. Francis for the plaintiff.

Cur. adv. vult.

Mar. 5. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: The relevant facts in this case are these. Three persons, all of whom were stated to be "working men" and all of whom (save as to the late Mr. Dean after his illness) were working directors, formed the defendant company shortly before the last war for the purpose of carrying on in Sheffield a light engineering business. The paid-up capital of the company has consisted at all material times of two hundred shares each of £1 and no more. Of these shares one hundred and forty were held by the late Mr. Dean and thirty each by the two individual defendants, Messrs. Prince and Cowen. The business appears to have been highly successful during the war, but more latterly has been far less prosperous. On the true inference to be derived from the audited accounts of the company for the last six years up to May 31, 1951, there has been some argument. According to the defendants' counsel, the company was at the material date "trembling on the brink of insolvency". The facts are that in each of the six years in question the company made a trading profit in the sense that, after meeting or providing for all trade expenses and outgoings and for depreciation, but before payment of any directors' remuneration, there was a surplus of income over outgoings averaging £1,300 per annum. But the three directors were, as I have said, working directors in the true sense—each of them in one capacity or another working whole time in the business. Their remuneration, therefore (which the judge himself stated was modest), must fairly be regarded as part of the expenses of the business, and, after deducting the remuneration so paid to the directors for each of these years, there was an adverse balance on profit and loss account in each year except one, which balance over the whole period amounted to over £2,500, or an average

for each of the six years of £424. The company was able to sustain these losses and to continue in business as it did, because during the period in question it obtained from the Inland Revenue repayment in respect of excess profits taxes amounting altogether to over £3,000. The state of the company's affairs, according to its balance sheet for the year ended May 31, 1950, stood thus: Fixed assets, including plant and machinery, fixtures and fittings and motor vehicles, were represented by the sum of £4,070, being the original total cost less depreciation, the latter being arithmetically slightly less than fifty per cent. of the cost. Under the heading of "Current assets" were stock in hand and work in progress—approximately £500. Sundry debtors and payments in advance were represented by £1,246, and cash at bank by £1,247. On the liabilities side of the balance sheet were trade creditors and accrued expenses, £1,591, which included a sum of £800 due to the plaintiff, Mrs. Dean; and a further sum of £1,312 due to the late Mr. Dean on current account in respect (as we understood) of advances made at one time or another by Mr. Dean. Omitting the item of share capital and insignificant items on both sides of the balance sheet, the balance on the liabilities side was made up of approximately £4,000 standing to the credit of profit and loss account.

The late Mr. Dean died on Nov. 6, 1951, and the provisions of the special articles relating to transfers of shares in such an event accordingly came into operation. The relevant article is art. 9 of the special articles which was applicable to all cases of transfer and transmission of shares. The particular paragraph applicable in the circumstances of the case is para. (g) which is in the following terms:

"In the event of the death of any member his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an arbitrator and accordingly the Arbitration Act, 1889, shall not apply. Unless they otherwise agree the directors shall take such shares equally between them."

As, in the course of the argument, reference was also made to para. (b) of the articles, it will be convenient to set out the terms of that paragraph:

"If any member desires to sell or transfer his shares or any of them, he shall notify his desire to the directors by sending them a notice in writing (hereinafter called 'a transfer notice') to the effect that he desires to sell or transfer such shares. The said transfer notice shall specify the number of shares for sale or transfer, and the sum estimated by the selling member to be the value of each of such shares. The receipt by the directors of the said transfer notice shall constitute an authority to them to offer the shares for sale at a fair value ascertained as follows viz.: The sum so estimated by the selling member shall, if approved by the directors, be the fair value, but in the absence of such approval in order to prevent disputes arising, the fair value shall be the auditor's valuation of the current worth of the company's shares to be made by him in writing at the request of the directors".

The valuation which art. 9 (g) required to be made was in due course undertaken by Mr. Jenkinson of the firm of W. G. Hawson Wynn & Co., chartered accountants, the company's auditors. Some question was at one time raised of the exact circumstances in which Mr. Jenkinson made his valuation, but it is now agreed that Mr. Jenkinson, in making the valuation which he did, was duly carrying out the obligation indicated by art. 9 (g) of the company's articles. Mr. Jenkinson, having completed his valuation, gave a certificate on Dec. 6, 1951, to the effect that the shares of the late Mr. Dean were, in his opinion, of the value of £7 a share, or £980 altogether. Since the proceedings began it appears that the sum due to Mrs. Dean and referred to above was found to have been

over-stated by slightly less than £200, and it has been conceded on the part of the first two defendants that the valuation of the shares in question should, accordingly, be increased by £1 per share. Nothing, however, turns on that matter, and it is also shown to be irrelevant, in my judgment, that shortly after the date of Mr. Jenkinson's certificate the affairs of the company took a considerable turn for the better. As appears from the cited paragraph of the article, Mr. Jenkinson was required to value the shares as at the date of Mr. Dean's death, viz., Nov. 6, 1951, and, at any rate for the purposes of this appeal, it has been accepted that Mr. Jenkinson was justified in concluding, as he did, when he came to make his certificate, that there was no reason to expect any such change for the better in the affairs of the company—indeed, his inquiries had led him to suppose that, on the contrary, matters had rather tended to worsen since May, 1951.

Mrs. Dean (who is the personal representative of the former director, Mr. Dean) was dissatisfied with Mr. Jenkinson's valuation, and she, accordingly, brought the present action in which she has sought a declaration that she is not bound to transfer the shares at the valuation arrived at by Mr. Jenkinson. Having regard to the form of the article it is not in doubt that, were it not for one circumstance, Mrs. Dean could not have questioned the validity and conclusiveness of Mr. Jenkinson's certificate, since no sort of imputation has been made or could be made of Mr. Jenkinson's complete integrity. The one circumstance to which I have referred is this. Mr. Jenkinson had (in the laudable hope of achieving agreement between Mrs. Dean and the first two defendants) indicated in writing the method which he had adopted in arriving at his valuation. Paragraphs 3 and 7 of this document are as follows:

"3. In view of these trading results—and taking into account to some extent the difficult position in which the company would be placed if the amounts due to Mr. and Mrs. Dean had to be paid it was clear that no value could be put on the shares on a normal going concern basis other than something purely nominal. It became necessary, therefore, to consider the only other basis which could apply, i.e., break-up value . . . 7. The foregoing showed that to a third party the shares were unlikely to be worth more than £1,400 and that it was by no means certain that that amount could be realised. To the parties who are under obligation to buy the shares it left out of account altogether one important factor, viz., that they could realise the break-up value only at the expense of losing their employment. To retain their employment, i.e., considering the transaction on a going concern basis, they would be paying £7 for shares on which we could place no value. In view of this position it could be regarded as a matter of grave doubt whether a valuation of £7 a share did not substantially favour the seller."

At the trial before HARMAN, J., a preliminary point was taken on the part of the defendants that the valuation was unchallengeable in the courts since the shareholders had by the articles submitted the matter in question to the exclusive arbitrament of the auditor. The learned judge disallowed this objection on the ground that by stating the reasons which had led him to arrive at his valuation, Mr. Jenkinson had exposed his certificate to examination by the courts into the validity of such reasons. There has been no appeal to this court from that part of the learned judge's judgment. The judge then proceeded to consider the basis of Mr. Jenkinson's valuation, and concluded in favour of the plaintiff that he, Mr. Jenkinson, had fallen into error on a matter of principle or had made a material mistake in arriving at his figure, and so declared that the plaintiff was not bound by the certificate. It is against this part of the learned judge's judgment that the defendants have appealed.

Having regard to the defendants' acceptance of the decision of HARMAN, J., on the preliminary point, it is not, in my judgment, open to them now to say

that whatever was the reasoning on which it was based Mr. Jenkinson's valuation is unchallengeable in the courts. The question for us, and the only question, is whether, in regard to the process, as it was stated in the document referred to above and expanded by him in evidence, whereby Mr. Jenkinson arrived at his valuation, that valuation is liable to be impeached. The learned counsel before us were both content to accept as the correct test to be applied the language of SIR JOHN ROMILLY, M.R., in *Collier v. Mason* (1) (25 Beav. 204):

A

" . . . this court, upon the principle laid down by LORD ELDON, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one ; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle . . . or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the court would refuse to act on the valuation."

B

In the case cited the learned Master of the Rolls was of opinion that the valuation was, perhaps, exorbitant, but " I cannot say it amounts to evidence of fraud, mistake or miscarriage."

C

There was some discussion before us of the proper meaning to be attached to the words " mistake ", " wholly erroneous principle " and " miscarriage ", as used by SIR JOHN ROMILLY, M.R. I shall not attempt any exhaustive exposition of that language or of the circumstances in which, in such a case as the present, the court should hold a party not bound by a valuation. For my part, I think the plaintiff is prima facie entitled to succeed if she is able to show that Mr. Jenkinson, in arriving at his figure of £7 per share, made a mistake of a substantial character or materially misdirected himself in the course of his valuation. Counsel for the defendants contended that the mistake must be a mistake related to the entire subject-matter of the valuation. I cannot agree. It seems to me that the most obvious case of mistake, one, indeed, indicated by SIR JOHN ROMILLY,

D

E

M.R., himself, would be if the valuer omitted altogether to take account of some substantial asset or made a serious arithmetical miscalculation in regard to a single but material part of the whole process. In the present case the learned judge was of opinion that Mr. Jenkinson erred in making his valuation on the basis that the only method of valuation appropriate in the circumstances was that of a break-up or forced sale of all the company's assets. In my judgment, if HARMAN, J., was right in this conclusion, then I think the plaintiff would have established a mistake or miscarriage within the language used by SIR JOHN ROMILLY, M.R., and would prima facie be entitled to the declaration which she obtained.

F

G

Let me say again that there is no question whatever of the integrity or impartiality of Mr. Jenkinson, or, I think, of his professional skill as an accountant. The possibility of occasional error is common to all men, to whatever profession they may belong. I have intimated already that the basis adopted by Mr. Jenkinson for his valuation was, in my judgment, clearly that of a break-up or forced sale of all the company's assets as on a liquidation brought about by insolvency. It is also plain that he took no account of the circumstance that the number of shares in question constituted a majority holding of the company—a matter which strongly impressed the mind of the learned judge. In regard to the latter point, it is, however, to be noted that the number of shares in question (one hundred and forty), being less than three-fourths of the whole, did not carry an absolute control over the affairs of the company, and I say at once that if the valuation was rightly made on the basis I have just mentioned, then I should not myself quarrel with the view that the figure eventually arrived at as representing the value of all the assets and the liabilities should then be apportioned rateably among all the shares in disregard of any majority holding.

H

A valuation of shares in a company such as the one in question in circumstances such as the present is plainly a matter of difficulty and one on which opinions may fairly differ. I apprehend, however, that it was the intention of the article that the auditor should arrive at a view of what the shares in question were really worth having regard to all relevant circumstances. I think, accordingly, that for this purpose there is no distinction to be found between para. (b) and para. (g) of the articles above quoted. On the other hand, I do not think that there is applicable any rule of thumb or accountancy principle which fixes or limits the possible bases of calculation to be adopted. It was suggested in argument for the defendants that there was some analogy to a valuation for estate duty purposes. But if it be a fact that, for convenience or otherwise, certain fixed alternative principles are commonly adopted for estate duty purposes, then it does not seem to me that the analogy is conclusive for we are not here concerned with any estate duty valuation.

In the case of a private company carrying on a profitable business, it is, no doubt, true that a sound and obvious basis of calculation would be in accordance with the expectation of profit for the future, particularly where the shares in question would constitute a majority holding. In my judgment, however, Mr. Jenkinson rightly rejected any such basis of valuation in the present case, for a continued expectation of loss would produce necessarily a negative result, and I have already said that the change of fortune which occurred after Mr. Jenkinson's valuation is, in my judgment, irrelevant. A calculation on the basis of profits (that is on the basis of expected returns on the footing of the company continuing as a going concern) being out of the way, Mr. Jenkinson, as I think, turned clearly to a break-up value as on a forced sale as the only available alternative. It was suggested in argument that though the phrase "break-up" was frequently used, Mr. Jenkinson was in truth proceeding on what was called the "asset content" of the shares or the undertaking. If, however, it was thereby suggested that Mr. Jenkinson proceeded otherwise than on the hypothesis of a forced sale and of a break-up of the company's undertaking and assets accordingly, I am for my part unable to agree. Since this point underlay the substance of much of the argument before us, I venture to quote at length certain passages from Mr. Jenkinson's evidence. In examination in chief he said:

"(Counsel for the defendants): So perhaps we need not consider what method of approach you would have considered if you had come to the conclusion that this company had a profit earning capacity, at least not in detail. Now, having got to that conclusion, what was your next step? A.—I then had to consider whether there was any other realisable value in the shares by considering what else the holders of those shares could do, and I came to the conclusion that there was one other way in which an amount could be realised on these shares, and that was to sell the assets individually, and to work out what value would thereby be produced. I therefore arranged for a valuation of the plant and machinery. Q.—On what basis was that valuation? A.—On a basis of what the items concerned would fetch in an auction. I then substituted the figure of that valuation for the book figures of those same assets, and I made a small deduction from the sundry debtors. The actual deduction was ten per cent. of the book value for the costs of realising them. (HARMAN, J.): I do not quite understand the deductions you made. A.—If it is necessary, my Lord, to realise all the debts of the company at one moment there is always some deficiency, and a reasonable measure of that deficiency was taken to be ten per cent. Doubtful debts were what I was referring to there. Q.—Anything else? A.—I found an item of work in progress in the 1951 balance sheet of £400, which related almost entirely to one partly finished machine, and I was advised by the directors that there was very little likelihood of ever

selling that machine and that its scrap value, as it would probably have to be scrapped, was £50. I therefore reduced the figure of work in progress for this purpose from £400 to £60. With those exceptions, no alterations were made to the figures on the balance sheet in May, 1951. (Counsel for the defendants): Pausing there, these deductions which you have made, as I understand it, were made for the purpose of arriving at the value for break-up purposes ? A.—That is right. Q.—Would that be the reason why no such deductions were made in the balance sheet ? A.—Certainly. Q.—Then, the next step was what ? I am afraid I interrupted you. A.—The result of those adjustments was to produce a figure of £1,400, which I found was the break-up worth of this company. With due respect, my Lord, I shall have to repeat that, as I found that that was greater than any value which could be arrived at on a going concern basis, I considered that that was a price, £7 per share, to which any seller was entitled or which any buyer would be ready to pay since that amount could at any time be realised. It was, therefore, in my opinion, the maximum price and also the minimum price for the purpose of my valuation.”

In cross-examination he gave the following answers:

“(HARMAN, J.) What did you do in particular with regard to this company ? Who did you consult of the company’s officials ? A.—The company’s officials had been consulted at the time of the May, 1951, balance sheet, and chiefly in that case it would be, I think, Mr. Cowen, although I am not sure about that, to see what debts were considered good or bad, but the main purpose of this deduction of ten per cent. was that, since we had decided that this was a valuation on a break-up basis, it is a well-known fact that you cannot hope to recover one hundred per cent. of your debts and that some reasonable deduction is necessary. So, to that extent, my answer is that it is in the nature of the general practice to make some deduction. If there was a liquidation, for instance—we have not used that word yet, but if there was a liquidation—you would be very fortunate, I think, if you got one hundred per cent. of the debts which appeared in any balance sheet ”.

In answer to another question he said:

“I do not think I can quite agree with that, because, as I explained, we are now considering break-up, which is a different matter from allowing one’s debtors to have sometimes extended periods of credit. To say that you think that in the long run you will receive all your debts in full is different from saying that you can within the course of a week or two realise them in full. (HARMAN, J.): Why was there this urgency ? I cannot understand that. Why within a week or two ? A.—Because that, my Lord, as I have explained, was the basis on which we decided I should value.”

G Again:

“Q.—I was suggesting to you that, if the balance sheet as at May 31, 1951, gives a true and fair view of the state of the company’s affairs at that time, it is nonsense to say that the real value of the assets was £1,400. That, in effect, was what you said, was it not ? A.—Yes. I am saying that the value of the shares was £7 a share, which I agree is the same thing as saying that the value of the net assets is £1,400 on a break-up basis. I must add that, ‘on a break-up basis’.”

Finally:

“(Counsel for the plaintiff): On that point, which is an important point, you did not consider, did you, whether the factory with the plant in situ could be disposed of to anybody ? You assumed that that was quite impossible, did you not ? A.—I assumed that it would be unlikely that

you would find a willing buyer at more than the price I put on it to take over this factory and the plant as it was, as it stood, with a view to carrying it on. The reason I came to that conclusion was because the evidence was all to the effect that unless he, the buyer, was going to put into it something which it had not got already—and that was no concern of mine—what he was buying would only continue to lose money for him and, therefore, a willing buyer of the whole thing was in my mind regarded as unlikely at a figure above my valuation, £1,400. (HARMAN J.): You did not ask for it to be valued on the basis that there might be a buyer, did you? A.—No. Q.—Did you ask the valuer whether he could find a buyer, or whether he thought there might be a buyer? You see, you are not a valuer yourself? A.—I did not ask any particular valuer that question, no. Q.—I do not expect that aspect of the matter ever entered your head? A.—I certainly considered the possibility, but I considered it most unlikely that anybody would want to take it over. Q.—Were you qualified to have an opinion on that subject, being a chartered accountant and not a valuer? A.—Yes, I think so, because I came to that conclusion on accountancy principles. (Counsel for the plaintiff): In other words, you assumed that if any buyer should come forward to buy the factory with the plant and machinery in situ there he would not pay any more than £1,400? A.—Yes. My job was to value shares, and that was the value. Q.—I know your job was to value shares, but I want to put that question again. You came to the conclusion that if any buyer did come forward and take the factory and the plant and machinery there in situ he would not pay more than £1,400? A.—That is right. Not just for the plant, but for the whole thing ”.

From the passages which I have quoted I draw the following inferences: (i) The effect of a valuation on the basis selected was plainly to depress greatly the value of the assets. It was made clear by Colonel Riddle in the written valuation supplied by him to Mr. Jenkinson and equally in his evidence in court that his figure for the plant, furniture, machinery, etc., viz., £1,785 10s., was arrived at on the basis of their auction value, i.e., on being broken up and removed from the factory and in part, at any rate, sold for scrap. Colonel Riddle made it clear that he was not asked to consider any other basis and further said in evidence that a valuation “in situ” would have been higher. In this connection, though I do not suggest that the balance sheet figure of over £4,000 for the same items could or should be taken as the value of these assets for present purposes, still, it must be remembered that, having regard to the small number of shares, an increase of even ten per cent. on the figure of £1,785 would mean an extra 17s. 6d. per share. (ii) (And as a corollary to the above) Mr. Jenkinson ignored the possibility of a gradual turning to account and disposal of the company’s assets. (iii) He ignored also in the same connection the circumstance that a majority holding, even though not a three-fourths majority, would enable a buyer to control the method and speed of disposal. It is in this respect that, to my mind, the fact that the shares in question constituted a majority holding was relevant. I can well understand that a notional buyer of thirty of the shares in the company would find the proposed sale highly unattractive since, once in the company, he would be unable to get out and could not control in any way the conduct of the company’s business. Finally: (iv) Mr. Jenkinson justified the basis selected by him “on accountancy principles”.

There is one very special and material circumstance about this company and its business to which I have not so far alluded, to which I shall presently return, and which, as will appear, seriously qualifies the conclusion at which I should otherwise arrive. But, apart from that circumstance, I should for myself have agreed with the judge in holding that Mr. Jenkinson made a material mistake or erred in principle in valuing the shares on the basis of the break-up value, that is, on the basis of a forced sale, of the company’s assets, and further in

regarding himself as, in effect, compelled to that conclusion by "accountancy principles." The question for Mr. Jenkinson was: What in truth were these one hundred and forty shares worth? In other words, if Messrs. Prince and Cowen paid £x for the shares, would they get that much value for their money? I prefer so to formulate the question, for there were here, for the purposes of the valuation, not only a willing seller and a willing buyer, but one who was bound to sell and two who were bound to buy at Mr. Jenkinson's price. In my judgment, the relevant question cannot fairly be answered by a mere application of accountancy principles, by a mere arithmetical process. The question has to be answered in light of the general conditions affecting the light engineering business in Sheffield and all circumstances peculiar to the defendant company. As regards the former matter, the evidence was clearly that the prospects of such businesses were generally, at the relevant time, good. As regards the latter matter, it was, in my view, of great significance that of the company's four-storey factory premises one floor was occupied by a Mr. Goodyear as tenant or licensee of the company, and he was and is in the same line of business and said in evidence that he was and is interested in the company's plant, etc., and the company's business in the event of a sale. Mr. Jenkinson did not, as is quite plain, make any inquiry of Mr. Goodyear or of anyone else because he was not concerned to consider, as material to the "asset content" of the company, the possibility of a sale of any of the assets "in situ", though, as I have already said, the value on such a basis would have been higher (see Colonel Riddle's evidence) and even a ten per cent. increase in the value of the fixed assets would have added another 17s. 6d. to the figure for Mr. Dean's shares.

In my judgment, Mr. Jenkinson erred in neglecting these considerations. It was said by counsel for the defendants that he did not neglect them; rather that he considered them all carefully, but formed the opinion that in all the circumstances they did not serve to add anything to the break-up value. If this was so, then I should agree with counsel that if Mr. Jenkinson erred, he committed no more than an error of judgment which would not avail Mrs. Dean, but I have not been able to accept the premise of counsel for the defendants. The passage in the evidence which I last quoted and which was the passage relied on for this purpose by counsel, does not, in my judgment, support his contention. In my view, all the general and particular considerations which I have mentioned were excluded by Mr. Jenkinson from his purview and were deliberately so excluded as irrelevant, since "on accountancy principles" a break-up valuation was alone (in his view) admissible.

In the result, therefore, Mrs. Dean would, in my judgment, *prima facie* be entitled to the relief she claimed and if the matter ended there I should for myself agree with HARMAN, J., in his conclusion, but there remains the special circumstance which I have mentioned above. We were informed that some part, unspecified but, I suppose, small, of the company's property was held by it on the terms of a monthly tenancy. But the greater part (or so I assume) of the company's business premises was the subject of an agreement dated Nov. 27, 1950, an agreement of a most unusual, and, from the company's point of view as things have turned out, a most unattractive, character. By this agreement Mrs. Dean contracted to sell and the company contracted to buy for £5,000 the premises in question which appear to have been vested in Mrs. Dean for a term of eight hundred years from Mar. 25, 1837, at a ground rent of £10 10s. per annum. The company thereupon became entitled in equity to the long term of years. It was, however, provided that the purchase price should be payable by yearly instalments of not less than £200 in any one year and at the material date one only of such instalments had been paid; and it may be added that, on the evidence, it is at least doubtful if the premises are worth as much as the unpaid

balance of the purchase money. It is, however, further provided (by cl. 8) that if the company should

"suffer any process of execution or distraint . . . or be wound-up either compulsorily or voluntarily, or fail to observe any of the covenants [earlier mentioned] or fail in any one year to pay to the vendor a minimum of £200 on account of the purchase money, the vendor may give three months' notice in writing to the purchaser . . . and if before the expiration of the notice the purchaser shall not comply with "

the requirement in the notice (which the company would not appear to be able to do in the case of a winding-up) the vendor is entitled to terminate the contract and re-enter and re-sell the premises. Finally, by the succeeding clauses the company is prohibited from assigning or charging the benefit of the contract without the vendor's written consent. It is unfortunate that the nature and effect of this contract were little referred to or considered at the trial. As a practical matter the company might well, no doubt, be able to grant licences to others to occupy all or part of the factory and such persons might then be willing to pay the company a price for the plant "in situ". But the tenure of such persons of the premises would appear to me to be of a somewhat precarious nature unless arrangements were made for the completion of the purchase or at least for payment of a substantial part of the outstanding purchase price—considerations obviously highly significant to a sale of the company's plant "in situ" which was the only alternative basis suggested by counsel for the plaintiff. In the event of a winding-up the company might, moreover, be in some difficulty in removing certain of the plant for any purpose.

I have had the advantage of reading in advance the judgments prepared by my two brethren who are of opinion that the appeal should be allowed—in the case of WYNN-PARRY, J., "with some reluctance". I share the reluctance of WYNN-PARRY, J., for I cannot help feeling that the amended price of £8 per share was and is appreciably less than the true worth of the shares. I repeat again the fact that an increase of £200 in the valuation of the assets represents an addition of £1 per share to the valuation. But having regard to the clear opinion of my brethren and bearing in mind that in this as in other actions the plaintiff must make good a case, I have felt compelled to the conclusion that though, as I think, Mr. Jenkinson erred in principle in treating himself as bound on accountancy principles to regard only the break-up value, Mrs. Dean has, nevertheless, failed sufficiently to establish that a consideration of the values of the plant "in situ" or otherwise would produce, in all the circumstances, a figure of value materially different from that at which Mr. Jenkinson arrived.

DENNING, L.J.: The task of the auditor here was to act as an expert and not as an arbitrator, and, as an expert, he was to certify what, in his opinion, was the fair value of the shares. The draftsman of art. 9 obviously was aware that there is a special virtue in an expert's valuation. The reason is that it is so much a matter of opinion that it is very difficult to say it was wrong. But difficult as it is, nevertheless, if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties.

In considering this matter we ought, I think, to put on one side the cases about the personal liability of a valuer. They show that he is not liable to an action unless he is dishonest: see *Pappa v. Rose* (2) and *Finnegan v. Allen* (3). But those cases have no application when we are considering the validity of the valuation itself. It can be impeached, not only for fraud, but also for mistake or miscarriage. That was made clear by SIR JOHN ROMILLY, M.R., in *Collier v. Mason* (1). For instance, if the expert added up his figures wrongly, or took something into account which he ought not to have taken into account, or conversely, or interpreted the agreement wrongly, or proceeded on some erroneous principle—in all these cases, the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly

large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some analogy with the cases on domestic tribunals, except, of course, that there need not be a hearing. On matters of opinion, the courts will not interfere, but for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents, and for miscarriage of justice, the courts will interfere: see *Lee v. Showmen's Guild of Great Britain* (4).

In this case the judge has upset the valuation on the ground that the auditor failed to take into account some factors and proceeded on wrong principles. I will take the points in order.

B 1. *The right to control the company.* The judge said that the auditor should have taken into account the fact that the one hundred and forty shares were a majority holding and would give a purchaser the right to control the company. I do not think that the auditor was bound to take that factor into account. Test it this way. Suppose it had been Mr. Prince who had died, leaving only thirty shares. Those thirty shares, being a minority holding, would fetch nothing in the open market. But does that mean that the other directors would be entitled to take his shares for nothing? Surely not. No matter which director it was who happened to die, his widow should be entitled to the same price per share, irrespective of whether her husband's holding was large or small. It seems to me that the fair thing to do would be to take the whole two hundred shares of the company and see what they were worth, and then pay the widow a sum appropriate to her husband's holding. At any rate, if the auditor was of opinion that that was a fair method, no one can say that he was wrong. The right way to see what the whole two hundred shares were worth, would be to see what the business itself was worth, and that is what the auditor proceeded to do.

C 2. *Valuation of the business "as a going concern".* The judge seems to have thought that the auditor should have valued the business as a going concern. I do not think the auditor was bound to do any such thing. The business was a losing concern which had no goodwill, and it is fairly obvious that, as soon as Mrs. Dean had sold the one hundred and forty shares to the other two directors—as she was bound to do—she would in all probability call in the moneys owing to herself and to her husband amounting to over £2,000. The judge said that she was not likely to press for the moneys because that would be "killing the goose that laid the eggs", but he was wrong about this, because as soon as she sold the shares, she would have got rid of the goose and there was no reason why she should not press for the moneys. She was an executrix and the company's position was none too good. It had only £1,200 in the bank to meet a demand for £2,200. In these circumstances, the auditor was of opinion that there was a strong probability of the company having to be wound-up, and he rejected the going-concern basis. For myself, I should have thought he was clearly right, but, at any rate, no one can say that his opinion was wrong.

D 3. *Valuation of the assets of the business.* Once the going-concern basis is rejected, the only possible way of valuing the business is to find out the value of the tangible assets. The judge thought that the assets should have been valued as a whole in situ. It was quite likely, he said, that "some one could have been found who would make a bid for the whole thing, lock, stock and barrel". But the judge seems to have forgotten that no one would buy the assets in situ in this way unless he could also buy the premises, and the company had no saleable interest in the premises. In respect of part of the premises the company had only a monthly tenancy. In respect of the rest, the company had only a contract for the purchase of the premises on paying £200 a year for twenty-five years. It had no right to assign this contract, and its interest was liable to be forfeited if it went into liquidation, either compulsory or voluntary; and the probability

was, of course, that, if it sold all the assets, it would go into liquidation, and hence lose the premises. The company could, therefore, only sell the assets without the premises. That is how the auditor valued them and no one can say that he was wrong in so doing.

4. *Valuation on a "break-up" basis.* The auditor instructed the valuer, Colonel Riddle, to value the plant and machinery at the break-up value as loose chattels on a sale by auction. The judge thought that was a wrong basis because it was equivalent to a forced sale. I would have agreed with the judge if the business had been a profitable concern. The value of the tangible assets would then have been somewhere in the region of £4,000 or £5,000, being either the balance sheet figure of £4,070 or Mr. Pressley's figure of £4,835. But the business was not a profitable concern. It was a losing concern, and it is a well known fact that a losing concern cannot realise the book value of its assets. There is an element to be taken into account which is sometimes spoken of as "negative goodwill". It comes about in this way. If a business is making a loss, that shows that its assets, regarded as an entity, are not a good investment. A purchaser will decline, therefore, to buy on that basis. He will only buy on a piece-meal basis, according to what the various assets, taken individually are worth, and it is obvious that on a sale of assets piece-meal, the vendor will suffer heavy losses as compared with the book figures. The auditor was, therefore, quite justified in asking the valuer to value the assets as loose chattels sold at an auction. At any rate, if he honestly formed that opinion, no one can say he was wrong.

5. *The special purchaser.* The judge thought that some one could have been found to buy the one hundred and forty shares who would use his majority holding to turn out the two directors, and reorganise the factory and put in his own business. In other words, that the shares would have a special attraction for some persons (namely, the next-door neighbour) who wanted to put his own business into these premises. I am prepared to concede that the shares might realise an enhanced value on that account, but I do not think it would be a fair price to ask the directors to pay. They were buying these shares—under a compulsory sale and purchase—on the assumption that they would continue in the business as working directors. It would be unfair to make them pay a price based on the assumption that they would be turned out. If the auditor never took that possibility into account, he cannot be blamed, for he was only asked to certify the fair value of the shares. The only fair value would be to take a hypothetical purchaser who was prepared to carry on the business if it was worth while so to do, or otherwise to put it into liquidation. At any rate, if that was the auditor's opinion, no one can say he was wrong.

I have covered, I think, all the grounds on which the judge upset the valuation. I do not think they were good grounds. I would, therefore, allow the appeal and uphold the valuation.

WYNN-PARRY, J. (read by SIR RAYMOND EVERSHERD, M.R.): I accept that the principles which this court should apply in a case such as this are those laid down by SIR JOHN ROMILLY, M.R., in *Collier v. Mason* (1). Two points appear to me to call for consideration. The first is the point taken by HARMAN, J., that the auditor was dealing in this case with a block of shares, which constituted a controlling interest, and that he failed to take this circumstance into consideration. It appeared to be accepted on behalf of both parties that it was necessary to postulate a sale between a notional willing seller and a notional willing buyer in a supposed free market. No doubt, in the case of valuations of shares in private companies for estate duty purposes where, either because of the restrictions on transfer in the articles of association, or for other reasons, no free market exists, certain assumptions, having no basis in reality must be made, but in a case such as this where an auditor, acting as an expert, is directed to value shares for a particular purpose, namely, in order to give effect to the

articles of association of a private company on the death of a member in order to regulate the rights between the estate of that deceased member and the surviving members, he is bound to have regard to the realities of the situation as it exists, and not to make more artificial assumptions than are necessary.

By art. 9 (b), which deals with transfers among members *inter vivos*, it is provided that in default of approval by the directors of the sum estimated by the transferring member to be the value of the shares to be transferred

A "the fair value shall be the auditor's valuation of the current worth of the company's shares."

That language appears to me to preclude the auditor from placing any extra value on a block of shares because it constitutes or will in the hands of the particular transferee constitute a controlling interest.

B By art. 9 (g) it is provided that

"in the event of the death of a member his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death."

C In my view, as a matter of construction the same basis of valuation should be applied under this paragraph as under para. (b), and, therefore, no extra value should be placed on the shares because they may constitute a controlling interest. Further, as the auditor, in my view, has to have regard to the realities of the situation, he must take into account that the other directors, and not merely one of them, are bound to purchase the shares in question. It is true that the other

D directors are entitled to decide between themselves how they will take up the shares, but, as I see it, they need not arrive at this decision until after the auditor's valuation has been received. It follows from this that the auditor cannot assume that the shares will remain as a block and be transferred to one director. Indeed, the reverse is the probability; for, if the shares are not an attractive proposition, it is unlikely that one director will assume a greater

E liability than he need, whereas if they should be an attractive proposition it is unlikely that his fellow director will allow one director to acquire a controlling interest. In my judgment, therefore, with all respect, the learned judge was wrong in approaching this case as one in which the sale of a controlling interest was involved.

F The second point, which is the substance of the argument of counsel for the plaintiff, is whether or not the auditor should have obtained a valuation of the plant and machinery *in situ* on the basis that a purchaser could be reasonably envisaged who would take over either the premises and the plant and machinery *in situ* or the shares of the company with a view in either case to carrying on, not the business of the company, but a business of his own, for the carrying on of which the plant and machinery would be suitable.

G It was urged on us by counsel for the defendants that the auditor did take this very matter into consideration, and having done so concluded that it was unnecessary to obtain such a valuation. On this point the relevant evidence is to be found in the transcript of the shorthand note of the evidence:

H "(Counsel for the plaintiff): On that point, which is an important point, you did not consider, did you, whether the factory with the plant *in situ* could be disposed of to anybody? You assumed that that was quite impossible, did you not? A.—I assumed that it would be unlikely that you would find a willing buyer at more than the price I put on it to take over this factory and the plant as it was as it stood, with a view to carrying it on. The reason I came to that conclusion was because the evidence was all to the effect that unless he, the buyer, was going to put into it something which it had not got already—and that was no concern of mine—what he was buying would only continue to lose money for him and,

therefore, a willing buyer of the whole thing was in my mind regarded as unlikely at a figure above my valuation, £1,400."

Now it is clear that up to that point the witness was proceeding on the basis that the buyer would not wish to carry on the existing business, and was contemplating a buyer who would purchase the factory and premises in order to carry on a different business. The evidence proceeds as follows :

" (HARMAN, J.): You did not ask for it to be valued on the basis that there might be a buyer, did you ? A.—No. Q.—Did you ask the valuer whether he could find a buyer, or whether he thought there might be a buyer. You see, you are not a valuer yourself ? A.—I did not ask any particular valuer that question, no. Q.—I do not expect that aspect of the matter ever entered your head ? A.—I certainly considered the possibility, but I considered it most unlikely that anybody would want to take it over. Q.—Were you qualified to have an opinion on that subject, being a chartered accountant and not a valuer ? A.—Yes, I think so, because I came to that conclusion on accountancy principles."

Now when the witness says: " I certainly considered the possibility, but I considered it most unlikely that anybody would want to take it over ", he must mean by " it " the whole undertaking of the company, and not merely the factory, plant and machinery. The evidence, however, goes on:

" (Counsel for the plaintiff): In other words, you assumed that if any buyer should come forward to buy the factory with the plant and machinery in situ there he would not pay any more than £1,400 ? A.—Yes. My job was to value shares, and that was the value. Q.—I know your job was to value shares, but I want to put that question again. You came to the conclusion that if any buyer did come forward and take the factory and the plant and machinery there in situ he would not pay more than £1,400 ? A.—That is right. Not just for the plant, but for the whole thing."

Now those two answers show, to my mind, that the auditor was still thinking of the whole undertaking of the company, and was not envisaging a purchaser who designed to buy the shares in order to carry on a different business on the premises. I conclude, therefore, that he never had that consideration in mind.

The question, however, remains, should he have had this consideration in mind? In the course of his argument, counsel for the plaintiff first proceeded on the basis of envisaging a purchaser who would take over, not the shares, but the factory and the plant and machinery with a view to carrying on in the factory a business of his own, but in view of the very unusual terms of the agreement of Nov. 27, 1950, under which the company held the premises, he was constrained to rest his case on the basis of a buyer who would purchase the shares, and then, through the medium of the existing company, carry on his existing or proposed business. I am bound to say that such a proposition, namely, the purchase of the shares of a private company in order to carry on a different business on its premises with its plant, made necessary because of the very unusual provisions on which it holds its premises, is such an unusual proposition that I cannot conclude that in not taking it into consideration the auditor was making such a substantial mistake or proceeding on such an erroneous principle as to entitle the court to interfere, and in coming to this conclusion I do not forget that there was a tenant, Mr. Goodyear, who, according to his evidence, would have been willing to take over the rest of the premises. The evidence, however, does not show that he was conversant with the provisions on which the company held the premises. I would, therefore, though with some reluctance, allow the appeal.

Appeal allowed. Action dismissed.

Solicitors: *Allen & Overy* (for the defendants); *J. R. Pullon, Walters & Co.*, agents for *Elliott & Slater*, Sheffield (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GOODMAN v. J. EBAN, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.),
January 27, March 5, 1954.]

Solicitor—Costs—Recovery—Action to recover—Letter accompanying bill “signed by solicitor”—Use of rubber stamp—Signature in name of firm by sole member—Solicitors Act, 1932 (c. 37), s. 65 (2) (i).

A The plaintiff, who practised as a solicitor under the name of a firm, delivered to the defendants a bill of costs accompanied by a covering letter at the end of which he had impressed by means of a rubber stamp a facsimile of his signature in the name of the firm. In an action for the recovery of the costs the defendants contended that the letter was not “signed” as required by the Solicitors Act, 1932, s. 65 (2) (i), and that, therefore, the

B plaintiff was not entitled to recover the costs under s. 65 (1).

HELD: (i) (DENNING, L.J., dissentiente) the signature on the letter having been shown to have been placed on it by means of the stamp by the plaintiff himself, the letter must be taken to be signed by him within the meaning of s. 65 (2) (i) of the Act of 1932.

C *Bennett v. Brumfitt* (1867) (L.R. 3 C.P. 28) and *Jenkins v. Gaisford & Thring* (1863) (3 Sw. & Tr. 93), applied.

(ii) (DENNING, L.J., expressing no view) the name of the firm being the plaintiff’s professional name, his signature in the name of the firm was a compliance with the provisions of s. 65 (2) (i).

D Per SIR RAYMOND EVERSLED, M.R.: Although I have come to the conclusion as a matter of law that the letter accompanying the bill of costs was properly signed in accordance with s. 65 (2) (i) of the Act of 1932, it does not seem to me that, as a matter of practice, at least in the absence of some incapacity on the part of the solicitor, such a method of signing a bill or accompanying letter for the purpose of satisfying the requirements of that sub-section is desirable, since such a method of signing does not carry with it the same clear authenticity or warrant of responsibility as a signature written

E in the ordinary way.

EDITORIAL NOTE. By the Short Titles Act, 1896, s. 1 and sched. I, the statutes 29 Chas. 2, c. 3, and 7 Will. 4 & 1 Vict., c. 26 were given the short titles the Statute of Frauds and the Wills Act, 1837, respectively.

F FOR THE SOLICITORS ACT, 1932, s. 65 (2) (i), see HALSBURY’S STATUTES, Second Edn., Vol. 24, p. 59.

FOR THE STATUTE OF FRAUDS, s. 4, see *ibid.*, Vol. 4, p. 658.

FOR THE WILLS ACT, 1837, s. 9, see *ibid.*, Vol. 26, p. 1332.

Cases referred to:

- (1) *Bennett v. Brumfitt*, (1867), L.R. 3 C.P. 28; 37 L.J.C.P. 25; 17 L.T. 213; 31 J.P. 824; 12 Digest, Replacement, 175, 1162.
- G (2) *Jenkins v. Gaisford & Thring*. In the Goods of *Jenkins*, (1863), 3 Sw. & Tr. 93; 32 L.J.P.M. & A. 122; 8 L.T. 517; 27 J.P. 504; 164 E.R. 1208; 44 Digest 251, 776.
- (3) *Re Blücher (Prince)*. *Ex p. Debtor*, [1931] 2 Ch. 70; *sub nom. Blücher (Prince)*, *Re, Debtor v. Official Receiver*, 100 L.J.Ch. 292; 144 L.T. 152; Digest Supp.
- H (4) *R. v. Cowper*, (1890), 24 Q.B.D. 533; 59 L.J.Q.B. 265; 13 Digest 492, 427.
- (5) *McLean v. Weaver*, (1924), 41 T.L.R. 47; 42 Digest 149, 1478.
- (6) *Grayson v. Atkinson*, (1752), 2 Ves. Sen. 454; 28 E.R. 291; *sub nom. Grayson v. Wilkinson*, Dick. 158; 21 E.R. 229; 44 Digest 249, 756.

APPEAL by the defendants against an order of His Honour JUDGE BENSLEY WELLS, at Marylebone County Court, dated Oct. 27, 1953.

The plaintiff, a solicitor practising as Goodman, Monroe & Co., claimed £50 9s. 6d. for professional services rendered to the defendants, and gave evidence

that he had delivered a bill of costs for that sum, accompanied by a letter dated June 23, 1952, referring to the bill and signed by him by means of a rubber stamp bearing the signature "Goodman, Monroe & Co." The defendants contended (i) that no services were rendered to them as alleged, and (ii) that no proper or sufficient bill of costs had been delivered to them as required by s. 65 (2) (i) of the Solicitors Act, 1932, because the letter of June 23, 1952, was not signed by the plaintiff as required by that sub-section.

The county court judge rejected both contentions and gave judgment for the plaintiff. The defendants appealed against the rejection of their second contention.

Stranders and J. Malcolm Milne for the defendants.
Leonard Halpern for the plaintiff.

Cur. adv. vult.

Mar. 5. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: Section 65 of the Solicitors Act, 1932, reads as follows:

"(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section . . .
 (2) The said requirements are as follows: (i) The bill must be signed by the solicitor, or, if the costs are due to a firm, one of the partners of that firm, either in his own name or in the name of the firm, or be enclosed in, or accompanied by, a letter which is so signed and refers to the bill . . ."

By s. 64 (2) it is provided that for the purposes, *inter alia*, of s. 65,

" . . . the expression 'solicitor' includes the executors, administrators and assignees of the solicitor in question."

The defendants argued that the plaintiff's bill did not satisfy the requirements of s. 65 (2) in two respects—first, because the "signature" at the end of the plaintiff's letter of June 23, 1952, enclosing his bill, was not written by him in his handwriting, but was impressed by means of a rubber stamp, on which was engraved a fac-simile of the signature "Goodman, Monroe & Co", and, secondly, because the so-called "signature" was that of the plaintiff's business, and not that of his own, name. The plaintiff proved in evidence, which was accepted by the judge, that the impressing of the stamped signature on the letter had been done by the plaintiff personally, and that he kept the stamp locked up in his own room so as to be available only for his own use. It did not appear in evidence whether the stamped signature was a representation or fac-simile of the plaintiff's own handwriting, but no point was taken below to the contrary effect, and the argument in this court has proceeded on the basis that the signature in question is a fac-simile of the plaintiff's own handwriting. The learned judge rejected these technical defences on the defendants' part as he had rejected their defence on the merits, and gave judgment, accordingly, to the plaintiff for the sum claimed.

I have found the questions raised matters of some difficulty: and although, for reasons which will appear, I agree with the county court judge that the bill sued on was properly delivered in accordance with s. 65 of the Act, I am bound to say that as a matter of good practice the "signature" of a bill of costs, or of a letter enclosing such a bill, by means of a rubber stamp seems to me in general undesirable. There is no doubt that the purpose of s. 65 is to impose on the solicitor (or on one of the members of a partnership firm of solicitors) personal responsibility for any bill of costs delivered, and although there are other provisions in the Act for the protection of the client, including under s. 66 (1) a right on his part to have the bill taxed as provided by the Act, it is, no doubt, also true that the client was intended to have the assurance by means of the personal authentication of the solicitor (or of a partner in a firm) that the bill delivered was

proper. These are significant matters since they constitute the background against which s. 65 must be construed.

A I confess that, if the matter were *res integra* I should be disposed to think, as a matter of common sense and of the ordinary use of language, that when Parliament required that the bill or letter should be "signed" by the solicitor, it was intended that the solicitor should personally "sign" the bill or letter in the ordinary way by writing his name (or, where appropriate, the name of his firm) in his own hand with a pen or pencil. The matter is, however, not free from authority. The county court judge relied on *Bennett v. Brumfitt* (1). That was an appeal to the Court of Common Pleas from a decision of the revising barrister for the borough of Liverpool who had been of opinion that the objection of the respondent to a name being retained on the list of voters for the borough was a valid objection within s. 17 of the statute 6 & 7 Vict. c. 18 (relating to the registration of voters), which enacted "that the notice of objection shall be signed by the person objecting." In that, as in the present case, the objector's name had been affixed by him to the notice by means of a stamp on which was engraved his ordinary signature. The court affirmed the view of the revising barrister, and I will cite in full the judgment of SIR WILLIAM BOVILL, C.J. B (L.R. 3 C.P. 30):

C "The question in this case is whether the notice of objection was 'signed by the person objecting', within the meaning of s. 17 of the 6 [& 7] Vict. c. 18. The name of the objector was affixed to the notice by himself by means of a stamp upon which was engraved his ordinary signature. I am of opinion that that was a perfectly good signature within this statute. It is clear that D it would be a good signature within the Statute of Frauds. It is equally clear that it would have been a good signature to a will. The decision of the revising barrister was therefore in my judgment perfectly correct. The ordinary mode of affixing a signature to a document is not by the hand alone, but by the hand coupled with some instrument, such as a pen or a pencil. E I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him. If the objector here had used a pencil or a paint-brush, it would hardly have been contended that he had not signed the notice. I think the requirement of the statute has been sufficiently complied with."

F The other members of the court were of the same opinion. WILLES, J., said (*ibid.*, 31):

"The using a stamp is only a compendious way of writing the party's name."

G BYLES, J., agreed with SIR WILLIAM BOVILL, C.J., that such a signature would be sufficient for the purposes of the Statute of Frauds, s. 17, and the Statute of Wills (now the Wills Act, 1837). Finally, KEATING, J., observed (*ibid.*, 32):

H "I see no reason why a different construction should be put upon signing under this statute from that which it has received under the Statute of Frauds and the Statute of Wills . . . I am at a loss to see how the genuineness of a notice of objection is better authenticated by a signature by means of a pen than by means of an impression of a stamp affixed by the party's own hand."

The relevant language in the Statute of Frauds, s. 4, is well known, namely, that the memorandum or note must be "signed by the party to be charged". In the case of the Wills Act, 1837, the relevant formula in s. 9 is "it shall be signed at the foot or end thereof by the testator". In *Jenkins v. Gaisford & Thring*. In the *Goods of Jenkins* (2) the testator, towards the end of his life, had

had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature, and the two codicils in question were so stamped in the testator's presence and by his direction by another person. SIR CRESSWELL CRESSWELL in the course of his judgment said (3 Sw. & Tr. 96):

"It has been decided that a testator sufficiently signs by making his mark . . . Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator."

It will be observed that in *Jenkins v. Gaisford & Thring. In the Goods of Jenkins* (2) the stamp had been impressed, not by the testator himself, but by another in the testator's presence and by his direction, and there is added to the formula which I have quoted from s. 9 of the Wills Act, 1837, words authorising such a vicarious signing. Similarly, there was added to the corresponding formula in the Statute of Frauds, s. 4, the well-known words "or some other person thereunto by him lawfully authorised", but these additions are not relevant to the present problem and do not qualify the authority of the cases cited. For the question is not by whom, but how, the relevant document must be "signed". I do not, therefore, think that *Re Prince Blücher. Ex p. Debtor* (3), cited by counsel for the defendants, assists the solution, for that case only decided that s. 16 (1) of the Bankruptcy Act, 1914, which requires that a proposal for composition should be signed by the debtor, was not satisfied if the proposal was signed by a firm of solicitors representing the debtor's interests.

In my judgment, therefore, it must be taken as established that where an Act of Parliament requires that a document be "signed" by a person, *prima facie* the requirement of the Act is satisfied if the person himself places on the document an engraved representation of his signature by means of a rubber stamp. Indeed, if reference is made to the SHORTER OXFORD ENGLISH DICTIONARY, 2nd ed., vol. 2, p. 1892, it will be found that the primary meaning of the verb "to sign" is not confined to actual writing with a pen or pencil, but appears to have related to marking with the sign of the cross. The later meanings include:

- "(ii) to place some distinguishing mark upon (a thing or person) . . .
- (iv) to attest or confirm by adding one's signature; to affix one's name to (a document, etc.)."

It follows, I think, that the essential requirement of signing is the affixing, either by writing with a pen or pencil or by otherwise impressing on the document one's name or "signature" so as personally to authenticate the document.

If this view be right, then, since the formula used in the Solicitors Act, 1932, does not differ from that in the Wills Act, 1837, s. 9, and the Statute of Frauds, s. 4, there seems no reason why a different requirement is imposed from that in the other cases—which is no more than the personal authentication of the individual "signing". It is not to be forgotten that when Parliament used the formula now appearing in s. 65 (2) (i) of the Act of 1932 it had been long established in the courts that the impressing by the person concerned of a fac-simile signature by means of a rubber stamp was a "sufficient" signature by him. The requirement of signature of a document appears elsewhere in the Solicitors Act, 1932, for example, of a written declaration for the purposes of a practising certificate (s. 37 (1) (a) (i) as substituted by the Solicitors Act, 1941, s. 5 (1)); of the roll of solicitors (s. 44 (1) (ii)); of the written agreement in relation to a lump sum bill in non-contentious business (s. 57 (3)). In no case does it appear from the language used, or the context, that signature in any particular form or manner is required. In other sections a different formula is used, namely, "the Master of the Rolls . . . shall by writing under his hand admit [a] person to be a solicitor" (s. 3 (1)); or "writing under their hands" with

reference to dissents on the part of the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls to regulations relating to examinations (s. 26 (4)). In my judgment, these other sections of the Act do not throw any light on the subject of the present appeal.

A But it was said that a different and stricter view should be taken of the require-
ment of s. 65 (2) (i) than that which was appropriate in the case of the Wills
Act, 1837, s. 9 and the Statute of Frauds, s. 4. In the first place, it was contended
that the proper protection of the client required that he should be satisfied,
from the document which he received, that the solicitor had, by personally
signing the document, assumed full responsibility for it, and that, if it appeared
to be signed by means of a stamp, he could not be so satisfied, since he could not
know, and should not assume, that the stamp had been impressed in fact by the
B solicitor personally. Further (and this is, perhaps, more significant) the Solicitors
Act, 1932, is by its full title expressed to be "An Act to consolidate the Solicitors
Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme
Court", and it was pointed out that for a long time prior to the passing of
the Act of 1932 the formula which had been used in the corresponding sections
of earlier Acts, namely, 2 Geo. 2 c. 23, s. 23, and the Solicitors Act, 1843, s. 37,
C was "subscribed with the proper hand of such attorney or solicitor"—a formula
which, it was argued, could not be satisfied by the impress of a rubber stamp.
Assuming (though I must not be taken to be deciding) that this last-mentioned
formula would not be satisfied by the use of a rubber stamp, nevertheless, in my
opinion, these considerations are not sufficient to outweigh what, in my judgment,
must now be taken to be the ordinary meaning of a formula such as that now
D contained in s. 65 (2) (i) of the Act of 1932. To hold otherwise would, it seems to
me, introduce doubt and uncertainty into the use of such a formula, and open the
way to arguments for creating fine distinctions between one statute and another
which I cannot think would be justifiable. Though it is true that a signature
apparently made by the use of a stamp might not, on the face of it, carry the same
assurance of authenticity as a signature written in the ordinary way with a pencil
or pen, there would be nothing to prevent the client, if in doubt, from inquiring
E of the solicitor whether he had personally authenticated the bill or accompanying
letter. In all the circumstances, therefore, I think that where, as in the present
case, the signature on the bill or letter is shown to have been placed by the
solicitor himself by means of a stamp containing a fac-simile representation of his
own signature, the document must be taken to be "signed" by him within the
meaning of s. 65 (2) (i) of the Act of 1932. It is unnecessary for the purposes of
F this case to express any view whether or not the same result would follow if the
"signature" impressed by the stamp was not a fac-simile representation of the
solicitor's handwriting, but a mere typed or printed representation of his name
or the name of his firm. I, accordingly, express no opinion on that matter, save
to observe that ex facie it would not appear to carry the same warrant of
G authenticity and to refer to *R. v. Cowper* (4), in which LORD ESHER, M.R., and
FRY, L.J., differed on the question whether or not a mere lithographed representa-
tion of a solicitor's name on a plaintiff's particulars in the county court constituted
a signature by him for the purpose of the County Court Rules, 1889. I venture to
repeat that, although I have come to this conclusion as a matter of law, it does
not seem to me that as a matter of practice, at least in the absence of some
H incapacity on the part of the solicitor, such a method of signing a bill or accom-
panying letter for the purpose of satisfying the requirements of s. 65 (2) (i) of the
Act of 1932 is desirable, since such a method of signing does not carry with it the
same clear authenticity or warrant of responsibility as a signature written in the
ordinary way.

I pass to the defendants' second point—that, if the solicitor may "sign"
the bill or accompanying letter by impressing thereon an engraved representation
of his ordinary handwritten signature, where, as in the present case, the solicitor

is the sole owner of the business, the "signature" must be the writing of his own proper name and not the name of the business which, as a solicitor, he conducts. Again, a first impression favours the defendants' contention, and counsel's argument is supported by the circumstance that, according to the language of s. 65 (2) (i), the use of the firm's name is expressly authorised in the case of a firm (that is, a partnership of two or more partners) and, therefore, it is contended, by necessary implication excluded in the case of the one-man business. As a matter of construction the words "either in his own name or in the name of the firm" relate, in my judgment, only to the second alternative, namely, "or, if the costs are due to a firm". In the earlier enactments the passage corresponding to that beginning with the words "or if" down to and including the words "in the name of the firm" was enclosed in brackets. But on further reflection I have reached, also on this point, the same conclusion as that of the learned judge. Though the reference to the firm's name is expressly related to the case of a partnership, it was, in my judgment, required to make clear that, in such case, the signing partner might subscribe either his own or the firm's name, and it is to be noted that either alternative constitutes a "signing" by the solicitor concerned. Bearing in mind, therefore, what I have said above of the meaning of the word "sign" and that the name "Goodman, Monroe & Co." is, in truth, the plaintiff's trading or professional name (registered as such under the Registration of Business Names Act, 1916), I think that the signature "Goodman, Monroe & Co." is as much the plaintiff's signature for the purposes of s. 65 (2) (i) of the Act of 1932 as a writing of his name "Charles Goodman" or "C. Goodman". In the present case I think that the sense and purpose of the statutory requirement, including the protection of, and assurance to, the client, is certainly no less well served by a signature in the name of the business, the services of which the client engaged and to which he would normally pay the costs due, than a signature in the solicitor's own name.

The point is short and not illuminated by authority. *McLean v. Weaver* (5), cited by counsel for the defendants is not, in my view, in point. That case decided the wholly different question that a bill signed by the plaintiff in his own name satisfied the requirement of s. 37 of the Solicitors Act, 1843 (now s. 65 of the Act of 1932), though, when the bill was delivered, the plaintiff had taken a partner and then carried on the business in a firm name, which also appeared on the letter but which did not exist when the costs were incurred. Nor do I think that the defendants' argument is assisted by the definition contained in s. 64 (2). It is unnecessary to decide whether the personal representatives of a solicitor who had carried on a practice alone could sign a bill in the deceased solicitor's business name or style. Although, therefore, it may be prudent practice for a solicitor in the position of the present plaintiff to "sign" by adding his own name to that of the name of his business, I think the signature "Goodman, Monroe & Co." was a good signature by the plaintiff for the purposes of s. 65 (2) (i). In my judgment, accordingly, the appeal fails on both points and should be dismissed.

DENNING, L.J.: I have come to a different conclusion. In modern English usage, when a document is required to be "signed" by someone, that means that he must write his name with his own hand on it. It is said that he can in law "sign" the document by using a rubber stamp with a fac-simile signature. I do not think this is correct—at any rate, not in the case of a solicitor's bill. Suppose he were to type his name or to use a rubber stamp with his name printed on it in block letters, no one would then suggest that he had signed the document. Then how does the fac-simile help it? Only by making it look as if he had signed it, when in fact he had not done so. It is the verisimilitude of his signature, but it is not his signature in fact. If a man cannot write his own name, he can "sign" the document by making his mark, which is usually the sign of a cross, but in that case he must make the mark himself,

and not use a typewriter, or rubber stamp, or even a seal. The virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document. A rubber stamp carries with it no such guarantee, because it can be affixed by anyone. The affixing of it depends on the internal office arrangements, with which the recipient has nothing to do. This is such common knowledge that a "rubber stamp" is contemptuously used to denote

A the thoughtless impress of an automaton in contrast to the reasoned attention of a sensible person.

It has long been held that a man cannot "sign" a document by putting his seal on it: see a case in 1620 reported in *ROLLE'S ABRIDGMENT* I, p. 245, pl. 25. The reason was well given by LORD HARDWICKE, L.C., in *Grayson v. Atkinson* (6), when he said (2 Ves. Sen. 459):

B "how can it be said, that putting a seal to it would be a sufficient signing ?
For anyone may put a seal."

If such be the case of a seal, a fortiori with a rubber stamp, for anyone can affix a rubber stamp. It is said, however, that a rubber stamp is a signature so long as it is affixed by the solicitor himself, but, if we were to admit a rubber stamp

C to this extent, it would open wide the door to evasion, for no one could ever check whether or not the solicitor did in fact affix it with his own hand. A clerk in a branch office could affix it without anyone being a penny the wiser. Despite all this, however, it is said that we are bound by authority to hold that whenever a statute requires a document to be "signed" by a man, the requirement is satisfied by his using a rubber stamp alone without putting his hand to the

D paper. The cases to which we were referred can, I think, all be explained by the nature of the documents there under consideration. They were not such as to require a personal signature of the person. I can well understand a rubber stamp being accepted in the case of a will, because there is the guarantee of authenticity by two persons then present. I can understand also a rubber stamp being accepted in the case of a memorandum under the Statute of Frauds,

E because a printed heading will suffice for that purpose, whereas no one would describe it as a signature for any other purpose. Likewise, a notice of objection to a voting list, because that was an impersonal document issued out of the office of a political agent so as to get the matter considered by a revising barrister. It is different with documents which plainly require a personal signature. Has

F anyone ever supposed that a bill of exchange or a cheque can be signed by means of a rubber stamp, or that a man can execute or witness a transfer of shares in such a way ? And has anyone ever before this case supposed that a solicitor could sign his bill of costs by a rubber stamp alone ? Ever since 1605 there have been statutes in force which have required that a solicitor's bill should be "subscribed with his own hand and name" (Act of 1605, 3 Jac. 1, c. 7, s. 1 (3)), or "subscribed with the proper hand of such attorney or solicitor" (Act of 1729,

G 2 Geo. 2, c. 23, s. 23 and Solicitors Act, 1843, s. 37). Those statutes clearly required him to write his name with his own hand, and did not permit the use of a fac-simile. The Solicitors Act, 1932, was a consolidating Act. It is presumed not to have altered, and I do not think it did alter, the law. Solicitors have

H had to sign their bills since 1605, and I do not think Parliament in 1932 intended to allow them to use a rubber stamp for the first time. Indeed, I think that most practising solicitors would be surprised by the suggestion. I would, therefore, allow this appeal on this ground, and it is unnecessary for me to say anything about the other ground.

ROMER, L.J. (read by SIR RAYMOND EVERSHED, M.R.): Although neither of the questions which was argued before us admits of a confident answer, I am of opinion on the whole that the defendants' contentions on both of them should be rejected.

The first point is whether or not the fact that the plaintiff's letter of June, 1952, bore a fac-simile signature impressed by a rubber stamp makes it insufficient, notwithstanding that the stamp was applied by the plaintiff personally, to constitute a signature for the purposes of s. 65 (2) (i) of the Solicitors Act, 1932. The first reaction of many people, I think, would be that the impression of a name produced by a rubber stamp does not constitute a signature, and, indeed, in some sense, is the antithesis of a signature. When, however, the matter is further considered in the light of authority and also of the function which a signature is intended to perform one arrives, I think, at a different result. I agree with the judgment, which I have had the advantage of reading, of SIR RAYMOND EVERSHED, M.R. It is stated in STROUD'S JUDICIAL DICTIONARY, 2nd ed., vol. 4, p. 2783:

"Signed; signature. (1) Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority . . . with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed . . ."

This statement appears to me to be in accord with the authorities, and, in my opinion, the plaintiff's letter was "signed" within this formula. The letter was type-written and concludes with the words (also typed) "Yours faithfully, Goodman, Monroe & Company". This was immediately followed by a repetition of the firm name, in the form Goodman, Monroe & Co., which looks at first sight as though it had been written by hand, but which in reality was impressed by the plaintiff through the medium of a rubber stamp. This repetition would be plainly otiose were it merely intended to repeat the typed name of the firm, and the obvious intention of the plaintiff was that it should be regarded as a signature for the purpose of authenticating the letter. If, in fact, the defendants entertained any doubt as to the authenticity of the letter, nothing could be easier than to ask him, by telephone or letter, to confirm it. A manual signature is not necessary either for a will, which is at least as solemn a document as a solicitor's bill of costs, or to satisfy the Statute of Frauds, and, provided that the affixing of a name by a rubber stamp complies in other respects with the definition in STROUD'S JUDICIAL DICTIONARY to which I have already referred, I see no reason why it should not be sufficient for the purposes of s. 65 (2) (i) of the Solicitors Act, 1932. It is true that this Act is a consolidating Act and that in its predecessors [the Act of 1729, s. 23, and the Act of 1843, s. 37] the corresponding words were "subscribed with the proper hand of such attorney or solicitor", but I do not myself think that much significance can be attached to that phrase in itself. Moreover, although the present Act is a consolidating statute, it is nevertheless the language of s. 65 (2) (i), and not that of its forebears, which prescribes the conditions with which solicitors are now required to comply.

The view which I have expressed is supported by the authorities to which SIR RAYMOND EVERSHED, M.R., has referred. In *R. v. Cowper* (4) the Divisional Court held that the lithographed name of a firm of solicitors was an insufficient "signature" for the purpose of the County Court Rules, 1889, Ord. 6. r. 10, and appendix, and on appeal LORD ESHER, M.R., and FRY, L.J., were divided in opinion on the point, so that the decision of the Divisional Court stood undisturbed. It is significant, however, that LORD ESHER, M.R., thought that a mere lithographed name would be sufficient to constitute the solicitor's signature. After pointing out that the whole object of the rule (which, as construed by the court, required the plaintiff's particulars to be signed by his solicitors) was to get the document authenticated as coming from a solicitor's office, he said (24 Q.B.D. 535):

" . . . if the solicitor has authorised the issue of the lithograph form that object is attained. He means it to be his signature and sends it forth as his, and that seems to me sufficient compliance with the Act "

I, accordingly, am of opinion that the defendants fail on their first point, but I wholly agree with SIR RAYMOND EVERSHED, M.R., that it is far preferable in practice that solicitors should sign their bills, or the letters referring to them, by writing under their own hands, and thus obviate all possibility of justification for disputes such as the present.

A In my judgment, the defendants fail also on their second point, namely, that "Goodman, Monroe & Co." is not the "name" of the plaintiff. The provision in s. 65 (2) (i) that, if costs are due to a firm, one of the partners of that firm may sign either in his own name or in the name of the firm is referable, in my opinion, only to a firm which has more than one "partner" and not to a case such as the present, where one solicitor alone carries on his profession under a firm name. Nevertheless, I can see no objection, either in reason or on the language of the sub-section, to such a solicitor signing in conformity with the designation under which he practises. Subject to certain irrelevant exceptions, B a man may use whatever name he pleases, and he may prefer one name for some particular purpose and a different name for another. The plaintiff's name for professional purposes is "Goodman, Monroe & Co.", and he is well entitled, in my opinion, to use that designation as his name when signing his bills of costs. And he is within the sub-section in doing so. For these and for the other C reasons which SIR RAYMOND EVERSHED, M.R., has stated, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *G. Lebor & Co.* (for the defendants); *Goodman, Monroe & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D

Re GREAVES' WILL TRUSTS. PUBLIC TRUSTEE v. ASH AND OTHERS.

E [COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.JJ.), February 17, 18, March 5, 1954.]

Power of Appointment—Revocation—Fraudulent exercise—Special power to appoint among children and issue—Appointor having life interest in income of trust fund—Revocable appointment to children and grandchildren—Revocation with intent to further scheme for distribution of part of capital of trust fund between appointor and adult children.

F By his will, dated Nov. 19, 1931, the testator, who died on Dec. 6, 1934, gave his residuary estate (referred to hereafter as the "trust fund") to his trustee on trust to pay the income thereof to his daughter (referred to hereafter as "the appointor") during her life, and, subject thereto, the trustee was to stand possessed of the trust fund and the income thereof on trust for all or any of the children or remoter issue of the appointor at such time and in such shares as she should by deed revocable or irrevocable or by will appoint, and in default of and subject to any such appointment G on trust for all the appointor's children who should attain the age of twenty-one or (being female) marry under it, in equal shares. By a deed of appointment, dated May 30, 1938, in which she reserved to herself the power of revocation, the appointor directed that the trust fund was to be divided into as many equal shares as there should be (a) children of hers H living at her death who should attain the age of twenty-one, or, being daughters, marry under that age, and (b) children of hers who should have predeceased her leaving children living at her death. She then directed the trustee to hold the share of each such child who survived her on protective trusts for that child during his or her life, and, subject thereto, to hold the capital and income of the share of each child on trust for that

child's children at the age of twenty-one. The appointor had five children, the youngest of whom was still an infant. In 1951 the appointor and the four adult children suggested to the trustee a scheme for the distribution of part of the capital of the trust fund, the details of the scheme being as follows: (a) that the appointor should revoke the appointment of May 30, 1938, and release her power of appointment; (b) that the trustee should divide the trust fund into five equal shares and appropriate one of such shares to each of the five children; (c) that the share appropriated to each adult child should be divided between the appointor and the child actuarially, according to the respective values of their interests therein, the appointor realising her life interest in the part to be taken by the child, and the child, by way of exchange, assigning to the appointor her reversionary interest in the part to be taken by the appointor; and (d) that, in the carrying out of the scheme, the appointor and the adult children should be separately represented both by solicitors and actuaries, and that due regard should be had to any estate duty payable in respect of the trust fund on the death of the appointor for which the trustee would be liable. With the object of carrying the scheme into effect, on Feb. 15, 1952, the appointor executed a deed whereby she revoked the appointment of May 30, 1938, and on Feb. 16, 1952, she executed a deed releasing the trust fund from the power of appointment conferred on her by the testator's will, to the intent that the trust fund should devolve according to the provisions contained in the will in default of appointment. The trustee sought the opinion of the court on the validity of the deed of revocation.

HELD: it was fundamental to the vice which constituted a fraud on a power that the appointor should have assumed the burden of making an appointment, which she was never bound to do, and should then have distorted its stated purpose, so defrauding the persons entitled in default of appointment; prima facie the appointor, having made a revocable appointment, owed no duty to anyone if she revoked the appointment, and no one was defrauded by such revocation; as the appointor was under no obligation to the persons taking in default of appointment to revoke the existing appointment, but was free to revoke it or not as she pleased, there was no objection in law to her stipulating for some benefit to herself as a condition of revocation; and, therefore, the deed of revocation was valid.

Re Jones' Settlement ([1915] 1 Ch. 373), overruled.

Decision of VAISEY, J. ([1953] 2 All E.R. 1395), reversed.

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 504-513, Nos. 972-1052.

Cases referred to:

- (1) *Portland (Duke) v. Topham (Lady)*, (1864), 11 H.L. Cas. 32; 11 E.R. 1242; *G sub nom. Portland (Duke) v. Topham (Lady), Bentinck (Lady) v. Topham (Lady), Bentinck (Lord) v. Topham (Lady)*, 34 L.J.Ch. 113; 10 L.T. 355; 37 Digest 503, 963.
- (2) *Shirley v. Fisher*, (1882), 47 L.T. 109; 37 Digest 507, 1001.
- (3) *Re Jones' Settlement*, [1915] 1 Ch. 373; 84 L.J.Ch. 406; 112 L.T. 1067; 37 Digest 508, 1006.
- (4) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.
- (5) *Re Somes*, [1896] 1 Ch. 250; 65 L.J.Ch. 262; 74 L.T. 49; 37 Digest 504, 971.

APPEAL by the defendant, Mrs. Ash, the appointor, from an order of VAISEY, J., dated Nov. 12, 1953, reported [1953] 2 All E.R. 1395.

The trustee of the will of Henry Greaves, deceased, issued an originating summons to determine, inter alia, whether, in the circumstances in which a deed of revocation, dated Feb. 15, 1952, was executed by the defendant, Mrs. Ash, an appointment, dated May 30, 1938, whereby she exercised the power given to her by the will of the testator, Henry Greaves, was effectively revoked by the said deed of revocation with the result that, under the trusts of the will and a deed of release, which was executed by Mrs. Ash on Feb. 16, 1952, the testator's residuary estate was now held on trust for Mrs. Ash during her life and after her death for such of her children as had attained or should thereafter attain the age of twenty-one years, or marry under that age, in equal shares.

Mrs. Ash had five children, the youngest of whom was still an infant. Under the will the income of the trust fund was to be paid to Mrs. Ash during her life. By the appointment of May 30, 1938, which was revocable, she exercised the power given to her by the will in favour of her children and grandchildren. The deed of revocation and the deed of release were executed with the intention of carrying into effect a scheme whereby, inter alia, part of the capital of the trust fund might be distributed between Mrs. Ash and the adult children.

VAISEY, J., held that the appointment of May 30, 1938, was not effectively revoked by the deed of revocation.

Jopling for the first defendant, the appointor.

Wigglesworth for the plaintiff, the Public Trustee.

W. F. Waite for the seventh defendant, the appointor's infant grandchild.

The remaining defendants were not parties to the appeal.

Cur. adv. vult.

Mar. 5. **SIR RAYMOND EVERSHED, M.R.**, read the following judgment of the court. By his will dated Nov. 19, 1931, the testator, Henry Greaves, who died on Dec. 6, 1934, gave to his daughter, the first defendant and appellant, Mrs. Margaret Frances Ash, a special power of appointment over the capital of his residuary trust fund subject (in the events which have happened) to the life interest of Mrs. Ash herself. The class of objects of the power consisted of the children and remoter issue of Mrs. Ash. The terms of the power, which were usual in form and are fully recited in the report of the case before VAISEY, J., in [1953] 2 All E.R. 1395, need not be here recited beyond stating that the power was expressed to be exercisable "by deed revocable or irrevocable or by will or codicil". In default of and subject to any appointment by Mrs. Ash, the testator gave his residuary trust fund to the children or child of Mrs. Ash who should attain the age of twenty-one years or (being female) attain that age or marry under it, if more than one, in equal shares. Mrs. Ash has had five children, all daughters and all made defendants to these proceedings, of whom one has been married and one is an infant. The married daughter of Mrs. Ash has had one child, also a daughter, and about two and a half years old, and she too is a defendant in the action and a respondent in this court.

On May 30, 1938, Mrs. Ash executed a deed of appointment pursuant to the power above recited. The effect of the deed (the terms of which are also fully recited in the ALL ENGLAND LAW REPORTS) was that the testator's residuary trust fund was settled so that each child of Mrs. Ash who attained twenty-one or being a daughter married under that age would be entitled to a life interest in the income of a proportionate share of the fund, the corpus of the share passing to the children of that child, with appropriate cross-remainders in default of such children. By a proviso at the end of the appointment Mrs. Ash declared that she reserved to herself power at any time or times thereafter by any deed or will wholly or partially to revoke the appointment. Subject, therefore, to such power of revocation the infant grand-daughter of Mrs. Ash became by virtue of the appointment entitled to an expectant share in the capital of the testator's trust fund.

On Feb. 15, 1952, Mrs. Ash by deed of that date wholly revoked and made void her appointment of 1938 to the intent that the trust funds thereby appointed should be held on the trusts applicable thereto as if the appointment of 1938 had not been executed. On the following day, Feb. 16, 1952, by a further deed Mrs. Ash released and for ever discharged the trust funds in question from the power of appointment given to her by the testator's will to the intent that such power should

"not henceforth be exercisable by her and the said trust funds . . . devolve according to the provisions in the . . . will . . . contained in default of appointment." A

On Feb. 18, 1952, Mrs. Ash entered into four further documents expressed to be conditional agreements for exchange with her four adult daughters. These last-mentioned agreements need not be further recited for they and the preceding deeds of revocation and release were all executed as part of a scheme the nature and purpose of which is clearly set out in para. 9 of the affidavit made by Mr. Higson on behalf of the plaintiff, the Public Trustee, in support of the originating summons. The paragraph is as follows:

"In the year 1951 the plaintiff was informed by Mrs. Ash's solicitors that a scheme had been suggested for a partial distribution of the capital of the trust fund between Mrs. Ash and her adult daughters; particulars of the scheme were as follows: (a) that Mrs. Ash should revoke the said appointment; (b) that she should release her said power of appointment among issue over the trust fund; (c) that the plaintiff should divide the trust fund into five equal shares and appropriate one of such shares to each of Mrs. Ash's five children; (d) that in the case of each of Mrs. Ash's adult children the share of the trust fund appropriated to the child in question should be divided between Mrs. Ash and the child actuarially according to the respective values of their interests therein Mrs. Ash releasing her life interest in the part to be taken by the child and the child by way of exchange assigning her reversionary interest to Mrs. Ash in the part to be taken by Mrs. Ash; (e) that in the carrying out of the said scheme Mrs. Ash on the one hand and her adult children on the other hand should be separately represented both by solicitors and actuaries and that due regard should be had to any estate duty payable in respect of the trust fund on the death of Mrs. Ash for which the plaintiff should be liable." B C D E

In these circumstances the question has arisen whether the transaction described in Mr. Higson's affidavit can be impeached as involving a "fraud on a power"—in particular a fraud on the power of revocation expressly conferred by the testator and expressly reserved by Mrs. Ash in the deed of 1938. Two separate points are involved, viz., (i) whether the principles enshrined in the formula "a fraud on a power" apply at all to the power of revocation conferred, reserved, and exercised, in the present case, and (ii), if so, whether on the facts of the present case there has been such a fraud. VAISEY, J., answered both inquiries affirmatively. As regards the second, the learned judge said ([1953] 2 All E.R. 1400): F G

"The truth is that the scheme in the present case may well be regarded as a meritorious one, but the very fact that it is beneficial to all parties, non-objects as well as objects and including Mrs. Ash herself, makes it impossible for me to say that it complies with the requirements laid down by LORD WESTBURY, L.C., and LORD ST. LEONARDS in *Duke of Portland v. Lady Topham* (1) and the many other cases which illustrate the same principle. The scheme may be very good, and there may be many ways in which to carry it out, but, in my judgment, it cannot be validly effected in any manner which gives to the appointor, Mrs. Ash, many thousands of pounds of capital through and by means of her execution of the fiduciary power." H

Assuming that the principles of a fraud on a power apply at all, we should entirely agree with VAISEY, J., on this second point, and, in light of the terms of para. 9 of Mr. Higson's affidavit, we cannot usefully add anything to the language of the learned judge save to observe the not insignificant point that Mrs. Ash has been the sole appellant before us and through counsel has most strenuously argued in favour of a reversal of VAISEY, J.'s judgment on both the points formulated above.

- A On the first point VAISEY, J., drew attention to the extreme paucity of authority on it. The matter seems twice only to have been before the court at first instance—in *Shirley v. Fisher* (2) before BACON, V.-C., and in *Re Jones' Settlement* (3) before ASTBURY, J.—and it has never been, until today, before the Court of Appeal. In *Shirley v. Fisher* (2) an appointor having revoked an appointment previously made by him, became (if he did not re-appoint) entitled as personal representative of a deceased son to the share of the trust property which had vested in the son in default of appointment. It is true that some of the reasoning of the Vice-Chancellor as reported in his judgment is not entirely easy to follow, and ASTBURY, J., in the later case thought that since the Vice-Chancellor was of opinion that there was in any event no evidence of any “fraud”, his pronouncement on the more general question must be regarded as obiter. However that may be, there is no doubt that the general question directly arose in *Re Jones* (3) and that ASTBURY, J., after hearing argument on it clearly and deliberately answered that question in the affirmative—i.e., he held that the principles of a “fraud on a power” were applicable to a power of revocation in such cases as *Re Jones* (3) and the present. VAISEY, J. (without expressing any view of his own except to observe the resulting anomaly between a revocation of a power once exercised and a general release of a power), felt it his duty not to “re-open the general question” but to follow the decision of ASTBURY, J., and to answer the present inquiry in the same sense.

- In order to answer the general question posed, it is useful to discover and to state what is the essential quality of the vice which constitutes a fraud on a power. In our judgment, the essential characteristic is that the appointor, having assumed the burden of making the appointment, i.e., of deciding whether (in preference to allowing the trust in default of appointment to take effect) a selection or discrimination should be made by him among the whole class designated by the creator of the power, and, if so, what kind of selection or discrimination, then proceeds to decide the matter, not with the single view of conferring benefits among the designated class, but with the purpose of procuring the receipt of a material benefit by some person not among the designated class and to that extent defeating or departing from the intention of the donor of the power. The well-known language of LORD PARKER OF WADDINGTON in *Vatcher v. Paull* (4) ([1915] A.C. 379) may once more be cited:

- “The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger . . .”

- It is, therefore, in our judgment, fundamental to the vice that the appointor should have assumed the burden of making an appointment which (in such a case as the present) he was never bound to do; and should then have distorted its stated purposes. To that extent he has defrauded the persons entitled in default of appointment, for he has divested such persons of their interests otherwise than for the purposes and in the way limited by the donor of the power. It is for this reason, in our view, that the distinction is drawn between an exercise of a special power of appointment, on the one hand, and a release of such a power, on the other. The donee of the power being (in such a case as the present) free to exercise or not to exercise the special power as he chooses, is embarrassed by no duty if he prefers the latter alternative. In that event, he leaves things

as the donor of the power left them; the persons beneficially entitled have been selected by the donor and it is nihil ad rem that the donee of the special power, the appointor, has decided not to exercise the power in the expectation that, or because, he will as a consequence receive himself some benefit from one or other of the persons who take in default of appointment. LORD PARKER OF WADDINGTON thus puts it in the judgment from which we have already quoted (*ibid.*):

"Nor is there any case in which a bargain to allow the funds to go in default of appointment . . . has been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be bona fide exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention."

We refer also to the language of CHITTY, J., in *Re Somes* (5) ([1896] 1 Ch. 255):

"There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it."

It follows that if the appointor elects (as he is free to do) not to exercise the special power conferred on him, he owes no duty to the class of objects of the power; he owes no duty at all.

If we are right so far, then, *prima facie* at least, the appointor, having made a revocable appointment, owes no duty to anyone if he revokes the appointment; if he revokes and does not re-appoint, no one can complain of what he has done, for no one can assert the misuse of a power, *viz.*, the power of appointment. *Prima facie* according to the ordinary use of language, if an appointment has been made subject to a power of revocation, then the appointor has reserved to himself a *locus penitentiae*, a right to recall the selection or discrimination he has made, to wipe the slate, as it were, clean again, to go back whence he started and to decide afresh, not only what selection or discrimination he will make, but whether he will select or discriminate at all. If he repents of his original selection or discrimination, revokes the appointment he has made, and then, without more, releases his power of appointment, he will have, on second thoughts, renounced the power vested in him. The persons entitled to take will be the persons designated by the creator of the trust in the precise event which has happened, *i.e.*, the event that the donee of the power to direct a different destination of the trust property will not have effectively availed himself of the opportunity granted to him. As already stated, he is under no positive duty to exercise the power at all. The only relevant duty which he owes is to the persons designated by the donor of the power to take in default of appointment: the duty not to exercise the power of divesting them save strictly to the extent and in the manner prescribed by the donor. No one can, therefore, complain of a fraud on the power if the power has been, in the end of all, repudiated.

To this reasoning, however, the objection has been raised that the appointor, having once exercised the special power, cannot thereafter disembarrass himself of the duty in which, by such exercise, he has involved himself, so that he cannot revoke the power, he cannot recall what he has done and wipe the slate clean again, save in the exercise of the same "duty" to which he was subject in making the original appointment. In our judgment, this argument is erroneous and, also, logically impossible. The "duty" in relation to any exercise of the

- power of appointment is no more than a "duty" not to exercise the power otherwise than for the single benefit of the members of the designated class of objects. If, therefore, the "duty" applies to the revocation of an appointment already made, to whom is it owed? Clearly not to the original appointees or to the class of possible appointees, for the donee of the power never owed any duty to them to exercise it at all, and they can, therefore, have no valid ground for complaint if he chooses to recall a revocable exercise of it. Moreover, if the "duty" were held to be owed to these persons, it could only be a duty not to exercise the power of revocation otherwise than for their single benefit, and as revocation per se can never benefit the objects of the power as such, this would mean that the power of revocation could never be exercised save with a view to re-appointment. It has not been suggested that the donee of a special power of appointment, who has once exercised the power, could not in any circumstances revoke the appointment and thereafter wholly release the power. If it were otherwise the donee of a power, if an earlier exercise by him of the power had for any reason failed of effect, would be bound to re-appoint. Equally, in our judgment, the "duty" cannot be owed to the class of possible appointees plus the persons to take in default of appointment since the interests of the latter might (at any rate) be directly in conflict with the interests of the former. Finally, the "duty" cannot be owed to the persons to take in default of appointment so as (for the first time) to disable the donee of the power from taking or even (we suppose) permitting any one else to take directly or indirectly any benefit from or through any of such persons: for those persons have taken, once and for all, vested interests granted to them by the original donor subject only to the power of the appointor wholly or partly to divest them. And revocation without re-appointment must necessarily benefit the persons taking in default as such, so that the conception of a duty to them not to revoke an existing revocable appointment is a contradiction in terms. Further, as the donee of the power is plainly under no obligation to them to revoke the existing appointment, but is free to revoke it or not as he pleases, it follows that there is no objection in law to his stipulating for some benefit to himself or some third party as a condition of revocation. We add that we are not entirely clear on this argument what it is suggested that the result would be if an appointor having (as in the present case) reserved a power of revocation by will, by his will merely revoked the appointment previously made by deed without any further reference to the power of appointment or the trust funds subject thereto. It was, however, this argument which appears to have prevailed before ASTBURY, J., in *Re Jones* (3).
- Mr. F. E. Farrer's argument is thus reported ([1915] 1 Ch. 376):

- "A power to revoke an appointment under a limited power is part of that limited power, and therefore fiduciary. This is shown by the fact that such a power of revocation cannot be delegated —e.g., joint appointors cannot reserve a power of revocation to one during the other's life, though if authorised by the settlement creating the power they may reserve a power of revocation to themselves and the survivor . . . The proposed revocation with the avowed object of obtaining a benefit is therefore a fraud on the power."

The argument is reflected in the judgment (*ibid.*, 379):

- "In this particular case, however, the wife's proposal involves not merely a release of her power, but a revocation of the existing appointment in favour of the daughter and her children; and in my opinion a power of revocation and new appointment is fiduciary and must be exercised for the purposes and objects of the original power."

In our view, ASTBURY, J.'s decision rested on the acceptance of Mr. Farrer's argument. For reasons which we have attempted to state, we think the argument was unsound, and we are unable to agree with the conclusion which was based

on it, and think, accordingly, that the decision in *Re Jones* (3) should be overruled.

In our judgment, a power to revoke an appointment means what it says—that is, that the appointor can wholly recall what he has done and place himself in all respects in the same position as if he had never made any appointment. In other words, since the power of revocation is free from obligation there can be no “fraud on the power” by its exercise. It is in truth not so much a power as a right.

In the result the appointor is entitled, in our judgment, to succeed on her first point, the more general question. The second point (on which, however, out of respect for the argument of counsel for the appointor we have already indicated our view) does not, therefore, strictly arise.

We add that our judgment is confined to the facts of the present case and to facts strictly analogous thereto; that is, when the following conditions are found: (i) a special power of appointment expressed to be exercisable by deed, revocable or irrevocable, or by will, with a gift over in default of and subject to any such appointment; (ii) an exercise of that power by deed expressed to be liable to be revoked at any time; and (iii) a subsequent total revocation followed by, or (if you will) coupled with, a general release of the power. We can, for example, conceive of a case in which there is conferred a power to revoke previously declared trusts which is so closely related to a power of re-appointment that, as a matter of construction, the former power should be held to be only exercisable for the purposes of, and as an essential step towards, a re-appointment. In such a case we can well understand that, if for any reason the re-appointment were ineffective, the revocation might fall with it so as to leave the original trusts persisting. That kind of case is not before us and we express no opinion, therefore, on it. But in the present case we think the appeal should be allowed and an order made as prayed in the notice of appeal.

Appeal allowed.

Solicitors: *Vertue & Churcher* (for the first defendant); *Woodcock, Ryland & Co.*, agents for *Tweedale, Sons & Lees*, Oldham (for the plaintiff); *Kingsford, Dorman & Co.* (for the seventh defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

CHAO AND OTHERS (Trading as ZUNG FU CO.) v.
BRITISH TRADERS AND SHIPPERS, LTD. (N.V. HANDELS-
MAATSCHAPPIJ J. SMITS IMPORT-EXPORT Third Party).

[QUEEN'S BENCH DIVISION (Devlin, J.), January 20, 21, 22, 25, 26, 27, 28, 29,
1954.]

- A *Agent—Tort—Liability of principal—Fraud—Deception of principal.*
Shipping—Bill of lading—Date forged—Shipment after contract date—Right to reject—Goods retained by buyer after knowledge of breach of contract—Measure of damages—"Delivery" of goods—Effect of dealings with documents by buyer—Sale of Goods Act, 1893 (c. 71), s. 35.
- B By a contract made in August, 1951, the sellers, who were traders in London, agreed to sell to the buyers, merchants in Hongkong, twenty tons of Rongalite C., a bleaching chemical of Swedish origin, at £590 a ton c.i.f. Hongkong. Delivery for shipment was to be in four to six weeks subject to the availability of shipping space, and payment was to be net cash in sterling against the sellers' draft at sight accompanied by, inter alia, a "complete set of on-board bills of lading marked 'freight pre-paid'".
- C In accordance with a requirement of the contract the buyers instructed their bank to open a letter of credit to cover the cost of the goods. On Aug. 23 the sellers entered into a contract to purchase the goods from suppliers in Holland. Payment under this contract was to be in Sweden by letter of credit against shipping documents. On Aug. 27 the buyers re-sold the goods to another firm of merchants in Hongkong. As the suppliers and the sellers' forwarding agents in Holland were having difficulty in obtaining shipping space, the buyers, with the consent of their sub-buyers, agreed to grant an extension of time for shipment, but, owing to the fact that the market for the goods in Hongkong was falling, the buyers and their sub-buyers each insisted that shipment must be made on or before Oct. 31. It was then arranged for the goods to be shipped from Antwerp in the Tarn, which was scheduled to arrive at that port from Oct. 29 to Oct. 31. The goods were on the quay on Oct. 31, but the ship did not arrive until the next morning, and the goods were not loaded until Nov. 3. The bills of lading were indorsed: "Received for shipment and since shipped Oct. 31". The sellers' forwarding agents handed the bills to the suppliers, who required them to obtain payment in Sweden against the sellers' letter of credit.
- E Between Nov. 3 and Nov. 6 the bills were altered, the words "Received for shipment and since" being erased. On Nov. 8 the sellers' bank received the bills, on Nov. 10 they paid the amount due under their credit to the suppliers, and on Nov. 12 they presented the bills to the buyers' bank and received the amount due from the buyers. Towards the end of November the sub-buyers ascertained that the Tarn had not called at Antwerp until Nov. 1, and on Dec. 1 they asked for their contract to be cancelled as the goods had not been shipped in October as specifically required. On Dec. 12, in reply to an inquiry from the buyers, the shipping agents confirmed the date of the ship's arrival at Antwerp. On Dec. 17 the goods arrived at Hongkong, and the buyers took delivery on behalf of their bank, to whom the goods were pledged, put the goods in a go-down, and gave the go-down warrants to the bank as security. On Feb. 11, 1952, they paid the bank the amount due on the bills. Owing to the fall in the market they were unable to re-sell the goods, and on Feb. 29 their solicitors wrote to the sellers saying that the bills of lading had been forged, that the goods had not been shipped on Oct. 31, and that they would hold the sellers responsible for damages arising out of the breach. On Mar. 18 the sellers replied denying the breach of contract and any knowledge of the forgery. On Mar. 18, 1953, the buyers commenced proceedings against the sellers, for the return of the

£11,800, as money had and received to the use of the plaintiffs on a consideration that had wholly failed, and, alternatively, as damages for fraudulent misrepresentation or breach of duty. Alternatively, they claimed damages for loss of profit by reason of their failure to re-sell. The court found that the forgery had been committed by or on behalf of the suppliers; that the sellers' forwarding agents were privy to the fraud; that the sellers were not a party to the fraud; that the letter of Feb. 29, 1952, could not be regarded as an election to reject the contract; and that the first act on the part of the buyers which could be regarded as an act of rejection was the issue of the writ on Mar. 18, 1953. On the question of the sellers' liability,

HELD: (i) as the sellers were the persons on whom, in the first instance, the fraud was being practised, and as they alone, having paid the suppliers, would have suffered if it had been discovered on Nov. 9, the forwarding agents were deceiving their own employers, and, therefore, the agents' knowledge was not the knowledge of the sellers, and the sellers were not guilty of fraud.

Re Hampshire Land Co. ([1896] 2 Ch. 743), and *Houghton & Co. v. Nothard, Lowe & Wills* ([1928] A.C. 1), applied.

(ii) the lapse of time before the buyers commenced their action against the sellers was so great as to be conclusive that the buyers had affirmed the contract and elected to keep the goods.

Dictum of MELLOR, J., in *Clough v. London & North Western Ry. Co.* (1871) (L.R. 7 Exch. 35), applied.

(iii) notwithstanding the forgeries, the bills of lading were not nullities as the alterations, although they were material, did not go to the essence of the instruments; the bills were still evidence of the contract of affreightment and were documents of title which would entitle the holder to take the goods from the ship; and, therefore, the buyers were not entitled to the return of their money as for a consideration which had wholly failed.

(iv) under the c.i.f. contract there were two separate and distinct obligations on the sellers, viz. (a) to deliver correct documents, and (b) to ship goods in conformity with the contract, and on breach of these obligations the buyers had two separate and distinct rights, viz., the right to reject the documents and the right to reject the goods; the right to damages for a failure to deliver correct documents vested when the breach was committed, and, as the effect of the breach was to deprive the buyers of the right to reject which they would have exercised if the bill of lading had been truly dated, the measure of damages was the sum required to put the buyers in as good a position as they would have been if the breach had not been committed; whether the buyers treated the failure to ship goods in conformity with the contract as a breach of condition or as a breach of warranty, their election could not alter the measure of damages recoverable for the earlier breach, viz., the failure to deliver correct documents; and, therefore, the true measure of damages to which the buyers were entitled was the difference between the contract price of the goods and the market at the date of delivery.

James Finlay & Co. v. N.V. Kwik Hoo Tong H.M. ([1929] 1 K.B. 400), applied.

Per curiam: In a c.i.f. contract the goods were "delivered" to the buyer, within the meaning of the Sale of Goods Act, 1893, s. 35, when they were put on board a ship at the port of shipment. When the documents of title were given to the buyer, the true view would seem to be that he obtained the property in the goods subject to the condition that they would re-vest in the seller if, on examination, they were found to be not in accordance with the contract. So long as the buyer dealt only with the documents, he would be dealing only with the conditional property which he had, but if he dealt

physically with the goods after they had been landed, e.g., if he delivered them to a sub-buyer, he would be doing an act inconsistent with the seller's ownership, i.e., his reversionary interest in the goods. But neither a pledge of the goods nor a sale of documents under an ordinary string contract would interfere with the seller's reversionary interest.

Hardy & Co. v. Hillerns & Fowler ([1923] 2 K.B. 490), considered.

AS TO BUYER'S RIGHT OF REJECTION, see HALSBURY, Hailsham Edn., Vol. 29, p. 224, para. 297; and FOR CASES, see DIGEST, Vol. 39, pp. 586-592, Nos. 1876-1920.

Cases referred to:

- (1) *Re Hampshire Land Co.*, [1896] 2 Ch. 743; 75 L.T. 181; *sub nom. Re Hampshire Land Co., Ltd., Ex p. Portsea Island Building Society*, 65 L.J.Ch. 860; 9 Digest 645, 4267.
- (2) *Houghton & Co. v. Nothard, Lowe & Wills*, [1928] A.C. 1; 97 L.J.K.B. 76; 138 L.T. 210; Digest Supp.
- (3) *Clough v. London & North Western Ry. Co.*, (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 35 Digest 69, 669.
- (4) *Kreditbank Cassel G.m.b.H. v. Schenkers*, [1927] 1 K.B. 826; 96 L.J.K.B. 501; 136 L.T. 716; Digest Supp.
- (5) *Mahony v. East Holyford Mining Co.*, (1875), L.R. 7 H.L. 869; 33 L.T. 383; 9 Digest 642, 4239.
- (6) *Rowland v. Divall*, [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 39 Digest 431, 608.
- (7) *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; Digest Supp.
- (8) *Taylor & Sons, Ltd. v. Bank of Athens*, (1922), 27 Com. Cas. 142.
- (9) *Finlay (James) & Co. v. N.V. Kwik Hoo Tong H.M.*, [1928] 2 K.B. 604; 97 L.J.K.B. 817; 139 L.T. 582; *affd.* C.A., [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; Digest Supp.
- (10) *Hardy & Co. v. Hillerns & Fowler*, [1923] 2 K.B. 490; 92 L.J.K.B. 930; 129 L.T. 674; 39 Digest 592, 1919.

ACTION.

The plaintiffs, Kwei Tek Chao, Chee Foo Chao, Soo Chee Kho and Walter Martin Sulke, were partners in a firm of merchants carrying on business in Hongkong under the name of Zung Foo Co. The defendants, British Traders and Importers, Ltd., were importers and exporters carrying on business in London. By a contract made in August, 1951, the terms of which were embodied in two sales notes, dated, respectively, Aug. 23 and Aug. 24, 1951, the defendants agreed to sell and deliver, and the plaintiffs agreed to accept and pay for, twenty metric tons (in two lots of ten tons each) of Rongalite C. lumps of Swedish origin at £590 a ton c.i.f. Hongkong. Rongalite was a chemical used for bleaching cloth, and at the time of the contract there was a great demand for it on the Chinese mainland. The delivery clause provided:

"Delivery for shipment: 4/6 weeks subject the availability of shipping space. Payment: net cash . . . against [the defendants'] draft at sight accompanied by the following documents: (a) complete set of on-board bills of lading marked 'freight pre-paid' . . ."

The plaintiffs were required to establish immediately letters of credit which were to cover the cost of the goods, to allow shipment from any continental European port, and to be valid for ninety days, that period being later extended. In accordance with this requirement the plaintiffs instructed their bank, the Mercantile Bank of India, to open the letters of credit and gave them a pledge of the goods for the advance.

On Aug. 23, 1951, the defendants, to fulfil their contract with the plaintiffs, entered into a contract to buy the Rongalite from the third party, a Dutch firm

called N.V. Handelsmaatschappij J. Smits Import-Export (referred to hereinafter as Smits), the price to be f.o.b. Rotterdam (later altered to Antwerp) and delivery to be in two or three weeks. In September the contract was changed to a c.i.f. contract to provide for payment in Sweden by letter of credit against shipping documents, and, on the defendants' instructions, Barclays Bank, through one of their correspondents, opened a credit in Sweden in favour of a person nominated by Smits.

On Aug. 27, 1951, the plaintiffs entered into a contract to re-sell the goods to a firm called Nam Hua in Hongkong. A

During September, 1951, Smits and a Dutch firm, called Sloodmakers, who were employed by the defendants as their forwarding agents, were finding difficulty in obtaining shipping space. By a letter, dated Sept. 25, the plaintiffs, having obtained the consent of Nam Hua, agreed to extend the date for shipment to Oct. 31, but insisted that that should be the latest date, as the market for the goods was then falling. The defendants passed on this information to Smits and Sloodmakers. From the beginning of October two shipping agents in Antwerp known as Wall's and Van Ommeren were also trying to find shipping space for the goods, each being in charge of one lot of ten tons. Eventually space, for each lot of ten tons, was booked in the Tarn, which was scheduled to arrive at Antwerp from Oct. 29 to Oct. 31, but subsequently the date of arrival was changed to Oct. 31. Having failed to obtain a further extension of time from the plaintiffs, the defendants, in a letter dated Oct. 11, informed Sloodmakers that shipment must be effected by Oct. 31, and that B C

"unless you can arrange for the shipping company to issue genuine shipped on board bills of lading dated not later than Oct. 31 we will not be able to proceed with the shipment." D

On Oct. 17 the defendants informed Smits that they would not take delivery of the goods unless shipped on board bills of lading dated on or before Oct. 31 were presented. On Oct. 18 they forwarded the shipping instructions to Sloodmakers and authorised them to hand the bills of lading to Smits. The form of the instructions was: E

"Please call this consignment forward and take out bill of lading on our behalf. Bill of lading to be dated not later than Oct. 31. Clean bill of lading in the name of British Traders and Shippers, Ltd., evidencing goods 'shipped on board'."

On Oct. 31 the goods were on the quay at Antwerp ready for shipment, and Van Ommeren and Wall's presented to the shipping company the bills of lading with the name of the ship and the words "shipped Oct. 31" filled in. The Tarn arrived at Antwerp at 4.15 a.m. on Nov. 1, and the goods were loaded on Nov. 3. The shipping company refused to sign the bills in the form presented, and the words "Received for shipment and since" were inserted before "shipped Oct. 31", so that the bills read: "Received for shipment and since shipped Oct. 31." In a letter, dated Nov. 5, Sloodmakers informed the defendants that the goods had been shipped in the Tarn and that the original bills of lading together with the copies had been handed over to Smits. They did not refer to the date of shipment or to the indorsement on the bills. They had not been authorised to hand over to Smits the copies of the bills, but should have forwarded them to the defendants. F G

On some date between Nov. 3 and Nov. 6 the bills of lading were altered, the words "received for shipment and since" being erased, leaving the words "shipped Oct. 31". The bills were presented on behalf of Smits to the bank in Sweden with whom the defendants' letter of credit had been arranged, and on Nov. 6 the Swedish bank forwarded them to Barclays Bank. One bill which required indorsement was sent to the defendants, who indorsed it without question. On Nov. 10 Barclays Bank paid the amount due under their credit H

on behalf of the defendants, and presented the documents to the Mercantile Bank of India. On Nov. 12 Barclays Bank received from the Mercantile Bank the sum due under the plaintiffs' letters of credit. On Nov. 15 the defendants sent a cable to the plaintiffs saying that the goods had been shipped in the Tarn on Oct. 31 and that the documents had been presented on Nov. 10. On Nov. 19 the documents arrived in Hongkong, and on Nov. 21 the Mercantile Bank presented the bills to the plaintiffs who accepted them.

- A Towards the end of November Nam Hua ascertained that the Tarn had not called at Antwerp until Nov. 1, and on Dec. 1 they wrote to the plaintiffs informing them of that fact and asking them to cancel the contract as the goods had not been shipped during October. The plaintiffs thereupon communicated with the shipping company's agents, who, by a letter dated Dec. 12, confirmed that the ship had arrived at Antwerp on Nov. 1 and had left on Nov. 4. On Dec. 17 the goods arrived at Hongkong and the plaintiffs took delivery on behalf of their bank, to whom the goods were pledged. The goods were put in a go-down and the plaintiffs obtained go-down warrants which they handed to the bank as security. On Jan. 21, 1952, the plaintiffs, not having received the copies of the bills of lading, wrote to the defendants asking for them. On Jan. 31 Sloomakers, who had retained the copies, sent them to the defendants, at their request, and on Feb. 4 the defendants sent them to the plaintiffs.

C In the meanwhile the plaintiffs had tried to persuade Nam Hua to take the goods, but they refused to do so owing to the fact that, in November or December, the Chinese had placed an embargo on the Rongalite entering the mainland and, in consequence, the market for it in Hongkong had fallen. On Feb. 11 the plaintiffs paid to the bank the amount due on the bills.

- D On Feb. 29, 1952, the plaintiffs' solicitors wrote to the defendants saying that the bills of lading had been forged and that the goods had not been shipped on Oct. 31. The letter ended:

E "On the strength of this forgery you were able to negotiate the document and obtain payment from our clients' bankers. Our instructions are, therefore, to hold you responsible for damages arising out of your breach of contract, but before instituting proceedings however, we shall be glad to hear what proposal you may have to put forward to compensate our clients. Unless, therefore, we hear from you with some reasonable proposition by return air mail, our clients will be reluctantly compelled to institute proceedings without any further notice."

- F On Mar. 18 the defendants, through their solicitors, replied denying that they had committed any breach of contract and that they had any knowledge of the forgery or of the fact that the Tarn arrived at Antwerp at a date later than that on the bill of lading. On Apr. 15 the plaintiffs' solicitors ascertained beyond doubt, from the shipping company's agents, the fact that the bills were forged and the nature of the forgeries. On Mar. 18, 1953, the plaintiffs issued the writ in the action against the defendants.

- G By their statement of claim the plaintiffs claimed that it was the foundation and/or an implied condition of their contract with the defendants that true, accurate and genuine bills of lading stating correctly the date of shipment should be presented by the defendants to the plaintiffs' bank and to the plaintiffs, that the bills, being a forgery, were a nullity and of no effect, and that, therefore, no payment for the goods ever became due or payable. Accordingly, the plaintiffs claimed the return of £11,800 as money had and received to the use of the plaintiffs on a consideration that had wholly failed, and, alternatively, they claimed that sum as damages for fraudulent misrepresentation or breach of duty. They further claimed, *inter alia*, £1,427 12s. loss of profit, due to the cancellation of their contract with Nam Hua. The defendants denied the allegations and brought Smits in as third party. Before the trial Smits indicated through their counsel that they would call no evidence and that they would

accept for the purposes of the issue between the defendants and themselves whatever facts were found on the issue between the plaintiffs and the defendants.

Ashe Lincoln, Q.C., and G. J. Webber for the plaintiffs.

Eustace Roskill, Q.C., and Honeyman for the defendants.

M. R. E. Kerr for the third party.

DEVLIN, J., stated the facts, and found that the defendants and their servants were innocent of fraud or of any complicity in the fraud; that the forgery of the bills of lading was committed by Smits, the third party, or by someone on their behalf; and that there was a conspiracy to which Sloomakers, the defendants' forwarding agents, were a party in which they assisted by forwarding forged non-negotiable copies of the bills of lading. His LORDSHIP continued: What is the result of that in law? It is suggested that, as Sloomakers were the defendants' agents, the defendants are responsible for their fraud, but that, of course, is stating the matter far too broadly. No doubt, that might have been the case if Sloomakers had been a servant. Any act which a servant does in the course of his employment, even if it be for his own benefit, is one for which his employers must answer. But it cannot be said that Sloomakers were servants. They were agents, and, therefore, the question is whether they committed an act in the course of the authority which they had. I do not suppose there would be any doubt that, if, for example, Sloomakers had made fraudulent representations to Wilhelmson, the agent of the shipping company, in order to procure the bills of lading, the defendants would have been liable although they had not expressly authorised it, because Sloomakers would be doing improperly the very act which they had been authorised to do. But that is not the question which I have to consider. The fraud which is alleged against the defendants is that they fraudulently presented the bills of lading, and thereby made a fraudulent representation that the bills were genuine and a representation about the shipping date. Of course, a limited company has to act through agents, and, if the person who presents the bills of lading knows that they are untrue and is an agent, that is an end of the matter, but that is not suggested here. The bills of lading were presented, on behalf of the defendants, by Barclays Bank, and, therefore, the representation on which the credit was obtained was made by them, and no one suggests that they were fraudulent. The question then is: Did some other agent of the defendants have knowledge of the true state of facts, and not merely knowledge, but guilty knowledge, i.e., knowledge that the representation was false, that the facts on which it was founded were false, and that it was going to be made for the purpose of deceit? I think that Sloomakers had that knowledge? The next question is: Is Sloomakers' knowledge the knowledge of the defendants. It is only by showing that Sloomakers' knowledge is the knowledge of the defendants that fraud can be proved against the defendants. In my judgment, Sloomakers' knowledge is not the knowledge of the defendant company, and I do not need to decide that by asking myself whether knowledge acquired by an agent, in these circumstances and in regard to such a matter, would, normally, be within the knowledge of the defendants, because there is a special principle which, I think, applies to exclude it in the present case. On the findings which I have made, the defendants were innocent of fraud or of any complicity in the fraud. It follows, therefore, that they were the people on whom, in the first instance, the fraud was being practised, and Sloomakers, by making themselves a party to the forgery of the bills of lading, were deceiving their own employers. If the fraud had been discovered on Nov. 9, it would have been the defendants, and they alone, having parted with their money, who would have suffered by it. In those circumstances the principle which has to be applied is the principle which was formulated by VAUGHAN WILLIAMS, L.J. ([1896] 2 Ch. 749) in *Re Hampshire Land Co.* (1). I take the statement of it from its incorporation in the speech of VISCOUNT DUNEDIN ([1928] A.C. 15), in *Houghton & Co. v. Nethard*.

Lowe & Wills (2), where it received the approval of the House of Lords. It is this:

A “ ‘ If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud: but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company ’ .”

B In the circumstances I hold that the charge of fraud, whether it be personal fraud or fraud through the agency of Sloomakers, has not been made out, and, therefore, I must deal with the case on the other matters on which the plaintiffs rely.

C The most convenient point at which to begin is the question whether, having regard to the plaintiffs’ conduct after the delivery of the goods in Hongkong, it is now open to them to have the transaction set aside and to recover the money which they had paid, as money had and received to their use for a consideration which has wholly failed. There is no dispute that, if this contract called for shipment by Oct. 31, an essential condition of the contract has been broken, that the date of shipment is part of the description of the goods, and that, therefore, a failure to deliver goods of an October shipment means that there has been a breach of a condition which would give the plaintiffs the right to elect to rescind the contract. Fraud being out of the case, the, perhaps, greater latitude which is accorded to a buyer or a party aggrieved when the other party has been fraudulent, viz., latitude in the matter of making up his mind whether or not he is going to affirm the transaction, may not strictly be in point, but I think it is desirable that I should deal with it, because the other ways in which the case has been put show that the question may not be the bare question, under the Sale of Goods Act, 1893, whether or not a buyer has the right to reject, but the broader question as to the period of time within which he has the right to make his election to affirm or avoid a voidable transaction.

F The first thing is to inquire what are the acts on which the plaintiffs rely as being acts of rejection or as rescinding the transaction. They rely on two, and two only, the first being the letter of Feb. 29, 1952, and the second being the claim made on the writ, which was not issued until Mar. 18, 1953, a year later. Therefore, the first question is whether the letter of Feb. 29 amounts to a rejection or to a decision to avoid the transaction, claiming the return of the money, with the consequence that the property goes back where it belongs. I am quite unable to follow the argument that the letter of Feb. 29 was a rejection of the goods or an avoidance of the transaction. It is true that it contains a complaint and says that the defendants will be held responsible, but the essence of the matter is: What form of relief were the plaintiffs intending to claim? I do not know whether the writers of the letter were seeking to do anything more than merely to formulate a complaint on behalf of the plaintiffs, but, if the plaintiffs were making a choice one way or the other, the natural interpretation which one would put on the letter is that they were choosing to affirm the transaction and to claim damages. There is not a word about rejection or about the goods going back. After saying that, as a result of the breach of contract, the plaintiffs had suffered serious damage, the plaintiffs’ solicitors go on to say:

“ Our instructions are, therefore, to hold you responsible for damages arising out of your breach of contract . . . ”

It is true that, on the basis of rejection, there could be a claim for damages for loss of profit, but, in my opinion, the letter would naturally suggest to anyone that the plaintiffs were going to affirm the contract and to seek their remedy in claiming damages in relation to the market value of the goods themselves, especially when the letter is taken in conjunction with the fact that, until then, the plaintiffs had acted as if they were going to affirm the transaction, by taking delivery of the goods, putting them in a go-down, and handing the go-down warrants to their bank. I am not sure that the recipient of that letter might not have been justified in inferring that the plaintiffs were making an election to affirm the contract, but it is not put as high as that, and it is sufficient for me to say that I cannot possibly regard it as being an election to reject. It follows, therefore, that between that time and the issue of the writ there was no act of rejection that can be relied on, so that the rejection which is relied on in this case is on Mar. 18, 1953. A

I think it is a fair summary of the state of mind of Mr. Sulke (one of the plaintiffs) that he had the material which would have enabled him to reject as early as Dec. 12, 1951. He knew by that date that the ship had not sailed on Oct. 31 and had not been loaded on that day, because she had not called at Antwerp until Nov. 1. It is fair to say that he was not in the position to make his rejection on that information alone, because his rights might depend on whether or not the bills of lading were correct, and, perhaps, he needed a little more time to make up his mind about that. But by the middle of January, 1952, he suspected that there was something wrong with the bills of lading, and by Feb. 29 those advising him were sufficiently clear in their minds to formulate a precise charge that the bills had been forged. On Apr. 15 he was told in detail by the shipping company that they had examined the originals of the bills of lading and that they had been forged, and I find difficulty in seeing why, after Apr. 15, he needed any further time for making inquiries. In order to make up his mind what he was going to do, he did not need to know anything more than that there had been incorrect bills of lading. One must make allowances for the fact that he had to have time to consult his solicitors, and that he was entitled to try to do the best he could in the way of pressing his buyers to take the goods, but that had failed by Jan. 25, and by Apr. 15 he knew beyond any doubt that there was forgery. Nothing whatever was done until Mar. 18, 1953, and no explanation has been given to me how the time was occupied, except for a suggestion that the matter was passing between London and Hongkong, and that there were handwriting experts at work on the bills of lading. B C D E

The generous test, if I may so put it, in the case of fraud, is that which is laid down in *Clough v. London & North Western Ry. Co.* (3). The essence of the decision in that case is that there is no immediate necessity in the case of fraud to make an election at once, and within certain limits a buyer may keep the situation open, provided that he does nothing to affirm the contract. Differing from the decision of the Court of Exchequer, MELLOR, J., in the Exchequer Chamber, said (L.R. 7 Exch. 34): F

"... we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract."

He went on to say (*ibid.*, 35): G

"We think that so long as he has made no election he retains the right to determine it either way... And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined." H

I think that, in all the circumstances of the present case, and having regard to the fact that the goods have been dealt with, that, if anything is to be made of them, they will have to be marketed, and that the markets may be falling,

the lapse of time, which is nearly fifteen months, is so great as to be conclusive, even if fraud were proved, that an election had been made to affirm the contract. If the test be the simpler one under the Sale of Goods Act, 1893, s. 35, then counsel for the plaintiffs concedes that, if the letter of Feb. 29 was not a rejection, the plaintiffs must be held to have affirmed the contract and elected to keep the goods.

A It is with that background, therefore, that one has to consider the claim made by the plaintiffs for the return of their money. It is put as a claim for a consideration that has wholly failed, and I confess that I am not able to understand how that differs from a claim made in the ordinary way under the Sale of Goods Act, 1893, where there has been a rejection. Of course, if goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is by an action for money paid for a consideration
B which has wholly failed, i.e., money had and received, but that form of action is governed by exactly the same rules with regard to affirming or avoiding the transaction as in any other case. The principal element relied on by counsel for the plaintiffs was the claim that the bill of lading, because it was a forgery, was a nullity. Counsel for the defendants contested that. He submitted that, although there had been a material alteration, it did not necessarily make the
C bill a nullity. The bill, he said, still evidenced the primary thing, the contract of affreightment, although the description of the way in which the goods were put on board and the date on which they were put on board were incorrect, and it was still a document of title which would entitle the holder to take the goods from the ship.

D There does not seem to be any authority precisely in point, and counsel for the plaintiffs relied on broad statements, in *Kreditbank Cassel v. Schenkers* (4) in particular, that a forged document is null and void. In that case BANKES, L.J., said ([1927] 1 K.B. 835):

“To mere irregularities the principle of [*Mahony v. East Holyford Mining Co.* (5)] no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void.”

E But such general dicta must be related to the circumstances in which they are made. If someone forges the signature to a document, that document is wholly fictitious from beginning to end, and it is, of course, null and void as soon as forgery is proved, but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and
F void. Deciding the matter in the absence of authority and on principle, I think the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument, or not. If it does, and if the forgery corrupts the whole of the instrument or its very heart, then the instrument is destroyed, but if it corrupts merely a limb, then the instrument remains alive, though, no doubt, defective. For example, if a man adds two
G noughts to a cheque, that is the end of it. It is no longer a cheque for, let us say, £10, because the original figure of £10 has been destroyed by the addition of the two noughts. It is not a cheque for £1,000, because the figure of £1,000 is a forged figure. There is, therefore, nothing left of it, and it must go. I do not think, however, that the same result would necessarily follow if a man were, for example, to forge the date on a cheque because he thought that, as it was
H overdue, there was a possibility that awkward questions might be asked. Accordingly, in my judgment, the bill of lading in the present case was not a nullity, and the submission of counsel for the defendants on that point is right. But, even if it were not so, it would not alter the conclusion which I have reached. If a bill of lading is a nullity, no doubt the property does not pass by its tender, but if a man, with knowledge of the bill of lading and the fact that it is a nullity, acts on it, takes delivery of the goods and keeps them, I do not think that it is then open to him to avoid the transaction. The question then is simply this:

Is the transaction void ab initio? If it is, then the seller, as well as the buyer, can avoid it or set it aside. If it is only voidable, that gives an election to the buyer, and, if he wishes to reject, he must do so within a reasonable time.

Counsel for the plaintiffs contended that, as the bill of lading did not pass the property, it was null and void from beginning to end, no question of rejection could ever arise, and at any time, apparently, its nullity could be decreed. It is interesting to observe that that was not the course taken in *Rowland v. Divall* (6), which was cited by counsel for the plaintiffs as being a comparable case. In that case the seller purported to sell a motor car to which he had no title, and, accordingly, the property could not have passed. When the buyer sought to get his money back as for a total failure of consideration, it was suggested that he had used the car for some time, and, that, therefore, the consideration had not totally failed. In that case, the property could not have passed, and, therefore, if the argument of counsel for the plaintiffs is right, it could have been decided simply by saying that the property had not passed, and, therefore, the buyer was entitled to have his money back, because the transaction was void. It was, however, not decided on that basis, but as a claim made for breach of an implied condition on the part of the seller that he had the right to sell the goods, and *BANKES, L.J.*, said ([1923] 2 K.B. 503):

"The plaintiff now brings his action to recover back the price that he paid to the defendant upon the ground of total failure of consideration. As I have said, it cannot now be disputed that there was an implied condition on the part of the defendant that he had a right to sell the car, and unless something happened to change that condition into a warranty the plaintiff is entitled to rescind the contract and recover back the money. The Sale of Goods Act itself indicates in s. 53 the circumstances in which a condition may be changed into a warranty: 'Where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty' the buyer is not entitled to reject the goods, but his remedy is in damages. Mr. Doughty [for the seller] contends that this is a case in which the buyer is compelled to treat the condition as a warranty within the meaning of that section, because, having had the use of the car for four months, he cannot put the seller in statu quo and, therefore, cannot now rescind, and he has referred to several authorities in support of that contention".

The answer that the buyer gave was: "As soon as I knew that I had not got the property I took my action, and the fact that I had had the use of the car does not make any difference". Clearly, the answer would not have been the same if the buyer, with knowledge of the true facts, had continued to use the car for another twelve months or so, and had then found that the market had fallen and that he would like to hand it back again. Nor, of course, would it be open to the seller in such circumstances to take the car back again, and, when the buyer protested, to say: "The car was never yours, because I never had any property in it. I never bought the property from the person who really owned it. It has improved considerably in value, and now I want it back, so here is the price which you paid for it". But such a course would be possible if the contract were void, and not merely voidable.

For those reasons I think that the claim for return of the money as for a consideration which has wholly failed is a bad one in law and on the facts, and cannot succeed. The claim with which I, therefore, have to deal is a claim for damages for breach of a contract. Counsel for the defendants contended that the plaintiffs, by their election, had not merely waived the breach of condition, but had also waived the breach, meaning thereby that, by taking up the goods when they were taken off the ship in December and by their subsequent conduct, they had abandoned the right to claim any damages. But that argument, with respect, seems to me to be quite unsound. The only way of establishing it would be to show a separate agreement, binding on the plaintiffs, by which they had

agreed to surrender the right to damages which automatically vested in them at the time of the breach. The authority to which I was referred in support of the contention was some dicta of BRANSON, J., referred to by LORD WRIGHT, M.R. ([1936] 2 All E.R. 607), in *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (7), which did not seem to me to do anything more than set out the well-known principle that a man must elect between the choice of treating a condition as giving him a right to rescind or turning it into a warranty and giving him a right to damages. Thus, I think, the question which is left for me to determine in this case is what is the true measure of damages.

This question gives rise to some difficulties in law. In the present case there was a considerable fall in the market. Prima facie, that is not a matter for which a buyer whose contract has been broken can recover damages; a fall in market value does not flow from anything which the seller has done. Therefore, counsel for the defendants contended that the true measure of damages in this case was simply the difference in the market value between a November and an October shipment. The seller shipped four days late, with the result that the buyer had a November shipment instead of an October shipment. The fact that shipments made in October, November, January, February, March, April, had all fallen in value is wholly irrelevant. The question to be determined is whether a November shipment fell rather more than an October shipment, in which case the difference can be recovered as damages. That that is the ordinary measure of damages in the ordinary case of delayed shipment of the same goods is made plain by the authority of *Taylor & Sons, Ltd. v. Bank of Athens* (8), and I do not think that I need do more than cite the essential sentence in the judgment of McCARDIE, J., who said (27 Com. Cas. 147):

"It is vital to observe that the loss must result from the breach of warranty, as distinguished from a loss through having entered into the contract. It does not extend, I think, to a case where the loss results not from the breach of warranty but from an unfortunate or improvident bargain which the buyer may have made. Market falls are not generally due to a vendor's default. A buyer cannot, I think, save perhaps in very exceptional circumstances, attribute to his seller a loss which, in substance and in fact, arises not from the seller's breach, but from a fall in market values. To impose the burden of such a loss on the seller would be to saddle him with something for which he is wholly free from blame."

That case was distinguished in *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (9), where the facts were substantially the same, except that the buyer, instead of suing for damages for failure to ship within the contract time, sued, as he was able to do in that case, for damages for failure to deliver a correct bill of lading. There was no fraud found, but the shippers had succeeded in persuading the ship's agent to put an incorrect date on the bill of lading, with the result that the documents had been accepted, whereas otherwise they would not have been. The buyer, therefore, sued for a breach of that term of the contract. It is generally accepted, and accepted specifically by counsel for the defendants in the present case, that it is an implied term of a contract of this kind that one must tender a correct bill of lading. WRIGHT, J., held in *Finlay's* case (9) that the true measure of damages for a breach of the term was damages for the loss of the right to reject, and the Court of Appeal affirmed his decision. The injury which the breach had worked on the buyer was that it deprived him of the right to reject which he would have exercised if the bill of lading had been truly dated, and he must, therefore, be put in the same position as he would have been in if he had had the right to reject. If the market has fallen, a buyer, if he is considering only economic conditions, will exercise his right to reject, because he can then go out into the market and buy the same goods at the market price, which, ex hypothesi, is lower than the contract price, and he can put the difference in his pocket. Therefore, the Court

of Appeal held that in that case the true measure of damages was the difference between the contract price and the market price.

Which is the right measure to apply in the present case? Prima facie, the measure which is laid down in *Finlay's* case (9), since this is a case of an incorrect bill of lading. It does not seem to matter for the purposes of the present case about further and other damage, but it is sufficient that it is an incorrect bill of lading. But counsel for the defendants contended that *Finlay's* case (9) could be distinguished, the main distinction on the facts being that in *Finlay's* case (9) the buyer did not discover the true facts until after he had taken delivery of the goods at the port of destination and had re-sold them. By that time he had lost any right which he might have had to reject the goods themselves on their arrival at the port of destination. In the present case counsel for the defendants says that that is not the fact. Before the goods were landed, and before the plaintiffs were required to do any act in relation to them, Mr. Sulke, one of the plaintiffs, was aware that the shipment had been made on the wrong date, and that the bills of lading were incorrectly dated, and, accordingly, his loss of the right to reject flowed from his own act in accepting the goods. He could, then, have simply said: "I am not going to take the goods", and he could have rejected them at that time. His loss of the right to reject was not, as it were, permanently lost, and, matters not having proceeded so far as in *Finlay's* case (9), he still had his rights open to him, and he could have rejected the goods. That loss, it is contended cannot, therefore, be attributed to the incorrectness of the documents, because the fact that they were incorrect was known to him in time to enable him to reject them if he had wanted to do so.

There may be some question on the facts about that. I think that Mr. Sulke knew that the goods had not been shipped until Nov. 1, and it may well be that he ought to have known that the bill of lading date could not be the correct date. He could have ascertained definitely from the ship herself that she had not called at Antwerp until Nov. 1, if there had been any doubt about it, and certainly he could have ascertained the fact from the defendants' solicitors. But I have come to the conclusion that on broader grounds, whether or not Mr. Sulke had sufficient knowledge on which to act or sufficient time in which to make up his mind, the distinction is not a sound one, because it rests on a fallacy, if I may so put it, or on an incorrect way of looking at the matter, which treats it as if there was only one right to reject the same thing, a right to reject which arose when the documents were tendered, and which was not finally disposed of until the goods were handled and delivery was taken of them, and which, therefore, could have been rescued, as it were, before the final act had taken place. I do not think that that is the right view of the matter. There is, in my judgment, not one right to reject, but two rights to reject. A right to reject is, after all, only a particular form of a right to rescind the contract. Wherever there is a breach of condition there is a right to rescind the contract, and if there are successive breaches of different conditions committed one after the other, each time there is a breach there is a right to rescind in respect of that breach. A right to reject is merely a particular form of the right to rescind, because it involves the rejection of a tender of goods.

In the present case there is a right to reject documents, and a right to reject goods, and the two things are quite distinct. A c.i.f. contract puts a number of obligations on the seller, and for the purpose of this case one may say that they are obligations some of which are in relation to the goods and some of which are in relation to the documents. So far as the goods are concerned, the seller must put on board at the port of shipment goods that are in conformity with the contract description. He must also send forward documents, and those documents must also comply with the contract. If he commits breaches, they may, in one sense, overlap, in that they flow from the same act. If there is a late shipment, as there was in this case, the date of the ship-

ment being part of the description of the goods, the seller has not put on board goods which conform to the contract description, and, therefore, he has broken that obligation. He may or may not break the obligation to send forward a correct bill of lading. I should think it follows that, in such a case, a seller knows that he cannot send forward a bill of lading which conforms with the contract and, at the same time, describes accurately the date of shipment, and, therefore, in that sense, it is true to say that the same act necessarily

A causes the two breaches of two independent obligations. There may, however, be cases where the two breaches are not necessarily reflected both in the documents and in the goods. However that may be, there are distinct obligations, and the right to reject the documents arises when the documents are tendered, and the right to reject, or the moment for rejecting, the goods arises when they are landed and when, after examination, they are found not

B to be in conformity with the contract. There are many cases where the documents are accepted, but the goods are subsequently rejected. It may be that, if the actual date of shipment is not in conformity with the contract, the buyer, by accepting the documents, loses not only his right to reject the documents but also his right to reject the goods, but that would be because he had waived in advance the date of shipment. That they are distinct

C obligations, and that that is the root of the reasoning in *Finlay's* case (9) is, to my mind, apparent from the way in which the case is put in the judgment of GREER, L.J. The lord justice said ([1929] 1 K.B. 413):

“The respondents say that the appellants not merely promised to ship the sugar in September but by a distinct and separate promise undertook to hand a bill of lading which would truly state that the sugar was

D shipped in September; so their claim is not merely for damages for breach of contract to deliver the sugar to the ship in September but for damages for the breach of the undertaking to give a true bill of lading. It seems to me that that is the answer to Mr. Jowitt's vigorous argument [on behalf of the appellants] that the two things to be compared are the position the respondents would be in, so far as money is concerned, if the whole

E agreement had been performed on the one hand, and the position they would be in if the whole agreement was not performed. What has to be considered is the plaintiffs' position as regards money if the particular term of the agreement had been performed, and they are to be put, so far as money is concerned, in that same position by damages for breach of that term of the contract. The judge has taken the view that the shippers

F promised to state truly in the bill of lading the date of shipment, and the respondents say that if that had been done they would have been entitled to reject the goods. By the breach of contract in sending forward a bill of lading containing a false statement, the plaintiffs say they have been deprived of that right. I suggested to the appellants that if their promise

G to tender a correctly dated bill of lading had been in a separate contract their contention would have been unarguable. It seems to me to make no difference that the term is in the same contract which contains the obligation to ship the sugar in September. I agree with [counsel for the appellants] that the result of that is to give the plaintiffs in this case exactly the same damages as they would have received if they had successfully brought an action for fraudulent misrepresentation, but there may

H well be terms in a contract which, if broken, put the party complaining of the breach in the same position as if he claimed damages for false representation. That is the view that commends itself to my mind . . .”

There being, therefore, two separate and distinct obligations, there is a right to rescind arising on the breach of any one of them and the matter has to be looked at in the way GREER, L.J., suggests, viz., as if the two obligations were contained in two separate contracts.

It follows, therefore, as a matter of principle, that the action of the plaintiffs on the second breach cannot affect their right to damages on the first breach. The two breaches are distinct, not merely in law, but also as a matter of business and of ordinary common sense. There being a right to reject the documents separately from a right to reject the goods, it is obvious that, as a matter of business, very different considerations will govern the buyer's mind as he applies himself to one or other of those questions. When he has to make up his mind whether he accepts the documents or not, he has not parted with any money. A If he parts with his money and then has to consider whether or not to reject the goods, wholly different considerations will operate. In the interval he may have had dealings with the goods. He may have pledged them to his bank, he may have agreed to re-sell the specific goods, and the position may have been entirely altered.

Let me leave aside the position of a bank and take the simple case of a buyer B who has bought documents. Suppose that he has not dealt with the property in any way but has accepted the documents believing them to be accurate, that the goods arrive, and that the market has fallen by, let us say, five per cent. If he rejects the goods and wants to put himself into the same position, he is faced with the choice of having to go out into the market to buy a new lot of goods at ninety-five per cent. of the purchase price. If the seller to him C was someone about whom he knew little, the buyer might well feel that he would not part with the goods by rejecting them and pay out another ninety-five per cent. (which he might pay to the seller himself if the seller was selling the goods in the market, the property having returned to him) and be faced merely with an unsecured claim for the recovery back from the seller of the price which he had originally paid. Very different considerations would naturally D govern his mind at that stage, when he was considering whether or not to reject the goods, from those which would govern his mind when he was considering whether to reject the documents. If I might call the breach of the term to deliver correct documents breach (a) and the failure to ship goods in conformity with the contract, i.e., on the contract date, breach (b), it seems to me that the right to damages for breach (a) vests when the breach is committed, E that the measure is then determined as being the proper measure to put the buyer in as good a position as he would have been in if the breach had not been committed; and that, when a separate breach, breach (b) is committed, the buyer has a separate and independent right to elect on that breach how he is going to deal with it, whether he treats it as a condition or as a warranty, F and that he cannot be fettered in the exercise of that right by his election altering the measure of damages which he could have recovered from the earlier breach. That measure of damages must remain the same, however the buyer elects to deal with breach (b).

In my judgment, therefore, the only way in which counsel for the defendants could properly put his case, once one accepts the view that there are two breaches with two separate rights to reject or rescind that can be separately G and independently exercised, is to say that in some way the buyer was pledged to minimise his damages under breach (a) by taking a certain course of action under breach (b) by rejecting the goods. I do not think counsel did put it in that way, and I do not think that it would be a successful way of putting it. In fact, if the buyer had rejected the goods, it would not have been to the advantage of the seller in any way nor would it have minimised the damages. H The damages would have been just the same except that the seller would, no doubt, have had the convenience of handling the goods instead of the buyer. For these reasons I think, therefore, that that distinction by the defendants of the principle in *Finlay's* case (9) is a bad distinction and, so far as that is concerned, the principle applies.

The other ground, which was, perhaps, a comparatively minor one, on which

counsel for the defendants sought to distinguish the principle in *Finlay's* case (9), was that in the present case, as distinct from *Finlay's* case (9), there had, in fact, been a shipment within the contract time. He said that, on a true construction of the contract, contrary to the belief of the parties at the time, the last date of shipment was not Oct. 31. That, of course, does not directly affect the matter. Whatever the time for shipment may be, it is still a breach of contract to tender a bill of lading which does not represent truthfully the date of shipment. Counsel for the defendants contended that in those circumstances it would not lead to any damages, for the buyer did not thereby lose his right to reject, because the seller could have obtained and tendered a true bill in time and it would have been within the contract. But that leads to complications. The duty on the seller is to bring forward the bills of lading with reasonable promptitude and without delay. If when he has tendered a forged one he goes back to the shipowner and says that he is very sorry but that he or some person to whom he entrusted the bill unfortunately forged it and would the shipowner please issue another one, he would probably encounter difficulties in getting it and it might be difficult for him to say when he next presented the bill that he then presented it without delay. I think the short answer is that I am satisfied on the facts of this case that the true date when the shipment period expired was Oct. 31.

The position was that under the contract as originally made there were four to six weeks for "delivery for shipment." I will accept, without deciding it, as correct, the interpretation which counsel for the defendants put on those words, viz., that the goods need only be delivered within that time. I accept also that that requirement was qualified by the exception that it was to be subject to the availability of shipping space. But that means that there was a duty on the defendants to deliver the goods on the quay within four to six weeks, and, if they failed to do so, it is for them to establish that they were excused from doing it because no shipping space was available. I am satisfied that they did not establish that the lack of shipping space was the reason why they did not deliver the cargo. Accordingly, to be within the contract period they had to have an extended date of shipment. They asked for it, and I am satisfied that what they got was a shipping date: they did not get a date of delivery for shipment, whatever the original contract was, but a date which required them to ship by Oct. 31. Whether or not that was still subject to the exception of availability of shipping I do not think matters. Again, the defendants would have to bring themselves within the exception by proving the facts on which they rely, and I am satisfied that the reason why the cargo could not be shipped before Oct. 31 was, not because shipping space was not available, but because the cargo was not ready for shipment before that day. That disposes of the second ground of distinction on which counsel for the defendants relied.

Before I leave *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (9), I think it is worth referring to the passage which I read from the judgment of GREER, L.J. ([1929] 1 K.B. 414), where he equated the damages for this type of breach to damages for fraud. Counsel for the defendants conceded that, if fraud had been proved in the present case, the damages would be the same as if *Finlay's* case (9) applied. On the view which was taken of the facts of that case in the Court of Appeal and from what WRIGHT, J., said in the court below ([1928] 2 K.B. 614), one of the factors to which the court drew attention was the importance of seeing that behaviour of this sort in relation to shipping documents was not allowed to pass with impunity. Those are observations which the court made. They did not affect the legal principle, but I say, merely by way of observation, that, if the contention of counsel for the defendants were right, the defendants would escape with nominal damages, and, when they brought their action against the third parties, who, undoubtedly, on the view

which I have taken of the facts, have committed fraud, they would either have to claim against them the full measure of the fraud and obtain a profit for themselves, or, alternatively, they would ask only for an indemnity for nominal damages to compensate them for the plaintiffs' claim against them, in which case the third party would escape with impunity from the consequences of the fraud which they had committed.

There is one other matter on this aspect of the case with which I should deal, although it arises only indirectly. In view of the conclusion at which I have arrived that I am dealing with two separate breaches, each with their separate remedies, it is not relevant to consider whether the plaintiffs lost their right to reject the goods. In my view, they lost their right to reject the documents and their right to reject the goods was something different which they could exercise whichever way they chose. If there had been only one right to reject, it would have been material to ascertain whether the plaintiffs had, in any event, lost their right to reject by any action which they took in relation to the documents. If they had handled the documents in such a way as to amount to an acceptance under the Sale of Goods Act, 1893, s. 35, and if they had committed that act before they had knowledge of the true position, then counsel for the defendants would have been faced with the argument that, when the goods were landed, the plaintiffs would, in any event, have been obliged to accept them, having already lost their right to reject them, so that no distinction could properly be drawn between that and *Finlay's* case (9). One of the matters which was, therefore, canvassed in the course of the argument was whether the plaintiffs, by pledging the documents to their bank, as they did immediately on receipt of them, had not, in any event, dealt with the goods in such a way as to amount to an acceptance under s. 35 and had thereby lost their right to reject. On the view which I have taken, this point no longer arises. What I have to say about it is, therefore, merely *obiter dictum*, but, in view of the fact that it is a matter of some importance and that I have had considerable assistance from the researches of counsel for the defendants on the point, I think it desirable that I should state, if only so that those who may be concerned in the matter in the future may know that the problem arises and has to be solved, what I think is the right answer to it. Clearly, it would create a great deal of embarrassment and inconvenience in the ordinary forms of credit in these transactions if the normal act of pledging goods to the bank, which is done in ninety-nine cases out of a hundred, meant that the buyer had lost his right to reject. Yet, on the face of it, it seems that by pledging the goods he is doing an act inconsistent with the ownership of the seller, which amounts to an acceptance under s. 35. There appears to have been no litigation on the point and no authority, probably because all parties find when this sort of point arises that it is better to leave well alone, and, as the principles in relation to this point work very well in practice, there is no reason why they should be elucidated.

The only authority which counsel for the defendants could find on the point is a note in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 29, p. 224, para. 297, under the title "Sale of Goods". That article was contributed by SCOTT, L.J., and Mr. DIPLOCK, and counsel for the defendants has verified that this particular note was not in the earlier edition. I think it is fairly safe to say, therefore, that it strictly represents the view of SCOTT, L.J., on the matter and has that very considerable degree of authority. In the text he says:

"The right to reject is lost by unreasonable delay in rejecting, or by the buyer doing an act in relation to the goods inconsistent with the ownership of the seller. Re-sale of the goods before inspection, e.g., by transfer of the bill of lading to a third party is such an act, but it would seem that a mere pledge of the documents of title would not be such an act".

Note (h) below is:

"In most 'c.i.f.' contracts when the shipping documents are taken up

by a banker on the buyer's behalf there is a pledge of such documents by the buyer to the banker, so that if pledging the documents of title put an end to the right of rejection, there would never be a right of rejection in many 'c.i.f.' contracts. The point has never been taken in any decided case, but it is submitted that the statement in the text is not inconsistent with *Hardy & Co. v. Hillerns & Fowler* (10), and is in accordance with mercantile usage which is preserved by s. 55 of the Act . . ."

A The words of s. 35 which have to be considered are:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

B

In *Hardy & Co. v. Hillerns & Fowler* (10) the question which arose for decision was whether the buyers had accepted the goods under s. 35. Shortly after the goods arrived and while the time during which the buyers had the right to examine them was still running, they sold and delivered part of them to a sub-buyer. That was an act which was inconsistent with the ownership of the sellers.

C

The case for the buyers was that s. 35 was machinery which came into action only after the machinery in s. 34 had been completed, but the Court of Appeal held otherwise. The court held that, if a buyer chose to commit an act within s. 35, such as intimating to the seller that he accepted the goods, he could accept them notwithstanding that a reasonable time for examining them had not then expired.

D

Counsel for the defendants contended that in the phrase in s. 35,

" . . . when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller . . . "

the word "delivered" means physical delivery of the goods from the ship.

E

If that were so, no dealing with the documents would be within the meaning of the section, because all such dealings would have been done before the goods had been delivered. I cannot take that view of it. I think that "delivery" means, as s. 62 (1) of the Act defines it, a "voluntary transfer of possession", and, therefore, it means transfer of possession under the contract of sale. In a c.i.f. contract the goods are delivered, so far as they are physically delivered, when they are put on board a ship at the port of shipment. The documents are

F

delivered when they are tendered. A buyer, who, as it is convenient, takes delivery from the ship at the port of destination, is not taking delivery of the goods under the contract of sale but is merely taking delivery out of his own warehouse, as it were, by the presentation of the document of title to the goods, the master of the ship having been his bailee ever since he became entitled to the bill of lading.

G

I think that the true answer may be found rather differently. In *Hardy & Co. v. Hillerns & Fowler* (10) ATKIN, L.J., dealt with the situation, which is always a little puzzling, under a c.i.f. contract, viz., if the property passes when the documents are handed over, by what legal machinery, so to speak, does the buyer retain a right, as he undoubtedly does, to examine the goods when they arrive and to reject them if they are not in conformity with the contract? ATKIN, L.J., put forward two views for consideration. One was that, notwithstanding that the documents had been tendered, the property in the goods did not pass until the goods had been examined or until an opportunity for examination had been given. The other was that it passed, but only conditionally, at the time when the documents were tendered, and that it could be re-vested if the buyer properly rejected the goods. Counsel for the defendants said (and I think this is true) that, for the first of the two views which ATKIN, L.J.,

H

put forward, no other authority can be found, and it would, clearly, create considerable complications. If the property in the goods has not passed to him, how can the buyer pledge? It would provide a simple answer to the point had it arisen in this case, since there could not be a pledge. I think the true view is that, when the documents of title are given to the buyer, he obtains the property in the goods, subject to the condition that they re-vest if on examination he finds them not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with that conditional property in the goods. It follows, therefore, that there can be no dealing that is inconsistent with the seller's ownership unless the buyer deals with something more than the conditional property. If the property passed outright, not subject to any condition, there would be no ownership left in the seller with which any inconsistent act within s. 35 could be committed. If the property passes conditionally, the only ownership left in the seller is, so to speak, the reversionary interest in the property in the event of the condition subsequent operating to restore it to him. It is that reversionary interest with which the buyer must not, save with the penalty of accepting the goods, commit an inconsistent act. So long as he is merely dealing with the documents, he is not purporting to do anything more than pledge the conditional property which he has got. Similarly, if he sells the documents of title he sells the conditional property. But if, as was done in *Hardy & Co. v. Hillerns & Fowler* (10), he physically deals with the goods when they have been landed and delivers them to his sub-buyer, he is doing an act which is inconsistent with the seller's reversionary interest. The seller's reversionary interest entitles him immediately on the operation of the condition subsequent, i.e., as soon as opportunity for examination has been given, to have the goods physically returned to him in the place where the examination has taken place and without being dispatched to third parties. The dispatch to a third party is an act, therefore, which interferes with the reversionary interest, but, if the view which I have expressed be the right view, neither a pledge of the goods nor a sale of documents, such as takes place on the ordinary string contract, interferes with that interest. I observe that the view expressed in *HALSBURY*, in the passage which I have read, seems to be that the transfer of the bill of lading to a third party would be inconsistent with s. 35. I prefer to take the view that neither of them is inconsistent for the reasons which I have given. They stand on the same level and they are both dealing merely with conditional property. It would, I think, be unsatisfactory if a court had to decide, every time there was a string of contracts, that, as soon as the documents had been passed to the first in the string with the intention to pass title in the property, the right to reject was thereby lost. It might further be suggested that in any event, in the circumstances of this case, the buyer, having pledged the goods to a banker, was not in a position to reject, because it was his banker who exercised dominion over them by reason of the pledge. That, again, raises a question of some theoretical difficulty: Can a buyer, in effect, defeat a pledge by exercising his right of rejection? One view might be that, although the property is conditional property, i.e., subject to a condition subsequent, he cannot defeat the pledge by his own voluntary act in putting the condition subsequent into operation. The other view would be that it cannot have been contemplated that, when the buyer pledged the documents, he was intending to abandon or impair his right of rejection. It would certainly be very far from the circumstances of this case, in the course which the argument has taken, if I should express any view on that. It is merely a matter to which attention might be paid by those who are concerned with it. Obviously, the banker, in drafting his letter of credit or his instructions, can impose what condition he likes, and it may be that in those matters prevention is better than cure, at any rate, if the cure involves litigation.

- The plaintiffs will recover damages, which will be assessed on the measure that I have indicated. The only further point with which I have to deal is an additional claim for damages made by the plaintiffs for a sum of about £1,200 on the basis that they had lost the profit under the Nam Hua contract which they would have made if the contract had gone through. The ground for the claim is that the plaintiffs were known to be merchants. It was known, therefore, and must have been contemplated, that they had bought the goods for re-sale,
- A that they re-sold these same goods to Nam Hua, and, accordingly, that when the goods were delivered in breach of contract by not being shipped on the right date they were prevented from delivering them to Nam Hua and earning their profit. As the specific goods, viz., October shipped goods shipped on the Tarn by the defendants were never delivered, the plaintiffs say that they could not go out into the market, which, admittedly, had fallen, to buy goods to satisfy
- B Nam Hua's contract, because they had re-sold the specific goods. I do not think that that claim can succeed for two reasons. The first is that there is no evidence that that measure of damages was contemplated by the parties. It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for re-sale, but everyone who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference
- C to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for re-sale, but, if the goods are not delivered to him, he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has not suffered any damage; if the market has risen the measure of damages is the difference in the market price. There are, of course, cases where that *prima facie* measure of damages
- D is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. Then the loss of profit becomes the appropriate measure of damages. Similarly, it may well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for
- E re-sale generally but on a string contract where he will re-sell those specific goods and where he could only honour his contract by delivering those goods and no others, then the measure of loss of profit on re-sale is the right measure.

- In my judgment, there is no evidence that the defendants had any knowledge that the plaintiffs intended to re-sell those very goods. Indeed, I am not at all sure that the plaintiffs did intend to re-sell those very goods. I think the highest
- F that the case can be put is that the plaintiffs, if they did anything at all, appropriated those goods subsequently to the contract with Nam Hua. But there is no evidence that there was any system of string contracts, no evidence that the defendants knew anything more than that the plaintiffs were buying for re-sale generally, and no evidence to show that it could ever have been contemplated that, if the goods were not delivered, it would be necessary for the plaintiffs
- G to do anything except go out into the market and buy similar goods which would have taken their place. I can deal shortly with the alternative answer. The contract between the plaintiffs and Nam Hua is a curious document, but I do not think counsel for the plaintiffs argued that it was a contract for the re-sale of specific goods. What he said, in effect, was that, when the plaintiffs obtained the extension of time from Nam Hua, they made an arrangement with
- H Nam Hua by which they agreed to supply October shipment on the Tarn, and they had to honour it with that particular shipment. I do not think that the documents show that they really made any such arrangement. To get an extension of the date they naturally had to give some information to Nam Hua about what they were going to do to honour their contract. Therefore, they told them that the goods were coming in the Tarn and were to be shipped on Oct. 31. I do not think that they ever tied themselves down to those specific

goods. They could, therefore, have fulfilled their contract with Nam Hua by going out into the market and buying other goods. It is said that, if they had done so, they would have been doing something which was, commercially, not very honest. That is the second principle which was considered in *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (9). I do not take that view. I can understand that, having obtained a concession from Nam Hua, the plaintiffs would have been reluctant to force goods on them on a falling market which were not the goods which it was understood that Nam Hua were to have, but I do not think that that consideration brings the second principle in *Finlay's* case (9) into play. For those reasons, therefore, I cannot allow that element of damage. There will, therefore, be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *A. Kramer & Co.* (for the plaintiffs); *Constant & Constant* (for the defendants); *Middleton, Lewis & Co.* (for the third party).

Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.

CHAPMAN AND OTHERS *v.* CHAPMAN AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, L.C., Lord Oaksey, Lord Morton of Henryton, Lord Asquith of Bishopstone and Lord Cohen), February 8, 9, 11, 12, 16, March 25, 1954.]

Settlement—Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement—No administrative problem—Trustee Act, 1925 (c. 19), s. 57 (1).

Trust and Trustee—Variation of trusts by the court—No administrative problem—Trustee Act, 1925 (c. 19), s. 57 (1).

By a settlement dated Mar. 15, 1944, P. and his wife Q. declared that certain land or the proceeds of sale thereof and such further assets as might from time to time be brought into the settlement ("the trust premises") should be held by trustees, subject as thereafter by cl. 3 and cl. 4 provided, for all or any child of the settlors' son R. who should attain the age of twenty-one years or die under that age leaving issue and if more than one in equal shares. By cl. 3 it was provided: "... that until the youngest child of [R.] shall have attained the age of twenty-five years if that event shall happen within twenty-one years from the date hereof or until the expiration of twenty-one years from the death of the survivor of the settlors if the youngest surviving child of the said [R.] shall not then have attained the age of twenty-five years the trustees shall retain the trust premises and shall apply such part as they in their discretion shall think fit of the income thereof for or towards common maintenance education or other benefits of the children of the said [R.] for the time being living whether minors or adults or for or towards the maintenance education or other benefit of any one or more of them to the exclusion of the other or others and shall (subject as hereinafter mentioned) accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof in any investments hereby authorised in augmentation of the capital of the trust premises to be held upon the same trusts as the original trust premises but so that the trustees may apply the accumulations of any preceding year or years in or towards the maintenance education or benefit of all or any of the said children in the same manner as such accumulations might have been applied had they been income arising from the original trust funds in the then current year. Provided always that after each child of [R.] has attained his or her majority the surplus income of his share in the trust premises not expended by virtue of the foregoing powers of this clause shall not be accumulated but shall be paid to such child." By cl. 4 the

trustees had a discretionary power to advance up to one half of the expectant or presumptive or vested share of any child, whether minor or adult, of R. R. was married and had three infant children. In order to save estate duty on the deaths of the settlors it was proposed that the trustees should with the sanction of the court advance their funds to the trustees of a new settlement which was to contain similar trusts, but omitting the provision for common maintenance contained in cl. 3.

- A HELD: it could not be said that the court had unlimited inherent jurisdiction to modify or vary trusts provided only that (a) all persons interested who were sui juris consented, and (b) the modification or variation was clearly shown to be for the benefit of all persons interested who were not sui juris (including unborn persons); the jurisdiction of the court in that regard extended to cases in which the court (i) effects changes in the nature of an
- B infant's property, or (ii) allows trustees of settled property to enter into some business transaction which was not authorised by the settlement (the "salvage" cases), or (iii) allows maintenance out of income directed to be accumulated, or (iv) approves a compromise on behalf of infants and possible after-born beneficiaries; a compromise in this connection, (LORD COHEN dissentiente) meaning an agreement relating to disputed rights; and,
- C therefore, there being in this case no dispute as to rights, the court had no jurisdiction to sanction the scheme on behalf of infants and unborn persons.

Re Downshire's Settled Estates ([1953] 1 All E.R. 103) and *Re Blackwell's Settlement Trusts* (ibid.), not approved.

Re New, Re Leavers, Re Morley ([1901] 2 Ch. 534), applied.

Re Wells ([1903] 1 Ch. 848) and *Re Trenchard* ([1902] 1 Ch. 378), explained.

- D Decision of the COURT OF APPEAL (*sub nom. Re Chapman's Settlement Trusts*) ([1953] 1 All E.R. 103), affirmed.

AS TO GENERAL POWERS TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see HALSBURY, Hailsham Edn., Vol. 29, p. 745, para. 1037, and Vol. 33, pp. 296-299, paras. 519-521; and FOR CASES, see DIGEST, Vol. 43, pp. 839-841, Nos. 2857-2867.

- E Cases referred to:

(1) *Re Walker*, [1901] 1 Ch. 879; 70 L.J.Ch. 417; 84 L.T. 193; 28 Digest 224, 827.

(2) *Re Wells*, [1903] 1 Ch. 848; 72 L.J.Ch. 513; 88 L.T. 355; 28 Digest 186, 446.

(3) *Re Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 28 Digest 331, 1993.

- F (4) *Re Leeds (Duke)*, [1947] 2 All E.R. 200; [1947] Ch. 525; [1947] L.J.R. 1141; 177 L.T. 503; 2nd Digest Supp.

(5) *Re Lucas*, [1947] 2 All E.R. 213 n.; [1947] Ch. 558; [1947] L.J.R. 1153; 177 L.T. 516; 2nd Digest Supp.

(6) *Re D.'s Settled Estates*, [1952] 2 All E.R. 603; *revsd.*, C.A. *sub nom. Re Downshire's Settled Estates*, [1953] 1 All E.R. 103; [1953] Ch. 218.

- G (7) *Re B.'s Settlement*, [1952] 2 All E.R. 647; *revsd.*, C.A. *sub nom. Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218.

(8) *Winchelsea (Earl) v. Norcliffe*, (1686), 1 Vern. 435; 23 E.R. 569; 43 Digest 944, 3825.

(9) *Pierson v. Shore*, (1739), 1 Atk. 480; 26 E.R. 305; 18 Digest 9, 59.

- H (10) *Inwood v. Twyne*, (1762), Amb. 417 (27 E.R. 279); 2 Eden, 148 (28 E.R. 853); 43 Digest 870, 3145.

(11) *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534; *sub nom. Re New's Settlement*, 70 L.J.Ch. 710; 85 L.T. 174; 43 Digest 840, 2866.

(12) *Re Tollemache*, [1903] 1 Ch. 457; 72 L.J.Ch. 225; 88 L.T. 13; *affd.*, C.A., [1903] 1 Ch. 955; 72 L.J.Ch. 539; 88 L.T. 670; 43 Digest 841, 2867.

(13) *D'Eyncourt v. Gregory*, (1864), 34 Beav. 36; 3 Ch.D. 635; 10 L.T. 317; 55 E.R. 545; 43 Digest 611, 547.

- (14) *Johnstone v. Baber*, (1845), 8 Beav. 233; 4 L.T.O.S. 392; 50 E.R. 91; subsequent proceedings, (1856), 22 Beav. 562 (52 E.R. 1225); 6 De G.M. & G. 439 (43 E.R. 1304); 25 L.J.Ch. 899; 28 L.T.O.S. 110; 20 J.P. 757; 43 Digest 840, 2862.
- (15) *Bridges v. Bridges*, (1752), SETON ON DECREES, 3rd ed., p. 692.
- (16) *Ashburton (Lord) v. Ashburton (Lady)*, (1801), 6 Ves. 6; 31 E.R. 910; 28 Digest 185, 438.
- (17) *Re Jackson*, (1882), 21 Ch.D. 786; 28 Digest 181, 413. A
- (18) *Glover v. Barlow*, (1831), 21 Ch.D. 788 n.; 28 Digest 181, 415.
- (19) *Re Crawshaw*, (1888), 60 L.T. 357; 24 Digest 767, 7972.
- (20) *Re Morrison*, [1901] 1 Ch. 701; 70 L.J.Ch. 399; 84 L.T. 383; 43 Digest 840, 2861.
- (21) *Revel v. Watkinson*, (1748), 1 Ves. Sen. 93; 27 E.R. 912; 40 Digest 692, 2283.
- (22) *Cavendish v. Mercer*, (1776), 5 Ves. 195 n.; 31 E.R. 543; 23 Digest 457, 5307. B
- (23) *Greenwell v. Greenwell*, (1800), 5 Ves. 194; 31 E.R. 541; 23 Digest 451, 5232.
- (24) *Errat v. Barlow*, (1807), 14 Ves. 202; 33 E.R. 498; 23 Digest 451, 5237.
- (25) *Haley v. Bannister*, (1820), 4 Madd. 275; 56 E.R. 707; 28 Digest 227, 844. C
- (26) *Havelock v. Havelock. Re Allan*, (1881), 17 Ch.D. 807; 50 L.J.Ch. 778; 44 L.T. 168; 28 Digest 223, 824.
- (27) *Re Collins*, (1886), 32 Ch.D. 229; 55 L.J.Ch. 672; 55 L.T. 21; 50 J.P. 821; 28 Digest 223, 825.
- (28) *Re Montagu*, [1897] 2 Ch. 8; 66 L.J.Ch. 541; 76 L.T. 485; 28 Digest 182, 420. D
- (29) *Brooke v. Mostyn (Lord)*, (1864), 2 De G.J. & Sm. 373; 34 L.J.Ch. 65; 11 L.T. 392; 46 E.R. 419; *revsd. H.L., sub nom. Mostyn v. Brooke*, (1866), L.R. 4 H.L. 304; 28 Digest 329, 1978.

APPEAL by the settlors, who were also trustees, from an order of the Court of Appeal (SIR RAYMOND EVERSHED, M.R., DENNING and ROMER, L.JJ.), dated Dec. 17, 1952, and reported [1953] 1 All E.R. 103, affirming an order of HARMAN, J., dated July 28, 1952. E

The Court of Appeal held that the court had no jurisdiction under the Trustee Act, 1925, s. 57 (1) (because it involved the alteration or re-moulding of the trusts), to sanction a scheme whereunder, with a view to saving estate duty, it was proposed that trustees should transfer the settled funds to the trustees of a new settlement, the trusts of which were similar to those of the existing settlement save that, in the new settlement, discretionary powers of maintenance had been excluded. The scheme did not constitute a provision for maintenance or (DENNING, L.J., dissentiente) a compromise, and, therefore, it was not within the inherent jurisdiction of the court. F

Gray, Q.C., and *J. A. Armstrong* for the appellants.

Russell, Q.C., and *J. A. Wolfe* for the respondents. G

Denys B. Buckley appeared as *amicus curiae*.

The House took time for consideration.

Mar. 25. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, this appeal raises questions of considerable importance and for that reason, though I have had the privilege of reading the opinion which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver and agree with it in its reasoning and conclusions. I think it desirable to make some observations on the main argument of the appellants. By way of preliminary explanation, it is only necessary to say that your Lordships are invited to hold that a judge of the Chancery Division of the High Court of Justice has an inherent jurisdiction in the execution of the trusts H

of a settlement to sanction on behalf of infant beneficiaries and unborn persons a re-arrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit which may be, and, in the present case, is, that estate duty, payable in a certain event as things now stand, will, in consequence of the re-arrangement, not be payable in respect of the trust funds.

- A This argument, which found favour with DENNING, L.J., is based, as I understand it, on two separate lines of thought which are for this purpose blended. On the one hand, it is said that the Chancellor, the Court of Chancery and the Chancery Division of the High Court of Justice, exercising in turn on behalf of the Sovereign as *parens patriae* a peculiar jurisdiction over infants, had and has power to dispose of an infant's property in any manner beneficial to him in which he, if of full age, could have disposed of it; and, on the other hand, it is said that the same court, whose duty it has been for some centuries to execute and administer trusts, has jurisdiction to re-model those trusts by agreeing on behalf of infants and unborn persons to any re-arrangement which it deems to be advantageous to them. These two lines are happily united in the proposition of the learned lord justice which I quote ([1953] 1 All E.R. 132):

- C "He [that is LORD HARDWICKE] proceeded on the broad principle that the court had power to deal with the property and interests of infants or other persons under disability in a manner not authorised by the trust whenever the court was satisfied that what was proposed was most advantageous for them provided, of course, that everyone of full age agreed to it. I hope to show that that is the true principle today . . ."

- D It was natural that the learned lord justice should, on the basis of an unlimited inherent jurisdiction, proceed to the conclusion that, whenever the court had in the past asserted a want of jurisdiction, it had of its own motion placed limitations on its own jurisdiction, and, giving as examples of this abnegation its declared inability to remove a married woman's restraint on anticipation, to permit a sale of heirlooms, or to sanction an unauthorised transaction for the sake of expediency, should observe that in all these cases the intervention of the legislature to vest these powers in the court must not be read as delimiting the jurisdiction of the court, but rather as removing limitations which the court had imposed on itself. These statutory provisions he says (*ibid.*, 136):

- F ". . . show that the judges of the late nineteenth century made a mistake in tying their own hands in these matters. We ought not to make the same mistake today."

- G My Lords, I am unable to accept as accurate this view of the origin, development and scope of the jurisdiction of the Court of Chancery. I do not propose to embark on the arduous task of tracing to its sources this peculiar jurisdiction. Many volumes have been devoted to it and I have refreshed my memory by reference to some of them. Nowhere can I find any statement which would support the broad proposition for which the appellants contend. Moreover, the law reports contain many cases in which the scope of the jurisdiction has been discussed, everyone of them a work of supererogation if its scope was unlimited.

- H In my opinion, the true view that emerges from a consideration of this jurisdiction through the centuries is not that at some unknown date it appeared full-fledged and that from time to time timid judges have pulled out some of its feathers, but rather that it has been a creature of gradual growth, though with many set-backs, and that the range of its authority can only be determined by seeing what jurisdiction the great equity judges of the past assumed and how they justified that assumption. It is, in effect, in this way that the majority of the Court of Appeal in the present case have approached the problem, and, in my opinion, it is the right way. It may well be that the result is not logical and it may be asked why, if the jurisdiction of the court extended to this thing, it did not extend to that also. But, my Lords, that question is as vain in the sphere

of jurisdiction as it is in the sphere of substantive law. We are as little justified in saying that a court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors. It is for the legislature, which does not rest under that disability, to determine whether there should be a change in the law and what that change should be.

My Lords, I have indicated what is, in my view, the proper approach to the problem and do not propose to traverse the ground which has been so ably covered by the majority of the Court of Appeal and will be explored again by my noble and learned friends. The major proposition I state in the words of one of the great masters of equity, FARWELL, J. ([1901] 1 Ch. 885), in *Re Walker* (1):

"I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."

It should then be asked what are the exceptions to this rule. They seem to me to be reasonably clearly defined. There is no doubt that the Chancellor (whether by virtue of the paternal power or in the execution of a trust, it matters not) had, and exercised, the jurisdiction to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve rights of testamentary disposition and of succession. Equally, there is no doubt that, from an early date, the court assumed the power, sometimes for that purpose ignoring the direction of a settlor, to provide maintenance for an infant, and, rarely, for an adult, beneficiary. So, too, the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorised by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction. Lastly, and I can find no other than these four categories, the court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the court is in course of executing a trust.

This brings me to the question which alone presents any difficulty in this case. It is whether this fourth category, which I may call the compromise category, should be extended to cover cases in which there is no real dispute as to rights and, therefore, no compromise, but it is sought by way of bargain between the beneficiaries to re-arrange the beneficial interests under the trust instrument and to bind infants and unborn persons to the bargain by order of the court. My Lords, I find myself faced at once with a difficulty which I do not see my way to overcome. For though I am not, as a rule, impressed by an argument about the difficulty of drawing the line since I remember the answer of a great judge that, though he knew not when day ended and night began, he knew that midday was day and midnight was night, yet, in the present case, it appears to me that to accept this extension in any degree is to concede exactly what has been denied. It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary. It was, I thought, significant that learned counsel was driven to the admission that, since the benefit of the infant was the test, the court had the power, though in its discretion it might not use it, to override the wishes of a living and expostulating settlor, if it assumed to know better than he what was beneficial for the infant. This would appear to me a strange way for a court of conscience to execute a trust. If, then, the court has not, as I

hold it has not, power to alter or re-arrange the trusts of a trust instrument, except within the limits which I have defined, I am unable to see how that jurisdiction can be conferred by pleading that the alteration is but a little one.

A It remains to say a few words on the authorities. Counsel have not cited and I have not found any case before the twentieth century in which the court has given to the term "compromise" a meaning which it does not legitimately bear, and sanctioned an alteration of trusts where no dispute existed. Two cases were brought to your Lordships' notice which occurred in the early years of this century. One of them, *Re Wells* (2), a decision of FARWELL, J., does not, I think, on examination support the extension of the jurisdiction. I will not anticipate what my noble and learned friend has to say about it. I cannot think that it weighs heavily in the scales against the emphatic views elsewhere expressed by the same learned judge. The other case, *Re Trenchard* (3), a decision of BUCKLEY, J., is more difficult to explain. I should myself regard it as an isolated case in which the court went further than it had hitherto done in giving to the word "compromise" an unnatural meaning and to itself a jurisdiction never before exercised. After these two cases, there appears to have been no case in which the limits of the jurisdiction have been discussed until the present case and two others with it, which are not the subject of appeal, came before the court. But it seems that judges of the Chancery Division have, in recent years, entertained jurisdiction to make orders in chambers sanctioning on behalf of infant beneficiaries bargains or arrangements which involved the alteration of trusts but did not arise out of any dispute as to rights which it was expedient to compromise—just such orders, in fact, as that which is under consideration today. In the reported cases, *Re Duke of Leeds* (4) in 1947 and *Re Lucas* (5) in the same year, there is a clear indication of its being done, and learned counsel assured us that it was done. But neither in these cases, nor in other unreported cases in which a similar course was adopted, does there appear to have been any argument. It is, moreover, clear from the orders made by HARMAN, J., in the present case and by ROXBURGH, J., in the related cases of *Re D.'s Settled Estates* (6) and *Re B.'s Settlement* (7), that there was in 1952 no generally accepted doctrine on the question. Nor, though I am told that I myself made such an order when I was a judge of the High Court, would I assent of my own recollection to the view that this jurisdiction was at any time during my life at the Bar or on the Bench generally regarded as belonging to the court. But this sort of recollection is necessary fallible, and I would rather say that there is nothing in the reported cases of the last fifty years to show that there is now vested in the court a jurisdiction which it had formerly disclaimed.

F This appeal must, accordingly, in my view, be dismissed. Your Lordships will think it proper that the costs of the appellants and respondents should be paid out of the trust funds. I cannot, my Lords, conclude without expressing to Mr. Buckley the gratitude of the House for the very able argument which, as *amicus curiae*, he addressed to us.

G LORD OAKSEY: My Lords, my experience in the exercise of its jurisdiction by the Court of Chancery in the administration of trusts is so limited that I am not prepared to differ from the opinion about to be expressed by my noble and learned friend, LORD MORTON OF HENRYTON. I must confess, however, that I only agree with the greatest hesitation.

H The general rule is said to be that the court must see that the trusts are executed, but it is conceded that the court has no power to insist on the execution of the trusts if the cancellation of the settlement is desired by all the parties if they are *sui juris* and the property can then be re-settled on altered trusts. Yet, where infants are concerned, the court cannot, it appears, sanction any alteration of the trusts under the general rule, although the interests of the infants appear to demand the alteration.

LORD MORTON OF HENRYTON: My Lords, the case which is the subject of the present appeal is one of three cases which came before judges of the Chancery Division at the end of July, 1952. The other two are *Re D.'s Settled Estates* (6), and *Re B.'s Settlement* (7). These three cases differed to some extent in their facts, but in each of them the court was asked to alter the trusts of a settlement, and in each of them the reason for the application was the same. The trustees and the adult beneficiaries realised that if the trusts of the settlement remained unaltered, the burden of taxation would be very heavy, whereas if the trusts were altered in certain respects that burden would, or might be, greatly reduced. They, therefore, applied to the court for an order sanctioning a scheme carrying out these alterations, on the ground that the adult parties approved the scheme and that it was for the benefit of the infant beneficiaries and of any after-born beneficiaries.

The present case, *Re Chapman*, came before HARMAN, J., in chambers on July 28, 1952, and he dismissed the application. The learned judge did not deliver a formal judgment, but it is agreed that he took the view that he had no jurisdiction to make the order which was sought. On the same day ROXBURGH, J., had to consider *Re D.'s Settled Estates* (6). In that case the court was asked to sanction the scheme either under its general jurisdiction or under s. 64 (1) of the Settled Land Act, 1925. Argument was heard in chambers, but judgment was delivered in open court on July 30. The learned judge reviewed certain authorities and concluded as follows ([1952] 2 All E.R. 608):

"I hold that the transactions involved in this scheme amount in substance to a re-writing of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts have been declared and old trusts have been struck out or varied, and the admitted purpose of the scheme is not to solve any administrative problem but to re-arrange beneficial interests to greater advantage. Such proposals fall, in my judgment, outside the scope of the court's 'extraordinary' jurisdiction . . ."

He held also that the proposals were outside the ambit of s. 64 of the Settled Land Act, 1925, and s. 57 of the Trustee Act, 1925. Next day ROXBURGH, J., gave judgment in open court in *Re B.'s Settlement* (7), which had also been argued in chambers. In that case the settlement was of personalty, and the general jurisdiction and s. 57 of the Trustee Act, 1925, were relied on. The learned judge said (*ibid.*, 649):

"This scheme, in my judgment, proposes a much less drastic re-settlement than the scheme in *Re D.'s Settled Estates* (6) but my conclusions are the same . . ."

The applicants appealed in all three cases, and, as in none of the cases was there any person or class of persons concerned to argue against the applicants' contentions, the Court of Appeal thought it proper to suggest that counsel should be instructed on behalf of the Attorney-General to assist the court as *amicus curiae*. Mr. Buckley appeared in response to that suggestion, both in the Court of Appeal and in this House, and has rendered very valuable assistance.

The Court of Appeal allowed the appeals in *Re Downshire* (6) and *Re Blackwell* (7), but by a majority (SIR RAYMOND EVERSHED, M.R., and ROMER, L.J.) they dismissed the appeal in *Re Chapman*. DENNING, L.J., would have allowed the appeal in all three cases. The present appeal relates only to *Re Chapman*, but I have found it convenient to state the history of all three cases, for reasons which will appear later.

The application now before your Lordships' House relates to three separate settlements. The first of these settlements is dated Mar. 15, 1944, and is hereafter referred to as "the 1944 settlement". The settlors were Colonel Robert Chapman

and his wife (now Sir Robert and Lady Chapman). Clause 2, cl. 3 and cl. 4 of the 1944 settlement are as follows:

- A " 2. The trustees shall stand possessed of the trust premises (subject to
cl. 3 and cl. 4 following) for all or any the child or children of the settlors'
son Robert Macgowan Chapman who shall attain the age of twenty-one
years or die under that age leaving issue and if more than one in equal
shares as tenants in common. 3. Provided always that until the youngest
child of the said Robert Macgowan Chapman shall have attained the age
of twenty-five years if that event shall happen within twenty-one years
from the date hereof or until the expiration of twenty-one years from the
death of the survivor of the settlors if the youngest surviving child of the said
Robert Macgowan Chapman shall not then have attained the age of twenty-
five years the trustees shall retain the trust premises and shall apply such
B part as they in their discretion shall think fit of the income thereof for or
towards common maintenance education or other benefits of the children
of the said Robert Macgowan Chapman for the time being living whether
minors or adults or for or towards the maintenance education or other
benefit of any one or more of them to the exclusion of the other or others
and shall (subject as hereinafter mentioned) accumulate the surplus of such
C income until the time for distribution by investing the same and the resulting
income thereof in any investments hereby authorised in augmentation of the
capital of the trust premises to be held upon the same trusts as the original
trust premises but so that the trustees may apply the accumulations of any
preceding year or years in or towards the maintenance education or benefit
D of all or any of the said children in the same manner as such accumulations
might have been applied had they been income arising from the original
trust funds in the then current year. Provided always that after each child
of the said Robert Macgowan Chapman has attained his or her majority
the surplus income of his share in the trust premises not expended by virtue
of the foregoing powers of this clause shall not be accumulated but shall be
E paid to such child. 4. Provided also that the trustees may at any time raise
any part or parts not exceeding in the whole one half of the then expectant
or presumptive or vested share of any child whether minor or adult of the
said Robert Macgowan Chapman in the trust premises under the trust
hereinbefore contained and pay or apply the same to him or her for his or her
advancement or otherwise for his or her exclusive benefit in such manner as
F the trustees shall think fit and as to the part or parts so raised the maintenance
and other trusts of the last preceding clause shall cease to be applicable
and no interest on any such advance shall be charged to any child so
advanced in the accounts of the trust."

The remaining clauses of the settlement were administrative and are not relevant for the purposes of this appeal.

- G By the second settlement, dated Feb. 8, 1950, and hereafter referred to as
"the 1950 settlement", Lady Chapman settled certain further funds on
substantially the same trusts for the benefit of Mr. Robert Macgowan Chapman's
children as those declared by the 1944 settlement. In particular, the provisions
for common maintenance and accumulation contained in cl. 3 of the 1944
settlement were repeated by cl. 4 of the 1950 settlement save that the reference
H in the former clause to the expiration of twenty-one years from the death of
the survivor of the settlors was altered in the latter clause to the expiration of
twenty-one years from the death of Lady Chapman.

By the third settlement, dated Feb. 10, 1950 (hereafter referred to as "the Nicholas settlement" and made on the marriage of Henry James Nicholas Chapman with Anne Barbara Croft), Lady Chapman settled certain funds on trusts for the benefit of the children of that marriage and of the husband and the wife or (if none of such children attained a vested interest) then on similar

trusts for the benefit of the children of Nicholas by any subsequent marriage, and of Nicholas and any subsequent wife, and it was provided (cl. 4) that, in the event of the determination or failure of such trusts, the trustees should pay over the trust funds (subject as therein mentioned) to the trustees of the 1950 settlement to be held by them on the trusts of that settlement.

Mr. Robert Macgowan Chapman (who is the son of Sir Robert and Lady Chapman) has been married once, namely, to his present wife, Barbara May Chapman, and there have been three children of the marriage, namely, the respondents, David Robert Macgowan Chapman, who was born on Dec. 16, 1941, Peter Stuart Chapman, who was born on Aug. 24, 1944, and Elizabeth Mary Chapman, who was born on May 11, 1946. There has been no issue as yet of the marriage between Mr. Henry James Nicholas Chapman (who is also a son of Sir Robert and Lady Chapman) and his wife Anne Barbara. As at Mar. 24, 1952, the estimated values of the funds comprised in the three settlements were respectively as follows: The 1944 settlement, £43,000, of which £27,700 was settled by Sir Robert, and £15,600 by Lady Chapman; the 1950 settlement, £14,700; and the Nicholas settlement, £19,600. By reason of the discretionary trusts for the common maintenance of Mr. Robert Macgowan Chapman's children contained respectively in cl. 3 of the 1944 settlement and cl. 4 of the 1950 settlement, the trustees of those settlements were advised that, except in certain unlikely events, a claim for estate duty would arise in respect of the funds comprised in the former settlement on the death of the survivor of Sir Robert (now aged seventy-two) and Lady Chapman (now aged sixty-five) and in respect of the funds comprised in the latter settlement on the death of Lady Chapman. Further, the trustees of the Nicholas settlement were advised that, if the substitutive limitation contained in that settlement, and before referred to, is valid and should become effective, a claim for estate duty will arise in respect of their funds by reason of that limitation. If the present rates of estate duty remain unchanged it is estimated that nearly £30,000 will be exigible for duty in respect of the three trust funds whether Sir Robert survives or predeceases Lady Chapman.

In these circumstances a scheme of arrangement was prepared, the object of which was to avoid the expected claims for duty on the deaths of Sir Robert and Lady Chapman. This object could only be achieved by freeing the 1944 and 1950 settlement funds from the provisions for common maintenance contained in cl. 3 and cl. 4 of those settlements respectively. It was, accordingly, proposed that the trustees of those settlements should, with the sanction of the court, advance their respective funds to the trustees of a new settlement which was to be entered into containing similar trusts, but omitting those provisions, and that the trustees of the Nicholas settlement should, on the failure of the trusts therein contained for the benefit of Nicholas Chapman and his present and any future wife and issue, similarly transfer their fund to the trustees of the proposed new settlement to be held on the trusts thereof. To the above statement of the facts (which is taken in substance from the majority judgment in the Court of Appeal) I would add that, in this House, counsel asked for an order in somewhat different terms, the effect being that the trusts declared by cl. 3 of the 1944 settlement and cl. 4 of the 1950 settlement should no longer have any operation.

My Lords, the first question which arises is solely one of jurisdiction, and may be stated thus: Had HARMAN, J., jurisdiction to destroy the trusts contained in cl. 3 of the 1944 settlement and the similar trusts created by cl. 4 of the 1950 settlement if he came to the conclusion that the elimination of these trusts would result in benefit to the infant beneficiaries and to any after-born beneficiaries? For the sake of brevity I shall address my observations only to the case of the 1944 settlement, since precisely similar considerations will apply to the 1950 settlement. It is common ground that the discretionary trusts contained in cl. 3 of the 1944 settlement are in no way objectionable

in themselves, but I shall assume, for the purposes of this judgment, that their elimination would be beneficial to all parties concerned, by reason of the relevant taxing provisions.

Counsel for the appellant trustees and counsel for the respondents, three of whom are infants, invite your Lordships to answer the question already posed in the affirmative. Mr. Buckley, as *amicus curiae*, has put forward, for the

A Counsel for the appellants first contended that the Court of Chancery, and its successor the Chancery Division of the High Court of Justice, has had for many years an inherent jurisdiction to make such an order as is sought in the present case. The same argument was advanced in the Court of Appeal and was stated in the majority judgment as follows ([1953] 1 All E.R. 109):

B "It was the argument of the learned counsel for all the appellants (founded on *Earl of Winchelsea v. Norcliffe* (8), before SIR GEORGE JEFFREYS, L.C.), and other early cases, including *Pierson v. Shore* (9), before LORD HARDWICKE, L.C., and *Inwood v. Twyne* (10), before LORD NORTHINGTON, L.C., that the jurisdiction of the court to modify or vary trusts and to direct the trustees accordingly was unlimited, provided (i) that all persons

C interested who were *sui juris* assented and (ii) that it was clearly shown to be for the advantage or convenience of all persons interested who were not *sui juris* including persons unborn or not presently ascertainable. In other words, that the court has unlimited jurisdiction in relation to the property

D of infants, including the beneficial interests of infants and unborn cestuis *que* trust under a settlement, and will exercise that jurisdiction so as to secure any benefit or advantage for the infants or unborn persons which they could have themselves secured had they been in *esse* and *sui juris*, even to the extent of sanctioning a departure from the beneficial trusts of the trust instrument from which the interests in question are derived."

The majority rejected this argument, but DENNING, L.J., accepted it. My Lords, on this point I find myself in complete agreement with the majority.

E They expressed their conclusion in the following language, which I would desire to adopt as my own (*ibid.*):

F "In our judgment, such a broad and general jurisdiction is inconsistent with the two decisions of this court in 1901 and 1903, never so far as we are aware subsequently qualified or criticised, viz., *Re New*, *Re Leavers*, *Re Morley* (11) and *Re Tollemache* (12) . . . The general rule . . . is that the court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts: see, e.g., *D'Eyncourt v. Gregory* (13); *Johnstone v. Baber* (14). There have been cases in which the court has made orders which did, undoubtedly, result in a departure from the trusts declared by the settlor. In our opinion,

G however, these cases did not establish new rules, but only exceptions to the general rule."

Counsel for the appellants contended that the cases which the Court of Appeal regarded as exceptions were really examples of the unlimited jurisdiction which he sought to establish. I call it "unlimited jurisdiction", because counsel

H set no limit to it, provided only that the two elements already mentioned are present. It is necessary, therefore, to examine these so-called examples in some detail. Counsel grouped them under four heads—(a) Cases in which the court has effected changes in the nature of an infant's property, e.g., by directing investment of his personalty in the purchase of freeholds: (b) Cases in which the court has allowed the trustees of settled property to enter into some business transaction which was not authorised by the settlement: (c) Cases in which the court has allowed maintenance out of income which the settlor or testator

directed to be accumulated: (d) Cases in which the court has approved a compromise on behalf of infants and possible after-born beneficiaries.

As to head (a). In my view, these cases in no way assist the argument now under consideration. It is self-evident that a change in the nature of property to which an infant is absolutely entitled causes no change in the infant's beneficial interest, and it is noteworthy that, even in such cases, the court usually so framed its order that the infant's right to make a will during infancy in the case of personalty, and the rights of his heir to take the realty if the infant died under the age of twenty-one, were carefully safeguarded. Some earlier instances of this exercise of the court's paternal jurisdiction are *Earl of Winchelsea v. Norcliffe* (8), *Pierson v. Shore* (9), *Bridges v. Bridges* (15), *Inwood v. Twyne* (10), *Lord Ashburton v. Lady Ashburton* (16). Even this limited jurisdiction was recognised as being of an exceptional nature in *Re Jackson* (17): see also *Glover v. Barlow* (18). A similar jurisdiction was exercised in the case of lunatics.

As to head (b). The leading case under this head is *Re New* (11). In that case the Court of Appeal authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realisable shares (fully paid) and debentures in the proposed new or reconstructed company. The evidence showed that the scheme would be greatly to the advantage of all parties interested under the several trusts, including infants and unborn persons. In one of the three cases the trustees had power, under the trust instrument, to invest in shares or debentures of such a company as the proposed new company. In the two other cases, as the trustees had no such power, the court put them on an undertaking to apply for leave to retain the shares and debentures they would obtain under the scheme, if they desired to retain them beyond one year from the time the reconstruction should be carried into effect. ROMER, L.J., in delivering the judgment of the court, said ([1901] 2 Ch. 544):

"As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms. The cases of *Re Crawshaw* (19), decided by NORTH, J., and *Re Morrison* (20), decided by BUCKLEY, J., are instances where the court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorise. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time

A for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale: in such a case the court would have jurisdiction to authorise, and would authorise, the trustees to postpone the sale for a reasonable time. It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction; but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the court must be considered and dealt with according to its special circumstances."

B
C My Lords, surely the passage just quoted tells strongly against the argument now under consideration. The opening sentence states the general rule in the plainest terms and clearly recognises that even the limited and exceptional jurisdiction to sanction transactions in the nature of "salvage" of the trust property must be exercised with great caution. The court was, of course, only dealing with a proposed investment to be made by trustees, and the beneficial trusts were in no way altered; but, surely, if the court had had the wide general power to alter trusts for which counsel contends, the whole trend of the judgment would have been different?

D
E Two years later, KEKEWICH, J., and the Court of Appeal had to consider the case of *Re Tollemache* (12). In that case the trustees sought power to acquire a mortgage of the interests of the tenant for life. This transaction was not within the investments authorised by the settlement, but it was pointed out that it would increase the income of the tenant for life and would not injure the remaindermen. KEKEWICH, J., refused the application and carefully analysed the relevant authorities as to jurisdiction, including *Re New* (11). After citing certain cases, he observed ([1903] 1 Ch. 462):

F
G "The above are illustrations of the exercise by the court, justified by the practical necessity of the case, of jurisdiction going beyond the mere administration of trusts according to the terms of the instrument creating them. Others might be given, the applications or rather the circumstances inducing them exhibiting large varieties, but those mentioned suffice to explain the scope of the practice of the court. There might be added illustrations of the refusal of the court to exercise this extraordinary jurisdiction, but there is no occasion. All the cases of refusal may be grouped under one of two classes. Either, notwithstanding the advantage actual and prospective of what is proposed to be done, there is no urgency for it, and the existing state of things may without great mischief be allowed to remain, or the terms on which the advantage can be gained are such that the court would by accepting them create a new trust in lieu of that which it is administering."

H The judgments of the Court of Appeal are in [1903] 1 Ch. 955. They are as follows (*ibid.*, 956):

VAUGHAN WILLIAMS, L.J.: "It is admitted that the applicant cannot succeed unless she can bring herself within *Re New* (11). Putting that case shortly, it is this—that a case may arise in which, in the course of the administration of an estate, such an emergency may occur that it must be dealt with at once; but it cannot be said that there is any such emergency here. The appeal must, therefore, be dismissed, and with costs."

ROMER, L.J.: "I agree. *Re New* (11) shows how far the court will go, and beyond what point it will not go."

COZENS-HARDY, L.J.: "I agree. I will only add that, in my opinion, *Re New* (11) constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts."

To quote again the majority judgment in the present case ([1953] 1 All E.R. 112):

"These judgments are, in our view, consistent and only consistent with the conclusion we have expressed above, and are irreconcilable with the broad general proposition for which counsel for the appellants have contended. It is to be noted that ROMER, L.J., who had delivered the judgment in *Re New* (11), was a member of the court in *Re Tollemache* (12), and if, in view of the arguments now put forward, the present members of the Court of Appeal wish that he had more precisely stated the limits of the jurisdiction which he plainly had in mind, he indicated no dissent from or qualification of the other judgments of the court or the judgment of KEKEWICH, J."

My Lords, in my view, the cases just mentioned, exemplifying the exceptional jurisdiction which is exercised for the sake of "salvage" of the trust property, far from supporting the existence of a general jurisdiction in the court to alter trusts, go far to negative it.

As to head (c). It is said, and said truly, that in some cases under this head the court's order resulted in an alteration of beneficial interests, since income was applied in maintaining beneficiaries, notwithstanding that the testator or settlor had directed that it should be accumulated or applied in reduction of incumbrances. Some instances are *Revel v. Watkinson* (21), *Cavendish v. Mercer* (22), *Greenwell v. Greenwell* (23), *Errat v. Barlow* (24), *Haley v. Bannister* (25), *Havelock v. Havelock*. *Re Allan* (26). This jurisdiction is too well established to be doubted today. It was explained as follows by PEARSON, J., in *Re Collins* (27) (32 Ch.D. 232):

"The ground of the decision [that is, the decision in *Havelock v. Havelock*. *Re Allan* (26)] I take to be, that where a testator has made a provision for a family, using that word in the ordinary sense in which we take the word, that is the children of a particular stirps in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that these children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the court has accordingly found from the earliest time that where an heir-at-law is unprovided for, maintenance ought to be provided for him."

A somewhat similar explanation was given by FARWELL, J., in *Re Walker* (1) ([1901] 1 Ch. 885). It is clear that neither of these learned judges regarded the maintenance cases as affording any evidence that the court had an inherent jurisdiction to alter beneficial trusts in any way it pleased. To my mind, they must be regarded as an exception, and I think the only real exception, to the general rule, as stated by ROMER, L.J., in *Re New* (11) in the words already quoted, and by FARWELL, J., in *Re Walker* (1) when he said ([1901] 1 Ch. 885):

"I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."

Striking instances of cases which negative the existence of the alleged unlimited jurisdiction are *Re Crawshay* (19), *Re Morrison* (20) (BUCKLEY, J.), and *Re Montagu* (28). In the first of these cases, NORTU, J., said (60 L.T. 359):

"I should not be administering the trusts created by the testator if I

consented to this scheme. I should be altering his trusts and substituting something quite outside the will. *On the assumption that the scheme would be beneficial to the estate, I cannot decide that I have jurisdiction to authorise it."

A In the last-mentioned case the Court of Appeal held that it had no jurisdiction to allow the trustees of a settlement to raise money by mortgage of the settled estate and to apply it in pulling down and re-building some of the houses on the property. LINDLEY, L.J., said ([1897] 2 Ch. 10):

B "We none of us see our way to hold that there is jurisdiction to make an order in this case. It is very desirable that the court should have jurisdiction to deal with such a case; but Parliament has never gone so far as to give it that jurisdiction. No doubt it would be a judicious thing to do what is wanted in this case, and if the persons interested were all ascertained and of age, they would probably concur, and then it might be done; but they are not all ascertained nor of full age; and unless the court can authorise the trustees to do it, it cannot be done."

LOPES, L.J., said (*ibid.*, 11):

C "I have no doubt that what is proposed is beneficial, and would increase both the income and the capital value of the property. The question is whether the court has jurisdiction to sanction it. There is no provision in the settlement which would authorise the works in question, nor do they fall within any of the improvements sanctioned by the Settled Land Acts. It is urged that the court, having control over trust property, can sanction them, as it would be vastly for the benefit of the persons interested that it should do so. That is not enough. If the buildings were falling down it would be a case of actual salvage and would stand differently. Even in cases of repairs the court has been very careful in the exercise of its jurisdiction. In the case of *Re Jackson* (17), KAY, J., in dealing with a case of repairs, said (21 Ch. D. 789): 'I think that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage.' D The present cannot be said to be a case of actual salvage, and the learned judge was right in refusing to exercise a jurisdiction which he in fact did not possess." E

As to head (d). There are, of course, many cases to be found in the reports in which the Court of Chancery, and its successor the Chancery Division, have F approved compromises of disputed rights on behalf of infants interested under a will or settlement and on behalf also of possible after-born beneficiaries. In my opinion, these cases in no way support the existence of the "unlimited jurisdiction" for which counsel for the appellants contends. Where rights are in dispute and the court approves a compromise it is not altering the trusts, for the trusts are, *ex hypothesi*, still in doubt and unascertained.

G For these reasons, I would reject counsel's contention that the court has the unlimited jurisdiction already described. It now becomes necessary to examine a further argument, of far-reaching importance, which was fully developed by counsel for the respondents. This argument may be summarised as follows: "Let it be assumed, for the purposes of this argument, that the Court of Appeal rightly H rejected our submission as to the general jurisdiction of the Court of Chancery, and its successor the Chancery Division, to modify or vary trusts. Even on that assumption the present scheme can be sanctioned as being a 'compromise'. There is no doubt that in cases where the respective rights of persons interested under a will or settlement were in dispute, the Court of Chancery down to 1873, and the Chancery Division since the passing of the Judicature Act, has had jurisdiction to approve a compromise on behalf of infants and unborn persons. There has never been any logical reason why this jurisdiction should not extend to alterations of beneficial interests under a trust, if such alterations are desired

by the adult beneficiaries and are for the benefit of infants and any after-born beneficiaries, and it has been so extended on various occasions during the last fifty years. Arrangements of this kind may not be compromises in the strict sense if no rights are in dispute, but they are compromises 'in the broader sense of the word'—to quote the majority judgment of the Court of Appeal. The majority had no good reason for rejecting the arrangement in *Re Chapman* if they had jurisdiction to sanction the arrangements in *Re Downshire* (6) and *Re Blackwell* (7). No one of them is a compromise of disputed rights; each one results in an alteration or re-arrangement of beneficial interests under a settlement, and each one is made for the same reason—the desire to reduce or avoid taxation."

As this argument is based partly on the reasoning of the Master of the Rolls and ROMER, L.J., in their joint judgment, and partly on the fact that the Court of Appeal was unanimous in sanctioning the schemes put forward in *Downshire* (6) and *Blackwell* (7), it is necessary to set out in some detail the course taken in the joint judgment. After rejecting the argument as to the "unlimited jurisdiction", and referring to the maintenance cases as an exception to the rule that the court cannot alter or vary trusts, the joint judgment proceeded as follows ([1953] 1 All E.R. 113):

"It must also now be taken, in our judgment (at any rate since the decision of *Re Trenchard* (3), fifty years ago), that the court has a further power and jurisdiction . . . to approve, on behalf of persons interested under the trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are sui juris, and to direct and protect trustees accordingly, and the word 'compromise' should not be narrowly construed so as to be confined to 'compromises' of disputed rights."

It is to be noted that it is not stated at this point how far the word "compromise" is to extend.

The Master of the Rolls and ROMER, L.J., went on to consider *Re Trenchard* (3), and *Re Wells* (2). I shall consider these cases later. They then turned to a consideration of s. 57 of the Trustee Act, 1925. They thought that that section afforded the appellants no assistance, and, in this House, counsel have stated that they could not contend that that section had any application to the present case. After making some observations on s. 64 of the Settled Land Act, 1925, the majority then considered the case of *Re Downshire* (6), and said (*ibid.*, 125):

"In our judgment, the present scheme does fall fairly within the ambit of the court's jurisdiction to approve compromises (used in the broad sense of the word) which is illustrated in the decision of BUCKLEY, J., in *Re Trenchard* (3)."

Later they observed (*ibid.*, 126):

"... we think that . . . the proposals may fairly and properly be regarded as constituting a compromise in the broader sense of the word in which it was used in *Re Trenchard* (3)."

They then turned to the case now under appeal, and expressed their views in language which must be quoted in full (*ibid.*, 130):

"The only possible way, therefore, as it seems to us, that the scheme could be brought within the inherent jurisdiction of the court is by showing that it involves a compromise or composition of beneficial interests to which the principle exemplified in *Re Trenchard* (3) can properly be applied. We are unable, however, to see how any such compromise or composition arises. Certainly there is no question of compromise in the strict sense, for none of the relevant beneficial interests gives rise to any question of

A construction or is otherwise in dispute. It is suggested, however, that something in the nature of a composition of the rights of Mr. Macgowan's children is to be found in the elimination, during the lifetime of the settlors [the last six words should, I think, read "during the period stated in the settlements"], of the expectation that each may have of receiving more, or less, than the others and in substituting equal rights among the class, as between themselves, in its place. We think that there are two objections to the acceptance of this view. First, although it is true that the scheme, if sanctioned, would have the result described, we cannot regard that result as constituting a composition of rights in any real sense at all. It is nothing more than a re-arrangement of beneficial interests which, to the extent that it might prove to be of advantage to some members of the class, would correspondingly operate to the prejudice of others. It cannot, therefore, be compared to a proposal under which, for example, the contingent interests of all of the members of a class in a fund are converted into vested interests in a smaller fund, for in such a case the proposal, if beneficial to one member of the class, would of necessity be beneficial to them all. Secondly, it is impossible to say, on the facts of the case, that the rights and interests of the children under the existing discretionary trusts are prejudicial to them, and should, therefore, be eliminated. Both of the settlements were executed within the last ten years, and the trusts in question were presumably inserted therein because the settlors thought that their introduction would be of advantage to the children. They may well have thought, for example, that some of the children might need more for maintenance than others and, accordingly, they empowered the trustees to provide for this if occasion should require. Nothing has since transpired to show that their views on this matter were wrong. All that has transpired is that the manner in which the discretionary trusts were framed may attract an unexpected claim for death duties. The object of the scheme, accordingly, is not to compound the interests which the children have under the discretionary trust but to avoid the claim for duties, and such avoidance does not, and cannot, be regarded as a composition of rights for the purpose of the second exception to the rule. Moreover, although, as we have previously said, the fact that a scheme will result in the saving of death duties or income tax is, in itself, no ground for its rejection, the acceptance of the scheme now under consideration might well be followed by the presentation of further proposals of a similar character whenever it should be considered desirable in the future to avoid or mitigate the effect of such changes as may occur hereafter in the existing fiscal legislation. We would point out, therefore, that it is no part of the functions of Her Majesty's courts to re-cast settlements from time to time merely with a view to tax avoidance even if they had the power to do so which, in our opinion, they have not. It follows from what we have said that the scheme proposed is, in truth, what it appears on its face to be, namely, the destruction of trusts expressly declared, and that inasmuch as it cannot be brought within the first exception to the general rule and cannot, under the guise of a composition, invoke the second exception, the rule applies, and the court, accordingly, has no jurisdiction to authorise the trustees to carry it into effect. This appeal, in our judgment, must, therefore, fail."

To complete the picture, I add that the majority allowed the appeal in *Re Blackwell* (7), saying (*ibid.*, 132):

"In our judgment, therefore, the scheme is of a nature which it is competent for the court to sanction in exercise of its jurisdiction to approve compromises in the wide sense of that word which we have already indicated."

My Lords, I have set out this lengthy survey of the majority judgment because I could devise no other satisfactory way of approaching the argument addressed to your Lordships by counsel for the respondents, which I have already summarised. This argument brings one face to face with the vitally important question: Is it possible to draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights and the alleged unlimited jurisdiction to alter beneficial interests to any extent, provided that every person interested who is sui juris assents and the change is shown to be for the benefit of infants and after-born beneficiaries? I confess that I have found it impossible to draw such a line. As I have said, the court's jurisdiction to sanction a compromise in the true sense, when the beneficial interests are in dispute, is not a jurisdiction to alter these interests, for they are still unascertained. If, however, there is no doubt as to the beneficial interests, the court is, to my mind, exceeding its jurisdiction if it sanctions a scheme for their alteration, whether the scheme is called a "compromise in the broader sense" or an "arrangement" or is given any other name. Counsel for the respondents, in the course of his argument, suggested that the step from the former to the latter class of case was a short one. My Lords, it may be a short step, but it is a step into a field of extremely wide extent. In my view, that field was not open to the court at the beginning of the present century and is not open now. I think that FARWELL, J., was right when, in 1901, in *Re Walker* (1), he used the words already quoted ([1901] 1 Ch. 885):

"I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible".

If these words are true in the case of a will, they are equally true in the case of a settlement, and, in 1952, ROXBURGH and HARMAN, JJ., in effect, adopted the words of FARWELL, J., and applied them to the present day. I think these two learned judges were right.

It follows that, in my view, the majority of the Court of Appeal were right in dismissing this appeal, but their decisions in *Re Downshire* (6) and *Re Blackwell* (7) went too far. The facts in these two cases are fully set out in the majority judgment and need not be repeated here. Suffice it to say that the scheme in each case involved extensive alterations of the beneficial trusts declared in settlements dated respectively 1915 and 1933, in order to reduce taxation, including, in each case, the release of part of the settled property from a protected life interest. In neither case was there any appeal, but I have found it necessary to express my view on them because counsel have cited these cases as authorities, and have submitted (rightly, as I think) that the present case cannot be distinguished from them.

I must, however, examine the cases which were said to establish the jurisdiction to sanction the scheme now before your Lordships. The first such case is *Re Trenchard* (3), and the facts must be stated somewhat fully, in view of the argument which has been based on this case. A testator who died in 1899 by cl. 3 of his will gave to his wife

"the use of my residence Woodville aforesaid so long as she shall desire to make it her permanent place of residence and shall remain my widow. my estate to pay all rates, taxes, and outgoings in respect thereof, and to keep the house and grounds in tenantable repair".

The testator gave his residuary real and personal estate to his trustees on the usual trusts for sale and conversion and payment of debts and legacies, and directed them to stand possessed of his residuary trust moneys and the income thereof on certain trusts for his children and remoter issue. He directed his trustees to postpone the sale of his Honor Oak estate (which included Woodville House) until after the death or marriage again of his wife, and he empowered

them from time to time as they should think fit to develop the same estate, and for that purpose to use such part of his estate as they deemed advisable. The widow took possession of Woodville and resided there, but finding that it was a larger house than she required and that there were difficulties connected with the management, repairs, outgoings and development of the property, she asked the trustees to come to an arrangement with her. Questions arose, and on a summons taken out by the trustees, BYRNE, J., made an order declaring that the widow had the powers of a tenant for life under the Settled Land Acts and that she would not forfeit the benefits conferred on her by the directions in the will by selling or leasing the house under those powers. All the persons interested desired that the estate, which was freehold, should be developed for building purposes, but this could not be done so long as the widow remained in occupation of Woodville, and would be prevented if she sold Woodville in exercise of her powers as tenant for life under the Settled Land Acts. The widow estimated her interest in the rental value of Woodville, together with the rates, taxes and outgoings, at £350 a year and offered to release her claims under cl. 3 of the will to the trustees in return for a fixed payment of £320 a year. A summons was taken out to decide whether the trustees had power, with the sanction of the court, to enter into an arrangement by way of compromise for the payment to her of a fixed annual sum in satisfaction of her claims under cl. 3 of the will, and, if so, that an agreement to pay her a fixed sum of £275 per annum during widowhood by way of compromise of the whole of her claims under cl. 3 of the will might be approved by the court. There were infants interested in residue and they appeared by counsel, who expressed the view that the compromise was beneficial to them. BUCKLEY, J., approved the arrangement, saying ([1902] 1 Ch. 385):

“It seems to me that this is a fair compromise for all parties, and I declare that it is within the power of the trustees to enter into it, and I sanction it accordingly”.

My Lords, this decision appears to me to be no more than the sanctioning by the court of a purchase by the trustees of the widow's rights. It may be that BUCKLEY, J., stretched the jurisdiction to approve a compromise beyond its proper limits, but I cannot regard him as claiming a new and extensive jurisdiction, the existence whereof had so recently been denied by judges of the Chancery Division and by the Court of Appeal.

The next case relied on was *Re Wells* (2). The facts of this case are very fully stated in the majority judgment of the Court of Appeal and need not be repeated here. I entirely accept the observations in the majority judgment on that case ([1953] 1 All E.R. 115):

“... there was no re-arrangement or altering of any trusts. All persons interested under the trusts of the testator's will, according to its terms, were sui juris and capable of determining the trusts. The difficulty arose solely from the fact that derivative settlements had been made by the persons contingently entitled to the corpus of the estate. No alteration was required of any of the trusts of these settlements. What was proposed was that the trustees of the settlements should receive a present and certain subject-matter instead of their previously existing contingent rights”.

In my view, *Re Wells* (2) affords no support to the argument now under consideration. It was decided by FARWELL, J., and I feel sure he did not think that, in sanctioning the arrangement there proposed, he was in any way departing from the views, already quoted, which he had expressed so forcibly in *Re Walker* (1).

So far as reported cases are concerned, there is a long gap between *Re Wells* (2) and *Re Duke of Leeds* (4). Counsel assured us, however, that, during the intervening forty-four years orders had been made from time to time in chambers which were similar in their effect to the orders asked for in the present case, in

Re Downshire (6), and in *Re Blackwell* (7). My Lords, this may well have been so, but, accepting counsel's statement, I would make the following observations. First, when judges are exercising an undoubted jurisdiction in chambers, the manner in which they exercise it may form a useful precedent, but no judge can acquire a jurisdiction which he does not possess merely by making orders which extend beyond that jurisdiction. Secondly, it is impossible to found any proposition on an unreported case without being aware of all the facts, the precise nature of the order made, and the arguments advanced at the hearing. It may well be that the question of jurisdiction was never brought to the minds of the judges who dealt with these matters in chambers. I would add this—according to my recollection, which may be at fault, it was thought at one time by judges sitting in chambers that the decision in *Re New* (11), extended by s. 57 of the Trustee Act, 1925, justified the making of many orders which were later considered to have been made in excess of jurisdiction. I agree with the comments on *Re New* (11) and on s. 57 which are contained in the majority judgment in the present case, and it is conceded by counsel that neither that decision nor the section can possibly justify the application now before your Lordships.

I now come to the case of *Re Duke of Leeds* (4) already mentioned. In that case freehold estates comprising a number of coal mines in Yorkshire and the North Midlands had been settled by the will of a testator who died in 1927. By the Coal Act, 1938, these mines were compulsorily acquired by the National Coal Commission, the vesting date being July 1, 1942, and the compensation therefor was duly assessed by the Regional Valuation Boards of each area and paid to the trustees of the will. Questions arose as to how the compensation moneys should be dealt with as between the persons entitled in succession under the will, and the matter came before JENKINS, J. The learned judge decided all these questions and said ([1947] 2 All E.R. 216):

"In view of the unanimity of all parties in supporting the plaintiff's contention, I suggested the possibility of authorising the proposed commutation by way of compromise, if it could truly be shown to be for the benefit of all infant or unborn or unascertained persons interested or possibly interested under the settlement. It appeared, however, that this suggestion was not acceptable, and I was asked to decide the point one way or the other as a matter of construction of the Coal Act, 1938, and, in particular, sched. III, para. 21 (2). This I have, accordingly, done. My decision against the plaintiff's contention as a matter of legal right does not, of course, rule out the possibility of giving effect to it as a compromise or arrangement if shown to the satisfaction of the court to fulfil the condition mentioned above."

Junior counsel for the respondents informs us that, in fact, a compromise was subsequently approved by JENKINS, J., under which, I understand, a certain lump sum was paid to the tenant for life out of the compensation moneys and the balance was to be invested as capital and held on the trusts of the will. He also informed us that compromises of a similar nature were sanctioned by the court in *Re Lucas* (5).

My Lords, I should have been glad if I could have found it possible to draw some sound distinction between the two cases just mentioned and *Downshire* (6) and *Blackwell* (7), on the one hand, and the present application, on the other. The majority in the Court of Appeal, as I understand their judgment, drew a line between schemes which involved "a compromise or composition of beneficial interests", such as the schemes in *Downshire* (6) and *Blackwell* (7), and schemes such as the *Chapman* scheme, where no such compromise or composition was involved. If such a line could be drawn, no doubt the schemes in *Duke of Leeds* (4) and *Lucas* (5) would fall on the right side of it. I do not, however, feel able to draw this line. I agree that there is a distinction in fact between the *Chapman* scheme and the schemes in *Downshire* (6) and *Blackwell* (7), and this

is clearly pointed out in the majority judgment. Further, I think it might be possible to find some distinction in fact between *Downshire* (6) and *Blackwell* (7), on the one hand, and *Duke of Leeds* (4) and *Lucas* (5), on the other. Yet all the five cases do involve an alteration in the ascertained and undisputed beneficial interests under a settlement. For the reasons which I have set out, I fear at too great length, I am of opinion that the court has only claimed jurisdiction to make such an alteration in the maintenance cases already mentioned, and has frequently denied that it has such a jurisdiction in any other case. In saying this I am not overlooking the "salvage" cases, but they relate to administrative acts by trustees and not to alteration of beneficial interests. I agree with the majority of the Court of Appeal in their rejection of the present application, and I cannot accept the argument of counsel for the respondents based on the other cases which he has cited.

A
B My Lords, it will already be apparent why I cannot agree with the conclusions of DENNING, L.J., in his dissenting judgment, but I feel bound to comment on two passages in that judgment. DENNING, L.J., quotes the following passage from the judgment of TURNER, L.J., in *Brooke v. Lord Mostyn* (29) (2 De G.J. & Sm. 415):

C "That this court has power to compromise the rights and claims of infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the court, and results almost necessarily from the jurisdiction which the court exercises over trustees. In the exercise of that jurisdiction the court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of cestuis que trust who are infants or under disabilities . . . I have thought it right to make these observations, because I consider it of great importance that no doubt should be cast upon this power of the court . . . The rights of infants and incapacitated persons must in many cases be sacrificed if the power be not maintained."

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E It is to be noted that *Brooke v. Mostyn* (29) was a case of a true compromise of disputed rights, and the only question for decision was whether such a compromise could be set aside. In my view, the observations just quoted, though one sentence is couched in very general terms, must be read as relating only to cases of true compromise where, to quote the first sentence, the court is compromising

F "the rights and claims of infants and persons under disabilities." DENNING, L.J., goes on to say ([1953] 1 All E.R. 135):

"This jurisdiction is not confined to cases where there is a dispute about the extent of the beneficial interests, nor to cases of emergency or necessity, but extends wherever there is a bargain about the beneficial interests which is for the benefit of the infants or unborn persons."

G In support of this observation he cites *Re Trenchard* (3), *Re Wells* (2), and the argument of LORD PARKER, as junior counsel, in *Re New* (11). But, as I have already said, I cannot regard these cases as supporting the proposition.

Later, DENNING, L.J., said (*ibid.*, 136):

H "The proposed scheme for the CHAPMAN settlement is more troublesome. We are told that the lawyer who drew up the deed made a mistake. He did not have in mind the statutory definition about property passing 'on the death' for the purpose of death duties, and he included a discretionary trust for common maintenance when he ought to have omitted it. He ought to have left the children to receive maintenance equally instead of giving the trustees a discretion to grant more to one than the others. It is a small mistake, but it means a difference of £30,000 in death duties. The mistake cannot be remedied under the strict doctrine of rectification because

it is not a mistake in expressing the settlor's intentions, but only a mistake as to the legal consequences. Nevertheless, I do not myself see why the mistake should not be corrected by the settlors themselves."

In regard to this passage I would say, first, that counsel for all parties are agreed that the wishes of the grandparents, as settlors, are entirely irrelevant on the question of jurisdiction. By settling the property on certain trusts they have put it out of their power to alter these trusts, however much they may wish to do so. Secondly, it is not contended by counsel that there was any mistake, in the true sense of the word, in the present case. The trusts contained in the settlement are exactly the trusts on which the settlors intended the settled property to be held. The present application arises only by reason of the fact that it was afterwards realised that these trusts, although perfectly proper and sensible in themselves, would, or might, have unfortunate results as regards death duties. Lastly, the question is not whether the court ought to have jurisdiction to alter the trusts in this case, but whether, in fact, it has that jurisdiction. A

I would add, in amplification of remarks by the Master of the Rolls and ROMER, L.J., already quoted, that if the court had power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery Division and the legislature. The alteration of one settlement for the purpose of avoiding taxation already imposed might well be followed by scores of successful applications for a similar purpose by beneficiaries under other settlements. The legislature might then counter this move by imposing fresh taxation on the settlements as thus altered. The beneficiaries would then troop back to the Chancery Division and say, "Please alter the trusts again. You have the power, the adults desire it, and it is for the benefit of the infants to avoid this fresh taxation. The legislature may not move again." So the game might go on, if the judges of the Chancery Division had the power which the appellants claim for them, and if they thought it right to make the first move. I would dismiss the appeal. B C D

LORD ASQUITH OF BISHOPSTONE: My Lords, in this appeal counsel for the appellants began by taking his stand on an ambitious general principle of law: namely, that there resided in the Court of Chancery an inherent jurisdiction to vary the trusts of a settlement or a will in every case in which two conditions were satisfied, viz.: (i) that all adults interested in the trust dispositions consented, and (ii) that the variation was plainly for the benefit of all interested parties other than adults, viz., infants and unborn persons. Speaking with much less familiarity with these matters than most of my noble friends, I cannot but think this principle is too broadly stated, and respectfully agree with the conclusions and reasoning of my noble and learned friends, the Lord Chancellor and LORD MORTON OF HENRYTON. E F

In practice, courts of chancery have asserted this jurisdiction mainly, if indeed not solely, in three classes of cases: (a) Where the trust dispositions have provided for accumulations of income in favour of an infant during his minority without providing for his maintenance during that period, but this provision would be stultified if the infant were not maintained while the income was accumulating. The court has, in such cases, refrained from enforcing the letter of the trusts, and, by authorising maintenance, has saved the infant from starving while the harvest designed for him was in the course of ripening. (b) Where some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make shipwreck of his intentions, and it was imperative that something should be saved from the impending wreck. These are often referred to as the "salvage" cases, and many of the "maintenance" cases which I have classified separately could properly be subsumed under this wider class. (c) Where there has been a G H

compromise of rights (under the settlement or will) which are the subject of doubt or dispute. It is then often to the interest of all interested parties, adult or infant or unborn, to have certainty substituted for doubt, even if the supersession of a dubious right by an undoubted one may be doing beneficent violence to the terms of the trust, though it is, perhaps, inappropriate to speak of violence to terms to which different persons attribute a different meaning. Whether there is jurisdiction to do the same in reference to rights which are *not* in dispute is a point which lies near the centre of the present appeal, and to which I will revert.

Leaving this last point for the time being aside, I would venture to record my view that the inherent jurisdiction of the Court of Chancery in this sphere is limited to these three classes of cases: "maintenance" cases, "salvage" cases, and "compromise" cases, and that the court's exercise of jurisdiction in these three spheres is limited to those spheres and is not simply the exercise in particular circumstances of the far wider jurisdiction claimed for the court by counsel for the appellants—of a jurisdiction limited only by two conditions: (a) consent of interested adults; (b) benefit to interested non-adults. If that wider principle had been valid, a formidable volume of judicial learning and forensic argument directed to the question whether the facts of a case bring it within the three privileged compartments must have been expended in vain. Why this expenditure of time and erudition if the alleged broad principle was always there, offering a short cut? Nor, speaking more generally, does English jurisprudence start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with *ad hoc* decisions. General rules are arrived at inductively, from the collation and comparison of these decisions: they do not pre-exist them.

Now it is argued that, even if this be so, yet the third category or compartment creating jurisdiction—"compromise"—includes re-arrangements of property rights or interests even where these are not in dispute. And certain cases—*Re Trenchard* (3), *Re Wells* (2), two cases under the Coal Act, 1938 (*Re Duke of Leeds* (4), and *Re Lucas* (5) reported immediately after it) and the cases of *Downshire* (6) and *Blackwell* (7), decided simultaneously with the present case (though in a different sense) are prayed in aid as supporting this extension of the jurisdiction from cases of "compromise *stricto sensu*" to "quasi-compromise". And it is further argued that, if these cases, or some of them, attract the jurisdiction, then so does the present case. As to this latter point, though I can see differences, I cannot see any material distinction between the *Downshire* (6) and *Blackwell* (7) cases and the present case. But it will be observed (i) that until the twentieth century the category "compromise" had been construed as strictly confined to cases of disputed rights; (ii) that in practice, once it is construed as including what I have termed "quasi-compromise", there is, it would seem, no logical stopping point short of the broad and loose principle which was contended for by the appellants and which, for reasons given above, seems to me untenable. None of the decisions since 1900, relied on by the appellants, is binding on your Lordships' House. Some of them can, I think, be distinguished on the lines indicated by my noble and learned friend, LORD MORTON OF HENRYTON. For instance, the case of *Re Wells* (2), in my view, is a very special one and does not, on a true view, support the appellants' proposition. Subject to these considerations I would re-assert the rule that a compromise in this connection means a compromise in the strict sense and that the attempted creation of a category of quasi-compromise is invalid. As to the effect more specifically of a decision in this sense on *Re Trenchard* (3), *Re Wells* (2), the two cases decided under the Coal Act, 1938, and the cases of *Downshire* (6) and *Blackwell* (7), I have had the advantage of reading in advance the opinion just delivered by my noble and learned friend, LORD MORTON OF HENRYTON, and would respectfully adopt his observations. I am of opinion that the appeal should be dismissed.

LORD COHEN: My Lords, I have had the advantage of reading in print the opinion delivered by my noble and learned friend, LORD MORTON OF HENRYTON. I agree with him in rejecting the main argument advanced by counsel for the appellants. Like him, I accept the reasons given by the majority of the Court of Appeal for rejecting that argument. In my opinion, the cases relied on by counsel for the appellants are not examples of the unlimited jurisdiction for which he contends, but illustrate exceptions from the general principle that the court will give effect, as it requires the trustees themselves to do, to the intentions of the settlor or testator as expressed in the trust instrument. In considering those cases I will adopt the grouping made by counsel for the appellants and already stated by the noble and learned Lord. I agree with his comments on the first three groups, with the reservation that I do not think that the maintenance cases are the only real exception to the rule that the court will not alter beneficial trusts. My reasons for this reservation will appear from the observations I have to make on the scope of the exception which the Chancery Courts have adopted as regards the sanctioning of compromises on behalf of infants and possible after-born beneficiaries. My Lords, like the majority of the Court of Appeal, I think that this jurisdiction is not limited to compromises of disputed rights, but extends to compromises in the wider meaning of that word, and, had it not been that some of your Lordships take a different view, I should have been content to express my agreement with the reasoning of the Master of the Rolls and ROMER, L.J., on this point. A

LORD MORTON OF HENRYTON sums up the arguments advanced against their conclusion somewhat as follows: (i) The court's sanction of a compromise in the true sense, when the beneficial interests are in dispute, is not the exercise of a jurisdiction to alter those interests, for they are still unascertained. (ii) *Re Trenchard* (3), which is the foundation of the majority judgment of the Court of Appeal on this point, is not a case of compromise in the broad sense, but is "no more than the sanctioning by the court of a purchase by the trustees of the widow's rights." (iii) It is impossible to draw a line at which the jurisdiction to sanction a compromise in the broad sense ends, or, put otherwise, it is impossible to draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights and alleged unlimited jurisdiction to alter beneficial rights to any extent, provided that every person who is sui juris consents, and the change is shown to be for the benefit of infants and after-born beneficiaries. My Lords, I am not satisfied that the court, in sanctioning a compromise in the strict sense, is not exercising a jurisdiction to alter beneficial rights. It is true that in such a case the right has not been defined, but the right of the beneficiary is a right to that to which, on its true construction, the will or settlement entitles him. The very essence of a compromise is that it may give each party something other than that which the will or settlement would, on its true construction, confer on him. Nor am I able to accept the view that *Re Trenchard* (3) involved nothing more than the purchase by the trustees of the widow's interest. Under cl. 3 of the testator's will she was entitled only (a) to the use of the testator's residence so long as she desired to make it her permanent place of residence and remained the testator's widow, and (b) during that time to have the house and grounds kept up at the expense of the estate. If she ceased to reside, she would forfeit those benefits, the value of the tenantable repair provision being estimated at £350 a year. Under the arrangement sanctioned by the court she got £275 per annum, determinable only on re-marriage—not by non-residence in the house. The arrangement, therefore, in my opinion, clearly involved an alteration of the quality of the beneficial interest of the widow. So far as the residuary legatees were concerned, the primary effect was to alter the quantum of what they would receive, but I am unable to see that it can properly be said that the only purpose and effect of the transaction was a purchase of the widow's interest. The summons asked a question as to compromise (see [1902] 1 Ch. 380). BUCKLEY, J. (*ibid.*, 385), himself described the D E F G H

proposal as a fair compromise for all parties. He was not using the term "compromise" in the strict sense for the legal rights had already been decided. He was, I think, sanctioning a re-arrangement of rights as between tenant for life and remaindermen which could not be carried out without the sanction of the court because infants were interested. The question of jurisdiction was argued but BUCKLEY, J., seems to have felt no doubt as to his jurisdiction.

A cases of this kind the court is always under the disadvantage that, as most of such cases are heard in chambers, there are few reported precedents. There may well have been earlier unreported cases in which the Chancery Courts had exercised their jurisdiction over trustees in a similar way. Be that as it may, the decision in *Re Trenchard* (3) has stood unquestioned for fifty years and I see no reason why your Lordships should now overrule it.

B I turn, therefore, to the third argument. My Lords, a distinguished member of this House once said, in another connection, that, while he might have difficulty in drawing a line, he had never had any difficulty in deciding on which side of it a particular case fell. I think that a comparison of the facts in *Re Downshire* (6) and *Re Blackwell* (7), on the one hand, and the facts in *Re Chapman*, which is now before your Lordships, illustrate where the line might be drawn. In *Re*

C *Downshire* (6) and *Re Blackwell* (7), as in *Re Trenchard* (3), and, I think, also in *Re Duke of Leeds* (4) and *Re Lucas* (5) (which immediately follows that case), the court was dealing with compromises in the broad sense between tenants for life, on the one hand, and remaindermen, on the other hand; they were not varying the rights inter se of parties whom the testator had placed on an equality. In *Re Chapman*, on the other hand, there was no question of compromise between

D tenants for life and remaindermen; the court was being asked to vary the rights inter se of a class which the testator had directed should be treated in a particular way. As the majority of the Court of Appeal said in the present case, what is proposed is not ([1953] 1 All E.R. 130)

E "... a composition of rights in any real sense at all. It is nothing more than a re-arrangement of beneficial interests which, to the extent that it might prove to be of advantage to some members of the class, would correspondingly operate to the prejudice of others."

My Lords, I have, I hope, said enough to show why I think that the Court of Appeal were right in allowing the appeals in *Re Downshire* (6) and *Re Blackwell* (7) and in dismissing the appeal in *Re Chapman*, and why, though for different reasons, I agree that the appeal to your Lordships' House should be dismissed.

F I cannot sit down without expressing my doubt whether there is any foundation for the suggestion made by DENNING, L.J., that the effect of your Lordships' decision may be that schemes sanctioned in the past could be ignored by the revenue and by all persons not sui juris. The High Court is a superior court and the control of trustees is a matter within its jurisdiction. It would take a good deal of argument to satisfy me that its orders were a nullity and that

G trustees were not fully protected by orders made by that court in the exercise of that trust jurisdiction even though your Lordships may, in a later case, have said that the jurisdiction had been wrongly exercised.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co.*, agents for *Wheldon, Houlby, Moore & Armstrongs*, South Shields (for all parties except amicus curiae); *Treasury Solicitor*.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

BONSOR *v.* MUSICIANS' UNION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.JJ.), February 12, 15, 16, March 5, 1954.]

Trade Union—Action by member against union—Expulsion—Right to damages for breach of contract—Law of Property Act, 1925 (c. 20), s. 82 (1).

The plaintiff was a musician and a member of the defendant union. In 1948 he failed to pay his weekly subscriptions, which by June, 1949, were fifty-two weeks in arrears. On July 2, 1949, a branch secretary struck the plaintiff's name off the register of members on the ground that he was "excluded" by reason of the arrears, under r. 27 (7) of the union rules, which provided: "Any member not clear on the books at the end of each quarter shall be fined 3d., and any member twenty-six weeks' subscription in arrears shall be excluded unless a satisfactory reason be assigned". The plaintiff was, thereby, unable to obtain employment as a musician. On a claim by the plaintiff for a declaration that his exclusion was wrongful, an injunction to restrain the union and its officers from acting on the assumption that he was not a member, and damages,

HELD: (i) on construction r. 27 (7) gave power only to a branch committee to exclude a member; the purported exercise of such a power by the branch secretary was ultra vires the rules and ineffective; and the plaintiff was entitled to the declaration and injunction claimed;

(ii) (DENNING, L.J., dissentiente) the decision of the Court of Appeal in *Kelly v. National Society of Operative Printers' Assistants* (1915) (84 L.J.K.B. 2236) that a member of a trade union who was wrongfully excluded or expelled could not claim damages against the union was still the law and binding on the Court of Appeal since it was not given per incuriam, was not in conflict with any other decision of the Court of Appeal, and was unaffected either by any of the speeches in the House of Lords in *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley* ([1922] 2 A.C. 440) or by the Law of Property Act, 1925, s. 82 (1), and, accordingly, the plaintiff's claim for damages would be dismissed.

Amalgamated Society of Railway Servants v. Osborne ([1910] A.C. 87) and *National Union of General & Municipal Workers v. Gillian* ([1945] 2 All E.R. 593), distinguished.

Judgment—Order—Ante-dating of order—Death of party after judgment reserved—R.S.C., Ord. 41, r. 3.

The argument on the plaintiff's claim for damages was concluded on Feb. 16, 1954, and the case adjourned curia advisari vult. On Feb. 18, 1954, the plaintiff died. On Mar. 5, 1954, the court delivered a reserved judgment in favour of the union.

HELD: the judgment would be ante-dated Feb. 16, 1954, under R.S.C., Ord. 41, r. 3.

AS TO EXPULSION FROM MEMBERSHIP OF A TRADE UNION, see HALSBURY, *Hailsham Edn.*, Vol. 32, p. 481, para. 770; and FOR CASES, see DIGEST, Vol. 43, pp. 98-101, Nos. 1032-1052.

FOR THE LAW OF PROPERTY ACT, 1925, s. 82 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 604.

FOR THE TRADE UNION ACTS, 1871 to 1940, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 1244-1280.

Cases referred to:

- (1) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329; 3rd Digest Supp.
- (2) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 78 L.T. 647; 62 J.P. 469; 13 Digest 326, 631.

- (3) *Barnard v. National Dock Labour Board*, [1952] 2 All E.R. 424; [1953] 2 Q.B. 18; 3rd Digest Supp.
- (4) *Kelly v. National Society of Operative Printers' Assistants*, (1915), 84 L.J.K.B. 2236; 113 L.T. 1055; 43 Digest 99, 1038.
- (5) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 30 Digest, Replacement, 225, 691.
- (6) *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A.C. 440; 91 L.J.Ch. 688; 128 L.T. 65; 43 Digest 100, 1043.
- (7) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; *subsequent proceedings*, C.A., *sub nom. Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 43 Digest 93, 963.
- (8) *R. v. Cheshire County Court Judge & United Society of Boilermakers. Ex p. Malone*, [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 43 Digest 100, 1044.
- (9) *Russell v. Amalgamated Society of Carpenters & Joiners*, [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 43 Digest 94, 987.
- (10) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants (1900)*, [1901] A.C. 426; 70 L.J.K.B. 905 n.; 83 L.T. 474; 43 Digest 92, 957.
- (11) *Hardie & Lane, Ltd. v. Chiltern*, [1928] 1 K.B. 663; 96 L.J.K.B. 1040; 138 L.T. 14; Digest Supp.
- (12) *National Union of General & Municipal Workers v. Gillian*, [1945] 2 All E.R. 593; [1946] K.B. 81; 115 L.J.K.B. 43; 174 L.T. 8; 2nd Digest Supp.
- (13) *Baird v. Wells*, (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 8 Digest 512, 39.
- (14) *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 8 Digest 509, 25.
- (15) *Abbott v. Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp.
- (16) *London Assn. for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 17 Digest 162, 625.
- (17) *Wood v. Wood*, (1874), L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 8 Digest 510, 29.
- (18) *Turner v. London & South Western Ry. Co.*, (1874), L.R. 17 Eq. 561; 43 L.J.Ch. 430; 42 Digest 745, 1696.
- (19) *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; 66 L.J.Ch. 751; 77 L.T. 357; 61 J.P. 791; *affd.* C.A., [1898] 2 Ch. 358; 67 L.J.Ch. 458; 78 L.T. 702; 7 Digest 321, 411.

APPEAL by the defendant and CROSS-APPEAL by the plaintiff from an order of UPJOHN, J., dated Apr. 17, 1953.

- G The plaintiff was a musician and had for many years been a member of the Musicians' Union. During 1948 the plaintiff failed to pay his weekly contributions, and by the end of June, 1949, he was fifty-two weekly payments in arrear. On July 2, 1949, a branch secretary of the union purported to exclude the plaintiff from membership by virtue of r. 27 (7) of the union rules. In November, 1949, the plaintiff asked to be reinstated so as to enable him to obtain employment as a musician. The branch secretary refused to reinstate him except on payment forthwith of all arrears and fines totalling £4. The plaintiff offered to pay that sum out of the first week's wages in his prospective employment, but that offer was refused by the branch secretary. The plaintiff was, therefore, unable to obtain employment as a musician, and he now claimed (i) a declaration that his expulsion from membership of the union in or about November, 1949, was wrongful and null and void, (ii) a declaration that he was entitled to be reinstated as a member of the union, (iii) an injunction restraining the union and its officers
- H

from acting on the assumption that he was not a member of the union, (iv) damages, (v) further or other relief. Before UPJOHN, J., the plaintiff abandoned the claim for a declaration that he was entitled to be reinstated and conceded that the claim for damages could not be sustained in a court of first instance, but he formally reserved the latter claim for argument in the event of an appeal. On Apr. 17, 1953, UPJOHN, J., gave judgment granting the declaration and injunction as sought, but dismissed the claim for damages. The union appealed against that part of the judgment granting the plaintiff the declaration and injunction, and the plaintiff cross-appealed against that part of the judgment dismissing his claim for damages. On Feb. 15, 1954, the Court of Appeal dismissed the union's appeal. On Feb. 16 judgment was reserved on the cross-appeal. On Feb. 18 the plaintiff died.

Schapiro for the union.

Lester for the plaintiff.

Feb. 15. **SIR RAYMOND EVERSHED, M.R.:** The sole question on the appeal is, as counsel for the union has conceded, one of construction of the rules on the footing that they constitute the terms of a contract between the plaintiff and the union or members of the union, and, in particular, r. 27 (7), which reads:

"Any member not clear on the books at the end of each quarter shall be fined 3d., and any member twenty-six weeks' subscription in arrears shall be excluded unless a satisfactory reason be assigned".

[HIS LORDSHIP stated the facts and continued:] The vital word is "excluded". UPJOHN, J., came to the conclusion on the construction of the rules that there was no distinction between "exclude" and "expel", and no question on that has arisen here. Rule 27 bears the heading: "Offences, fines and penalties", and there are sixteen sub-rules. Some sub-rules provide possible alternative penalties, and it is made plain that the decision which penalty is to be imposed rests with the branch committee or some other body ranking, so to speak, higher than the branch committee, for example, the executive committee. For example, under sub-r. (1) a man may, for the offence there mentioned, be fined, suspended or expelled. But other sub-rules provide one particular penalty. For example, if a member is twenty-six weeks in arrear with his subscription, then, under sub-r. (7), the penalty is not fine or suspension but exclusion (or expulsion).

Counsel for the union conceded that the words "unless a satisfactory reason be assigned" must mean unless a reason be assigned which the branch committee should think satisfactory. The result of that view seems to me to be that the act of expulsion is *prima facie* at least an act of the branch committee. It does, I think, stretch the meaning of sub-r. (7) to say that a member twenty-six weeks' subscription in arrears is or may be expelled either by the secretary if he does not give a reason at all, or by the branch committee if he gives a reason unsatisfactory to that committee. I can understand that the rules might have provided that for failure to pay subscriptions for a long period of time the member should *ipso facto* at the end of that time cease to enjoy the rights of membership. But if that is what was intended the sub-rules should either have said so clearly or have been drafted in a context which required that meaning. In any case, counsel for the union does not contend that sub-r. (7) could mean an *ipso facto* determination of membership, for the words "unless a satisfactory reason be assigned" make such a view impossible.

I have already said that in some cases the offence may justify an alternative penalty to be decided by the branch committee, or, in appropriate cases, the higher body. But nowhere in these sub-rules is a power to expel expressly conferred on an officer such as the branch secretary. Those other sub-rules in which there is no alternative penalty do not state by whom and how the penalty should be imposed. In those circumstances I have thought it of assistance to

refer back to r. 6. That rule deals with the duties, composition and so forth of the branch committees, and sub-r. (7) makes it clear that in the case of conduct detrimental to the interests of the union, it is the committee which has the power to fine, suspend or expel. That leads me to think that the severe power of expulsion would be vested in the branch committee. It would be strange if in the majority of cases the branch committee would be the body with power to expel but in others—the rules nowhere say so in terms—such a power should be vested in the secretary. But, further, r. 6 (5) provides:

“ They [the branch committee] shall be a committee for general purposes, and shall determine, subject to appeal, anything wherein the rules of the union are silent ”.

It seems to me that since on this particular matter the rules are silent, there is no reason why r. 6 (5) should not fill the gap. It would do so, to my mind, in conformity with the general tenor of the rest of the rules. As JENKINS, L.J., pointed out during the argument, it would be anomalous, to say the least, if the secretary were to have the deciding voice in a case of this kind. He is, according to r. 14, which describes his office and his duties, a minister or officer of the branch and it is his duty to keep a proper account of the subscriptions that are or are not paid. So that, if it rests on him to expel under r. 27 (7), he is, so to speak, a judge in his own cause for he is, by striking a member off for twenty-six weeks' subscription in arrears, thereby in effect asserting the correctness of his own account.

The strongest point, it seems to me, in favour of the contrary construction of the rules, is to be found in r. 29, dealing with appeals, which reads:

“ (1) If any member shall be aggrieved at any fine, suspension or expulsion imposed under these rules other than under any rule where such fine, suspension or expulsion is imposed by a branch committee, or shall have any complaint against any officer, officers, member or members he shall be entitled to appeal to the committee of the branch of which he is a member ”.

At first sight it looks as though there might be an expulsion under the rules otherwise than by the branch committee, and, in particular, by the branch secretary or other officer. But I am not satisfied that that consideration is strong enough to outweigh what I regard as the inevitable inferences from r. 6. Where fines are exigible in the case of arrears for short periods, the branch secretary is to collect them. It is also provided that a man, though not being expelled from the union, may be expelled from a meeting by the president of that meeting. I cannot think, therefore, that it is essential to find somewhere in the rules a power to expel a member from the union vested in an officer, such as a branch secretary, by reason of the opening words of r. 29 (1). I think, as I have already indicated, that that sub-rule is insufficient to outweigh the considerations which seem to me, I confess, conclusive in the other direction.

It is true that the plaintiff did not take advantage of his right of appeal under the rules, but I cannot see how that affects the plaintiff's right to come to this court and say that the purported expulsion was *ultra vires* the rules and ineffective. I do not, therefore, propose to take up further time on that matter. In my opinion, UPJOHN, J., was right, and the appeal ought to be dismissed.

DENNING, L.J.: Although our task is to construe the rules of the union which constitute the contract between the plaintiff and the union, these rules are a contract in theory rather than in fact. A true contract requires the agreement of parties freely made with full knowledge and without any feeling of constraint. That was not so in the present case. The union was a “closed shop”. In order that a person should be allowed to work at his trade he had no option but to sign a document agreeing to the rules. The plaintiff himself said:

“ I did not want to be a member of it. I would like to tell his Lordship

[UPJOHN, J.] that if I could earn my living forthwith without being a member of this so-called Musicians' Union I would not want to join it, but I have got to join it in order to work, because it is a closed shop . . . If I am re-admitted I will always pay my subscriptions, but I will not take any active part in union matters. I will be a member by force, because I am forced to be a member ”.

Rules applied to a man in that state of mind are less a contract, as we used to understand a contract, than a legislative code laid down by some, to be imposed on all, members of the union. They are more like bye-laws than a contract. In these circumstances, the rules are to be construed not only against the makers of them, but, furthermore, any rule found to be contrary to natural justice or, what comes to the same thing, to what is fair and reasonable, will be held to be invalid: see *Lee v. Showmen's Guild of Great Britain* (1) and *Kruse v. Johnson* (2). A

I approach the present case, therefore, on the footing that the court should interpret the rules in such a way that they are fair and reasonable and, therefore, valid, rather than contrary to natural justice and, therefore, invalid. On this footing, I agree with what SIR RAYMOND EVERSLED, M.R., has said about r. 27 (7). The committee alone can say whether or not a reason is satisfactory. Sub-rule (7) means, therefore, that a member whose subscriptions are twenty-six weeks in arrear “ shall be excluded ” by the committee “ unless a satisfactory reason be assigned ”. If the committee are to decide the question of exclusion when a reason is assigned, so also they must decide it when no reason is assigned. Counsel for the union suggested that the exclusion was an administrative, not a judicial, act, and that, being administrative, it could be delegated to the secretary, but he had to admit that a member could not be excluded without notice being given to him. That shows that it is a judicial act and it cannot be delegated by the committee to the secretary. The secretary had no right to exclude the plaintiff any more than the port officer had a right to suspend the plaintiffs in *Barnard v. National Dock Labour Board* (3). I agree, therefore, that this appeal should be dismissed. B

JENKINS, L.J.: I agree. C

Appeal dismissed. D

Argument then took place on the cross-appeal.

Cur. adv. vult. E

Mar. 5. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: Since *Kelly v. National Society of Operative Printers' Assistants* (4) was a decision of the Court of Appeal, prima facie, and having regard to the rule established in *Young v. Bristol Aeroplane Co., Ltd.* (5), it would be binding on us no less than on UPJOHN, J. Counsel for the plaintiff has, however, before us argued that *Kelly's* case (4) ought no longer to be regarded as binding in the Court of Appeal, and that we, being free to reject *Kelly's* case (4), should proceed to do so and decide the present question in the plaintiff's favour. Counsel advanced two grounds for his submission (either of them sufficient, if made good, for his purpose according to the judgment in *Young v. Bristol Aeroplane Co., Ltd.* (5)), namely (i) that later pronouncements in the House of Lords are inconsistent with the reasoning on which the decision in *Kelly's* case (4) was based, and (ii) that the legal basis for the decision in *Kelly's* case (4) has been destroyed by the Law of Property Act, 1925, s. 82 (1). Dealing with the first point, it is sufficient for the present purpose to state that in *Kelly's* (4), as in the present, case the plaintiff alleged that he had been expelled from his union wrongfully and in breach of the union's rules, and claimed, accordingly, a declaration to that effect, an injunction to restrain the defendants, their officers, agents or servants, from excluding him from membership, and also damages. The action was brought in the county court where the plaintiff succeeded in obtaining a declaration and an injunction as sought by him. F

and £68 damages. The defendants appealed to the Divisional Court, where, HORRIDGE and ROWLATT, JJ., being divided in opinion, the appeal was dismissed. The defendants appealed again to this court, which unanimously dismissed the appeal so far as it related to the declaration and the injunction, but discharged the award of damages, holding the plaintiff's claim in that respect to be incompetent.

A It is the contention of counsel for the plaintiff that the speeches in the House of Lords in *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite*, *General Union of Operative Carpenters & Joiners v. Ashley* (6), containing approval of the decision of this court in *Osborne v. Amalgamated Society of Railway Servants* (7), by necessary implication disapproved *Kelly's* case (4), particularly so much of the judgments of the Court of Appeal in *Osborne's* case (7) as related to the plaintiff's claim for damages in *Kelly's* case (4). I am
B unable to accept this argument. In *Osborne's* case (7) the plaintiff, a member of the defendant union, sought rescission of a resolution purporting to expel him from membership on the ground that such resolution was ultra vires and otherwise wrongful, and also an order for his reinstatement as a member of the union. The defendants, by way of preliminary objections in their defence, alleged, first,
C that they were an unlawful association, and, consequently, that the contract constituted by the rules was incapable of enforcement in a court of law, and, secondly, that, in any event, the plaintiff's claim involved the enforcement of an agreement for the application of the funds of a union for providing benefits to members—an agreement expressly made unenforceable by the Trade Union Act, 1871, s. 4. Both objections were rejected by the Court of Appeal. The point
D raised by the second objection was again directly raised in *Braithwaite's* case (6), and was answered both in the Court of Appeal and in the House of Lords in the same sense as it had been answered in *Osborne's* case (7), the decision in which was, accordingly, expressly approved by the House: see, for example, the speech of LORD ATKINSON ([1922] 2 A.C. 463). It is true that *Kelly's* case (4) was referred to (*ibid.*, 445) in the course of the argument for the appellants, but it is not clear
E to what precise matter the citation was directed. In my judgment, it is impossible to contend that the House, in rejecting the argument of the unions, by implication disapproved the decision in *Kelly's* case (4) on the claim for damages, for that claim and the reasons for the court's rejection of it were not involved in, or relevant to, the issues in *Braithwaite's* case (6). *Kelly's* case (4) is nowhere referred to in any of the speeches in the House of Lords. The question, the
F decision of which in *Osborne's* case (7) was approved by the House of Lords in *Braithwaite's* case (6), was whether or not a claim by a union member that his expulsion was ultra vires the rules of the union involved an attempted enforcement of an agreement of a kind specified in s. 4 of the Trade Union Act, 1871. That question was not involved in any way in *Kelly's* case (4) or this court's decision in that case. Indeed, apart from the language of SCRUTTON, L.J., in
G *R. v. Cheshire County Court Judge & United Society of Boilermakers. Ex p. Malone* (8), I should have thought it clear that there was no conflict between *Osborne's* case (7) and *Kelly's* case (4). In my judgment, therefore, counsel for the plaintiff's first point cannot be sustained.

As to the second point, the Law of Property Act, 1925, s. 82 (1), reads:

H "Any . . . agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the . . . agreement had been entered into with the other person or persons alone."

The sub-section was enacted to overcome the difficulty which sometimes arose on transfers of mortgages by trustees to new and continuing trustees. It would, to my mind, be surprising if a sub-section contained in what may fairly be called conveyancing legislation had the oblique effect of altering at a stroke the rights of members of registered trade unions to recover damages from their unions for

breaches of the union rules. Still, if such is the effect of the enactment fairly construed, so it is. In order to invoke the sub-section it is essential for counsel to establish that the ratio decidendi in *Kelly's* case (4) was that the contract constituted by the rules of the union was a contract between each member and the union, that is, the whole aggregate of the members including himself, and also that by seeking to enforce such contract he was suing all the members of the union, including himself. In my judgment, counsel for the plaintiff fails to make good the essential premise to his argument. In my judgment, the decision proceeded on the view (expressed most clearly by BANKES, L.J.) (84 L.J.K.B. 2239) that the material contract was between the plaintiff and all the other members of the union except himself. And if the union is not itself a "persona juridica" distinct from the members who in the aggregate constitute the union, as this court in *Kelly's* case (4) clearly thought it was not (a matter to which I shall have later to return), this view seems inevitable. When a new member joins "the union" he is, *ex hypothesi*, not already a member. He contracts, on the basis stated, with all the other members, and he and each of them remains contractually bound to each other under, and in accordance with, the rules during their respective memberships. But the court further proceeded on the view that the committee, of whose acts the plaintiff had complained, were, under the constitution of the union, as much the plaintiff's agents as the agents of the other members, or, as BANKES, L.J., observed, if they did not act as such agents, then the plaintiff had no complaint against the union at all. Further, whatever was the nature of the contract, by suing "the union" the plaintiff was suing all the members, including himself, a class of action for which there was no warrant in authority. So in the present case the plaintiff, by suing the union (unless the union is a *persona juridica*), is suing all the members of the union, including himself. I set out the material passages from the judgments, and I do so more fully than might otherwise have been necessary by reason of their bearing on the general matter later dealt with in this judgment. SWINFEN EADY, L.J., said (84 L.J.K.B. 2238):

"I am not aware of any authority for the proposition that a member of a voluntary [un]incorporated association can recover general damages against the association as such for a breach of the rules, or of the contract contained in the rules. The committee of the society is the agent of all the members of the society, but one member cannot recover from the other members damages for the acts of the committee."

PHILLIMORE, L.J., said (*ibid.*):

"With whom did the plaintiff contract? Not, I think, with the trade union, which, as LORD MACNAGHTEN says in *Russell v. Amalgamated Society of Carpenters & Joiners* (9), is merely an unincorporated society of individuals. I think that the plaintiff contracted with each and every of the members, and if anybody has broken any contract with him, it is each and every member. Further, the officers of the society are agents for him quite as much as for the other members, and if he sues the trade union for what it has done, he is suing himself among others."

Finally, BANKES, L.J., said (*ibid.*, 2239):

"I can find no case in which a claim like the present has ever been made, and it is necessary, therefore, to consider it on principle. A trade union is in a peculiar position. LORD HALSBURY, in *Amalgamated Society of Railway Servants v. Osborne* (7) ([1910] A.C. 93), speaks of it as a legalised combination: LORD MACNAGHTEN, in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (10) ([1901] A.C. 438) points out that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who from their position may be taken fairly to represent the body: and later, at p. 439, he says that the

A registered name of a trade union is nothing more than a collective name for all the members. An action, therefore, against a trade union may be regarded as in its nature a representative action in which all the members are sued in their collective name. It was decided in the *Taff Vale* case (10) that in such an action the funds of a trade union could be made liable for a wrong done to some person outside the society by an authorised agent of the society; but, as FARWELL, J., points out at p. 431, the question in that case was not a question of the rights of members of the society, but of the wrong done to persons outside the society. Here the question is as to the rights of a member of the society; and to succeed in his claim for damages the plaintiff must establish, first, the contract for breach of which he sues; and, secondly, a breach either by the other party to the contract or by some duly authorised agent of that party. Here the contract relied on is that contained in the rules. These rules do, in my opinion, constitute a contract as between the plaintiff and the other members of the trade union. The plaintiff's case is that this contract has been broken not by all the other members personally, but by the London committee of the executive committee acting as the agents of those other members. It is here that the plaintiff fails. It is true that both these bodies were appointed by the general body of members, and as such they are the agents of the members; but they are just as much the agents of the plaintiff as the agents of his fellow members whom he seeks to make liable under their collective name. Further than this, the very ground on which the plaintiff succeeds in obtaining an injunction is fatal to his claim for damages. He succeeds in that claim because he has established that the London committee of the executive committee in expelling him from the society acted without authority and in defiance of the rules. Having established that fact, it is not possible to contend that they were at the same time the authorised agents of his fellow members to do the acts which he complains of as constituting breaches of his contract."

E I have set out the whole of the relevant part of the judgment of BANKES, L.J., though it seems, following later decisions of this court, for example, *Hardie & Lane, Ltd. v. Chiltern* (11), that the citation made by BANKES, L.J., from LORD MACNAGHTEN ([1901] A.C. 438) in reference to a representative action went further than was necessary or justifiable. But, in my judgment, the validity of BANKES, L.J.'s, reasoning is not thereby affected. Nor do I think that any question of a "representative action" is material to the problem which in the present case we have to decide. I add that, in my judgment, the proposition, contained, particularly, in the judgment of BANKES, L.J. (84 L.J.K.B. 2239) that a committee appointed under the rules of the union should be treated as the agent of all the members in performing the functions committed to it, is not, at least for present purposes, affected by the further proposition that the servant of an unincorporated body who commits a tortious act in professed performance of his duties, for example, by defaming a third party, cannot be assumed to be the agent of all the members of the society in so doing.

G There is no doubt that *Kelly's* case (4) was viewed critically in *Malone's* case (8), particularly by SCRUTTON, L.J., but it is equally clear that it was, nevertheless, regarded as binding authority in the Court of Appeal. No one has ever suggested that the decision was arrived at per incuriam. DENNING, L.J., whose strong dissent from my own conclusion I have had the advantage of reading in advance, is of opinion that the relevant question decided in *Kelly's* case (4) may not have been fully argued by counsel. I have carefully read the reports in the *LAW JOURNAL* (84 L.J.K.B. 2236) and the *LAW TIMES* (113 L.T. 1055), and though I think it possible that the point arose during the hearing in, and may even have been suggested by, this court, I cannot conclude that the question of the essential character of a trade union for the purpose in suit was not properly debated in argument. There was no earlier decision omitted from notice in favour of the

view that, for the purpose in question or otherwise, a union should be regarded as a distinct *persona juridica*—the opinions in the *Taff Vale* case (10), which were referred to, clearly supporting, in my opinion (notwithstanding the language of LORD BRAMPTON ([1901] A.C. 442) later mentioned), the opposite result. As I have said, neither in *Malone's* case (8) nor elsewhere has it been suggested that the decision in *Kelly's* case (4) was given *per incuriam*. Thus, in *Malone's* case (8) LORD STERNDALÉ, M.R., said of *Kelly's* case (4) ([1921] 2 K.B. 702):

"That was a decision of this court, which binds us till the House of Lords reverses it, that such damage as was claimed here cannot be recovered in law, because a member of a voluntary society like this cannot sue the society for damages which he alleges he has suffered by their action. I do not think it necessary to go into the reasons which the court gave for its decision. That is the law until the House of Lords alters it."

And see per YOUNGER, L.J. (*ibid.*, 712). In *Malone's* case (8) it was, however, decided that a wrongly expelled member of a union claiming merely a declaration and an injunction in respect of his expulsion, and not damages because disabled by *Kelly's* case (4) from so doing, could not sue in the county court, because by the County Courts Act, 1888, s. 56 (now s. 40 of the Act of 1934) the county court has no jurisdiction to grant such relief save as ancillary to a claim for damages of an amount within the court's jurisdiction. Notwithstanding that, the claim was based on, and followed precisely, the form of relief prayed in *Osborne's* case (7), and the court observed that that point had never been taken, and had, therefore, never been considered in *Kelly's* case (4), which had come also from the county court. It was, I think, in the light of those considerations that SCRUTTON, L.J., made the observations which counsel for the plaintiff cited in support of his submission of the conflict between *Osborne's* case (7) and *Kelly's* case (4), resolved, as he claimed, in the former's favour by the House of Lords, namely (*ibid.*, 709):

"I am glad it is unnecessary for us in this case to go into the question of the exact relation of *Kelly's* case (4) and *Osborne's* case (7). I do not understand them. In *Kelly's* case (4) the court decided that a person in the position of the present plaintiff could not recover damages against a society of which he was a member, because he himself was a member of that unincorporated body, and you cannot, on a contract between yourself and yourself, recover damages against yourself. But the court in *Kelly's* case (4) did grant a declaration and injunction to the plaintiff against himself, without apparently seeing that there was any inconsistency. If they had considered this point we should have been bound by their decision, whatever the result of it was; but I cannot find any trace in the judgment that it occurred to anybody to consider the effect of that action having come from a county court, and the effect of the limited jurisdiction of the county court upon that point. In *Osborne's* case (7) a declaration and injunction in the High Court were granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case the point taken in *Kelly's* case (4) about damages was considered by the court, that is whether a man can get damages or any other relief against himself or against a body by its trade name which includes himself. It may be that in some future stage of trade union litigation, which is likely to occupy the court for many years to come, that important point may come up for consideration; and I only desire at present to guard myself from expressing any opinion one way or the other about it, except by saying that I do not at present understand the relation of *Kelly's* case (4) and *Osborne's* case (7) to each other."

With all respect to so great an authority as SCRUTTON, L.J., I do not think, for reasons which I have already given, that this court's rejection of the claim for damages in *Kelly's* case (4) depended on the view that the contract there sued on was between the plaintiff and himself. Nor do I think that there is any

necessary inconsistency between the right to a declaration and an injunction, on the one hand, and the inability to recover damages, on the other. As a matter of logic and sense, in an association such as a trade union a member may be heard to claim against his fellows to have his view of the construction of the rules pronounced on, but may not be able to claim damages from all, or any, of them as on an implied obligation on the part of each to see that the rules are properly applied. And the injunction may fairly be regarded as ancillary to the declaration rather than as an alternative means of enforcing the implied obligation: see, for example, per FLETCHER MOULTON, L.J., in *Osborne's case* (7) ([1911] 1 Ch. 561). There is nothing in the observations of SCRUTTON, L.J., which, in my judgment, casts any doubt on the binding quality of *Kelly's case* (4) as an authority. The result, in my opinion, is that counsel for the plaintiff has failed to make good either of the grounds on which he sought to establish that within the principles laid down in *Young v. Bristol Aeroplane Co., Ltd.* (5), *Kelly's case* (4) should no longer be regarded as a binding authority in this court.

Counsel for the plaintiff also argued more generally that the result of *Kelly's case* (4) was irrational and anomalous. He drew attention to the apparent conflict between the grant of an injunction, on the one hand, and the refusal to award damages, on the other, and suggested by reference to certain passages in the *Taff Vale* case (10) that the whole conception of the union as a voluntary and unincorporated association of individuals, as a mere name or description of the aggregate of its members, was wrong, and that for such purposes as are here involved the union ought to be treated as, in some sense, an entity, a persona juridica, distinct from its members, with which, as such, the contract was made, and which also, as such, was liable in damages for any breach of the implied term of the contract of membership that a member would not be expelled from "the union" except in accordance with the rules. In my judgment, the speeches of the House of Lords in the *Taff Vale* case (10) cannot be said to make good the proposition contended for, notwithstanding the express affirmation of the judgment of FARWELL, J., and the language of LORD BRAMPTON ([1901] A.C. 442):

"I think that a legal entity was created under the Trade Union Act, 1871 . . . and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name."

The language of LORD MACNAGHTEN is inconsistent with such view. He said (*ibid.*, 439):

"It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members . . . A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union . . . I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union may be sued by its registered name."

LORD LINDLEY (*ibid.*, 445) and LORD SHAND (*ibid.*, 440) were clearly, as I read their speeches, of the same opinion as LORD MACNAGHTEN and, as will later appear, it does not seem to me, when FARWELL, J.'s judgment is examined, that it pronounced at all clearly in favour of the view that a new persona juridica had, at any rate save for very limited purposes, been created. In any event, *Kelly's case* (4) was decided ten years after the *Taff Vale* case (10) in reliance on it, and though it may be said to have been criticised, no one, I repeat, has ever suggested

that it was decided per incuriam. Having regard, however, to the nature of the general argument and the importance of the present case, I have thought it right to examine the later cases, and, particularly, *National Union of General & Municipal Workers v. Gillian* (12) which, though mentioned in argument, was not referred to before us.

In *Gillian's* case (12) the substantial point raised and answered affirmatively both by BIRKETT, J., and the Court of Appeal was whether or not a registered trade union could bring an action in its registered name against a third party for tort, that is to say, for libel. The case was, therefore, in a sense the counterpart of the *Taff Vale* case (10), which was chiefly relied on by BIRKETT, J., in answering each of the three following questions affirmatively: (i) Whether or not a union could sue a third party in its registered name for a tort, as it could be sued for a tort by a third party, subject to the express limitations imposed by statute; (ii) whether or not in such an action the union could sue for the damage suffered generally, not being, in effect, limited in its claim to the purposes specified in the Trade Union Acts (now 1871 to 1940); and (iii) whether or not, for the purposes of founding the claim in defamation, the union had a distinct "character" as such which was capable of being defamed. Since in the Court of Appeal SCOTT, L.J., stated (*ibid.*, 603) that he so completely agreed with the judgment of BIRKETT, J., that he would have been content to adopt it as his own, it is useful and necessary to examine the grounds of that judgment as well as those given in the Court of Appeal. I have said that, in my judgment, the majority of the House of Lords in the *Taff Vale* case (10) did not base their conclusion on the ground that the union had in the eye of the law an entity distinct from the members who composed it. Moreover, it is not clear to me that the question raised in *Gillian's* case (12) might not have been decided as it was, and as the converse question had been decided in the *Taff Vale* case (10), without assigning such a separate entity to the union—and there is authority for the view, at least by way of analogy, that one kind of unincorporated body, namely, a partnership firm, may sue for libel in the firm name: see LINDLEY ON PARTNERSHIP, 11th ed., p. 361, and cases there cited. Still, there is no doubt that BIRKETT, J., did arrive at the conclusion, and based his judgment on the ground, that a union registered under the Trade Union Acts, 1871 to 1927 (now 1871 to 1940) was endowed with a personality of its own. BIRKETT, J., in his reserved judgment, thus stated his conclusion ([1945] 2 All E.R. 602):

"The Act of 1871, in my opinion, designedly created registered trade unions for the first time, and designedly created a new entity in law, a new persona, and I think it must follow that that new entity is in the same position as any other creature of the legislature. It must be taken to possess all the rights which belong to a natural person, so long as they are not inconsistent with the position of a corporation, and, if not expressly withheld, the registered trade union is given all the rights, I think, of a natural person, and it can sue in its registered name for defamation when the defamation touches its corporate or its collective reputation, as I hold that this alleged libel does."

BIRKETT, J., referred at length to all the relevant authorities, including passages in well-known text-books, of which I quote as an example the following citation from SPENCER BOWER ON ACTIONABLE DEFAMATIONS, 2nd ed., art. 4 (2) note (*ibid.*, 600):

"It is believed that an examination of all the authorities collected in the treatises on corporations will justify the statement in the text, and that any body of persons, possessing the marks therein enumerated, viz., (i) continuous identity, (ii) corporate or collective name, and (iii) an expressly conferred, or not expressly withheld, capacity to sue and be sued in such name, or an expressly conferred capacity to sue and be sued in the name of any officer, is, for purposes of actions of tort, and therefore of defamation, in the same

position as a natural person, whether it be in strictness a corporation or what (in the earlier decisions) is called a quasi-corporate body, or a corporation by prescription, custom, or implication only'."

The foundation for the view that a trade union has such a separate personality in the eye of the law is, I think, the judgment of FARWELL, J., in the *Taff Vale* case (10), which was, undoubtedly, given express approval in the House of Lords.

A FARWELL, J., said ([1901] A.C. 427):

"Now it is undoubtedly true that a trade union is neither a corporation, nor an individual, nor a partnership between a number of individuals; but this does not by any means conclude the case."

After referring to certain parts of the Trade Union Acts, 1871 and 1876, FARWELL, J., proceeded (*ibid.*):

B "The Acts commence by legalising the usual trade union contracts, and proceed to establish a registry of trade unions, give to each trade union an exclusive right to the name in which it is registered, authorise it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate 'for the use and benefit of such trade union and the members thereof'; provide that it shall have officers and treasurers, and render them liable to account; require that annual returns be made to the registry of the assets and liabilities and receipts and expenditure of the society; provide that it shall have rules and a registered office, imposing a penalty on the trade union for non-compliance; and permit it to amalgamate with other trade unions, and to be wound-up."

D Finally, FARWELL, J., stated (*ibid.*, 430):

"Now, the legislature in giving a trade union the capacity to own property and the capacity to act by agents, has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property."

E This last passage, however, followed a statement by the learned judge where, emphasising the point that the action was not of contract, but in tort, he said (*ibid.*, 431):

"... it is not a question of the rights of members of the society, but of the wrong done to persons outside the society."

F Founding himself, then, on these passages, approved as they were in the House of Lords, and on the speeches in the House in the same case, BIRKETT, J., reached the conclusion which I have already cited. But it is to be noted that he did not purport to define the full or precise nature of the quasi-corporate capacity with which he held a union to be endowed, still less did he hold that in its relations with its own members the union should be treated as being a separate legal entity contracting as such. It is, however, certainly true that SCOTT, L.J., at least, in the Court of Appeal, went further in the course of his judgment. For, after deciding that a union was a distinct *persona juridica* created by statute, and basing that conclusion on substantially the same references to the Acts as had been indicated by FARWELL, J., in the *Taff Vale* case (10), he proceeded ([1945] 2 All E.R. 604) as follows:

H "In my view, the true interpretation of the Acts is that a trade union is given all powers of a *persona juridica* except (a) those solely characteristic of a natural person and (b) those which are expressly excepted by the creating or enabling statute."

MACKINNON, L.J., delivered no separate judgment of his own. UTHWATT, J., stated his conclusion in his opening paragraph as follows (*ibid.*):

"I agree. The point decided in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (10), was that a registered trade union might properly

be named as a defendant to an action. That decision involves to my mind that a registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation: but it is very like one. The association is not merely the aggregate of the persons who compose it and the presence of the corporate fiction is not necessary to secure its individuality. In an age of neologism it might be called a 'near-corporation'."

It will be observed that neither in the court below, nor in the Court of Appeal, was there any consideration of the position of a trade union vis-à-vis its own members, and, therefore, *Kelly's* case (4), though, prima facie, binding on the Court of Appeal, was never referred to from beginning to end.

It is not open to doubt that *Gillian's* case (12) is binding on this court no less than is *Kelly's* case (4), and if there is a direct conflict between the two, this court, I apprehend, can and must decide which to follow. In such event it would become necessary to go back to the Trade Union Acts, 1871 to 1940, themselves. And, so doing, although I, of course, concede the right and power of Parliament to create an entity not previously known to the law, I confess to the strong impression that Parliament did not intend to confer a distinct entity on a registered trade union, and that the provisions (Trade Union Act, 1871, s. 8) for vesting "union" property in trustees, relied on specifically for the contrary view, tend rather to be inconsistent with it. But though the general language used by the judges in the two cases presents, undoubtedly, an apparent inconsistency, there is not, in my judgment, the necessary conflict of decision. *Kelly's* case (4) was concerned with the relations between an individual member of a union and the union itself. It held that there was no authority for an action for damages by a member of a union for breach of the union rules, and directly decided the point now in issue. *Gillian's* case (12) was concerned with the relations between a registered trade union and third parties, strangers to it. In my judgment, therefore, later cases, and particularly *Gillian's* case (12), do not justify us in regarding, in conformity with the principles properly applicable, *Kelly's* case (4) as otherwise than binding on us in the present appeal. And if this be said to be taking too narrow a view of the law, then I answer, first, that, narrow or not, if such is the law, we must apply it. I answer, further, that if Parliament has, as we must, according to *Gillian's* case (12), hold that it has, chosen in its wisdom to bring into being a creature hitherto unknown to the law, a "near corporation" having not all but some, and unspecified, attributes and characteristics of a corporation, then anomalies and difficulties appear to be inevitable, and the qualities and habits of this statutory and amorphous being must be discerned as it is given body and clothing by judicial decisions, which may sensibly decide that it presents, legally, a different aspect in its dealings with outside persons from that displayed to its members in relation to its internal affairs. It is, no doubt, true that a union, by acting irresponsibly towards one of its members, may most seriously and harshly affect that member's whole livelihood—though I observe that in this context "a union" means the officers who conduct and manage its affairs, and who may, theoretically at least, be removed from office at any time by the members. It is also true that in the present case, according to the facts as found by UPJOHN, J., the unhappy train of litigation and the loss by the plaintiff of his professional career appear to owe their origin entirely to an almost elementary lack of forbearance on the part of one official. This may well, therefore, be a hard case, though, in fairness to the union, I must add that we do not know what has passed between the parties since the date of judgment of UPJOHN, J., and that up to that date I am not satisfied, in any case, that the plaintiff could make good a claim for substantial damages. But if, whenever a member of a union alleges a breach of the rules by some officer, or committee, or meeting, and that he has thereby suffered loss, he may successfully sue "the union" for damages, and, even if he cannot execute

against all the individual members throughout the length and breadth of the country, can, by some appropriate process, execute against the union's property, though vested in trustees not parties to the action, the result would not, I should have thought, of necessity be universally regarded as beneficial. In other words, if my view of the proper answer to this appeal is correct, I do not feel qualified to say whether or not there is left a mischief which ought to be remedied. On the other hand, if the contrary view prevails, the members of a registered

A trade union would appear to have obtained, somewhat by a side-wind, an advantageous position vis-à-vis their union not enjoyed by members of other voluntary associations. I note, finally, that in *Kelly's* case (4) it was said by SWINFEN EADY, L.J. (84 L.J.K.B. 2238), and by BANKES, L.J. (*ibid.*, 2239), that no similar claim for damages had previously come before the court, and I am

B not aware of any attempt since then to revive such a claim until the present action. These matters, however, go beyond the functions of this court in this appeal. I refer to them only for their relevance to the argument that a decision of the present appeal in accordance with *Kelly's* case (4) would involve some logical absurdity, or would be contrary to common sense or some established legal principle.

C For the reasons which I have given, I have come to the conclusion that the cross-appeal must fail and be dismissed. But I have reached my conclusion with the less confidence, having regard to the judgment of DENNING, L.J. The law cannot, it is clear, be regarded as satisfactorily settled, and I express the hope that, having regard to the highly significant position occupied today by trade unions, and the importance to them and their members of the subject

D involved in this case, an opportunity may be found for a review of the present authorities by the House of Lords.

DENNING, L.J.: The present case illustrates the great powers wielded by trade unions at the present day, to dictate both to employers and to workmen. The union excluded the plaintiff from the occupation as a musician in which he has spent his life, and which is the only occupation he knows, because he fell

E into arrears with his subscriptions. It is, indeed, a grievous punishment to inflict on him. He was reduced at one time to accepting employment to remove rust from a Brighton pier. At the time of the trial he was earning £6 a week in an engineering works whereas previously, as a musician, he was earning well over £10 a week. This exclusion has lasted for four years, and his loss of earnings must be considerable, to say nothing of the worry and trouble to which he has

F been put. And the exclusion was unlawful. The secretary of the branch had no right to do what he did. When the plaintiff tried to get reinstated, the secretary showed him no sympathy, but insisted on payment of all fines and arrears forthwith. The total sum was only £4, but the plaintiff could not find the money at once, and the secretary would not let him pay out of his first week's wages. So he was excluded from his profession. UPJOHN, J., said:

G "The blame must be laid fairly and squarely upon the shoulders of the secretary, whose behaviour does him no credit."

We have already held that this exclusion was a breach of contract. Yet it is said that we cannot award the plaintiff damages for the injury done to him. If this be so, it is a grievous thing, for I know of no other case where the law allows

H a party to break a contract with impunity. A man's right to work is just as, indeed more, important to him than his right of property. If he is unlawfully deprived of his right to work, the courts should intervene to protect him. They have always protected him against wrongful dismissal by his employer. They should also protect him against wrongful exclusion by his union.

The only decision which stands in the way of an award of damages is *Kelly v. National Society of Operative Printers' Assistants* (4). A careful reading of that case shows that it is based on the proposition that a trade union is only an

unincorporated association of individuals, without any legal personality of its own apart from its members. But that proposition is, I believe, false. A trade union is a legal entity with a personality in law comparable to that of a corporation. It is not, perhaps, an entire corporation, but it has many of the attributes of one. In particular, like a corporation it can make and break contracts and for the breach it is liable in damages, save for certain exemptions which Parliament has conferred on a trade union, none of which avail the union in the present case. A

Let me first show, however, that a trade union is a legal entity. I start by observing that as a simple matter of fact, not law, a trade union has a personality of its own distinct from its members. PROFESSOR DICEY pointed that out long ago (17 HARVARD LAW REVIEW, p. 513) when he said:

"When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted." B

And PROFESSOR MAITLAND expressed his whole-hearted concurrence with unrivalled clarity and felicity in his COLLECTED PAPERS, vol. 3, p. 306. He quotes the incident in the House of Commons in 1904 when the Prime Minister, Mr. Balfour, spoke of trade unions as corporations, and says (*ibid.*, 305): C

"... a distinguished lawyer on the Opposition benches [Sir Robert Reid (afterwards Lord Loreburn)] interrupted him with 'The trade unions are not corporations.' 'I know that', retorted Mr. Balfour, 'I am talking English, not law.'"

I take it to be clear, therefore, that a trade union is an entity in fact. The question is whether or not it is also an entity in law. When trade unions were first legalised eighty-three years ago (Trade Union Act, 1871, s. 2) their supporters were anxious that they should not be made corporations, because they wanted to avoid the liabilities which flowed from corporate personality. They desired that a trade union should be able to prosecute an officer or servant who embezzled its funds, but not that a trade union should be able to be sued by its members or by outsiders. But when the statutes came to be enacted it was found that this was not a possible state of affairs. The trade unions had, perforce, to be given a legal personality—and one cannot have the benefits of legal personality without the responsibilities attaching to it. The Trade Union Acts, 1871 to 1940, conferred on a registered trade union so many rights and duties, and such ample powers and capacities, as to make it a legal entity virtually indistinguishable from a corporation: (i) A registered trade union has the capacity to own property and to act by agents. (The Trade Union Act, 1871, *passim*); (ii) it can itself make complaints and lodge indictments in the criminal courts (s. 12 of the Act of 1871), and it is itself liable to penalties in the criminal courts for non-compliance with statutory provisions (for example, s. 15 and s. 16 of the Act of 1871); (iii) it has "its constitution" and "its objects" (s. 1 and s. 2 of the Trade Union Act, 1913) and cannot do anything outside them; (iv) it is capable of entering into contracts with third persons and with its own members. It is true that by s. 4 of the Act of 1871, certain contracts are not "directly enforceable" by action, but that leaves all other contracts enforceable; (v) it can undertake "engagements" on its own account and become indebted to its own "creditors": and it can by special resolution transfer "its engagements" to any other trade union without prejudice, however, to the rights of its own creditors (s. 6 of the Societies (Miscellaneous Provisions) Act, 1940.) In view of this catalogue of enactments from 1871 to 1940, there can, I think, be no doubt at the present day that a trade union is a legal entity. D

The decided cases support this view. Consider, first, the *Taff Vale* case (10) in which the House of Lords held that a trade union could be sued in tort for the wrongful conduct of its servants in the course of a strike. The majority of the E F G H

House adopted as their own the judgment of FARWELL, J., who said ([1901] A.C. 429):

- A "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a *capacity for owning property and acting by agents*, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of *liability to the extent of such property for the acts and defaults of such agents*. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised *it*, and *it* must be dealt with by the courts according to the intention of the legislature."
- B Note how he personifies it, treating "it" as something distinct from the individuals, and as responsible for the acts of its servants. THE EARL OF HALSBURY, L.C., likewise, said (*ibid.*, 436):

- C "If the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement."

- D LORD BRAMPTON said distinctly (*ibid.*, 442) that this thing so created by Parliament was "a legal entity . . . though not perhaps in the strict sense a corporation." It is interesting to notice that, after the proceedings in the House of Lords (which were of an interlocutory nature), the case went for trial, and a verdict was found for the plaintiffs against the trade union. The damages were assessed at £23,000, and that sum was paid out of the funds of the trade union: see the report of the Royal Commission presided over by LORD DUNEDIN, which reported on Jan. 15, 1906. The next step towards personifying a trade union was taken in *Osborne's* case (7) where the House of Lords held that a registered trade union had no power to levy a political contribution from its members. The doctrine of *ultra vires* was there applied fairly and squarely to a trade union just as much as to a corporation. THE EARL OF HALSBURY, L.C., said ([1910] A.C. 92) that "the Act [of 1871] is, as it were, the charter of incorporation", and LORD ATKINSON said (*ibid.*, 102) that trade unions

- F "are, when registered, quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of individuals merely bound together by contract or agreement, express or implied."

- G In *Braithwaite's* case (6) the House of Lords held that a member who has been wrongfully expelled from his union can sue the union in contract. He can sue it for a declaration as to his rights under the contract, and for an injunction to prevent the union from expelling him in breach of the contract, and he can recover costs against the union. This decision carries with it this important implication. An action against a trade union is not the same as a representative action against all the members. It is an action against a separate legal person. If it were the same as a representative action, it would mean that the member was suing himself, which is not possible. Finally, in *Gillian's* case (12), it was held that a trade union can sue for a libel on itself. A libel is, of course, in its very nature, a wrong to the person, not a wrong to property, and it is apparent that it is only by attributing legal personality to a trade union that it can be permitted to sue for a libel on itself. BIRKETT, J., said ([1945] 2 All E.R. 602):

"The Act of 1871 . . . designedly created a new entity in law, a new persona, and I think it must follow that that new entity is in the same position as any other creature of the legislature."

In the Court of Appeal SCOTT, L.J., said (*ibid.*, 603) that he agreed so completely with the judgment of BIRKETT, J., that he would have been content to adopt it as his own. UTHWATT, J., put the position simply and directly when he said (*ibid.*, 604) that

“ . . . a registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it.”

Note how close those words are to those of PROFESSOR DICEY (17 HARVARD LAW REVIEW, p. 513). The entity in fact is now recognised as an entity in law. UTHWATT, J., as if in deliberate contradiction to what LORD MACNAGHTEN had said in the *Taff Vale* case (10), was at pains to add (*ibid.*): “The association is not merely the aggregate of the persons who compose it . . .” My conclusion, therefore, is that a registered trade union is a legal entity capable of entering into contracts not only with outsiders, but also with its own members. A

Turn now to the contract of membership in the present case and see how naturally it fits into the conception of a legal entity. When the plaintiff joined the union he signed a printed document addressed to the secretary of the branch in these words: B

“I, the undersigned, do hereby make application to become a member of the Musicians’ Union, subject to the constitution and rules which I accept as a condition of my admission to membership. Declaration of new members. I, the undersigned, do hereby agree, of my own free will and consent, to conform to and abide by the rules of this union, as also any subsequent rules or alterations thereof that may be made in accordance with the constitution of this union, and I further declare my intention to promote to the best of my ability, the interests of this union and to act in harmony with my fellow members for the maintenance of the objects as expressed in its rules.” C

The rules of the union read like a legislative code, but the significant thing is that throughout the rules the union is treated as a legal person. In the face of these documents I ask myself: Suppose the union were only an unincorporated association of individuals with no legal personality of its own, what is the contract evidenced by those documents? Is it a contract by each member with the others jointly, or with them separately, and is a new contract made every time an old member goes out and a new member comes in? And what are the terms of the contract? Every member, of course, promises to pay his subscriptions and obey the rules, but does he do more? Are the officials to be regarded as his agents, so that he is responsible for their wrong-doing or for their breaches of contract? No confident answer can be given to any of these questions. But once it is held that a trade union is a legal entity, the nature of the contract by every in-coming member becomes clear. It is not a contract between him and his fellow members, but a contract between him and the union whereby he, for his part, agrees to abide by the rules of the union, and the union, for its part, impliedly agrees that he shall not be excluded by the union or its officers except in accordance with the rules. This view is supported by the statement in CITRINE ON TRADE UNION LAW, p. 175, where the author says that the rules D

“constitute the contract existing between the members and the union, upon the exact terms of which will depend the objects and powers of the union and the rights and liabilities of both contracting parties.” E

Once the contract of membership is held to be a contract between the member and the union, it follows in law that if a member is wrongfully excluded by the union or its officers in breach of the contract, he has a remedy in damages against the union. The position of the trade union is then indistinguishable from that of a proprietary club which has been held liable in damages for wrongful exclusion: see *Baird v. Wells* (13), *Young v. Ladies’ Imperial Club* (14), *Abbott v. Sullivan* (15). F

The last question is: Is this court bound by *Kelly's* case (4)? In that case the plaintiff was wrongfully expelled by the branch committee of a trade union. It was held by the Court of Appeal that he could obtain a declaration and an injunction against the trade union, but that he could not recover damages. No distinction had been taken in the courts below between the various remedies. Counsel for the trade union seems to have conceded that if the plaintiff was entitled to a declaration and an injunction he was also entitled to damages, subject only to the question of remoteness. It was in the Court of Appeal for the first time suggested that the claim for damages was not sustainable, but the court, so far as I can see, did not have the benefit of an argument from counsel, or, at any rate, not of any full argument. Furthermore, the court proceeded on four assumptions which later cases have shown to be wrong: (i) that a registered trade union is not a legal entity, but only an unincorporated association of individuals an assumption which has been shown to be wrong by *Gillian's* case (12); (ii) that an action against the trade union may be regarded as in its nature a representative action against all the members. This assumption was based on some observations of LORD MACNAGHTEN ([1901] A.C. 438) in the *Taff Vale* case (10), but later cases have shown that LORD MACNAGHTEN for once was in error. If it were truly the same as a representative action, it would mean that every single one of the members would be personally liable for a wrong committed by the officials, a view which has since been shown to be untenable: see per *London Asscn. for Protection of Trade v. Greenlands, Ltd.* (16), per LORD PARKER OF WADDINGTON ([1916] 2 A.C. 38), and *Hardie & Lane v. Chiltern* (11), per SARGANT, L.J. ([1928] 1 K.B. 699), and per LAWRENCE, L.J. (ibid., 701); (iii) that an action by a member against a trade union was an action against all the members, including himself—and he could not bring an action against himself. That assumption is inconsistent with the numerous cases where a member has been held entitled to sue his union for a declaration and an injunction and costs. That was pointed out ([1921] 2 K.B. 710) by SCRUTTON, L.J., in *Malone's* case (8); (iv) that the committee of the trade union were the agents of all the members, and that, therefore, when the committee excluded the plaintiff, Mr. Kelly, they were acting on behalf of everybody, including the plaintiff himself, and he could not complain of something done by his own agent. I cannot understand this line of reasoning. I cannot understand how it can be said that the committee, when they were excluding the plaintiff, Mr. Kelly, were acting as agents on his behalf. They were acting against him, not for him. It has, indeed, since been held by the House of Lords that in the case of an unincorporated association of individuals, no agency is implied by the mere fact of association: see *London Asscn. for Protection of Trade v. Greenlands, Ltd.* (16), per LORD PARKER ([1916] 2 A.C. 38). There was nothing else in *Kelly's* case (4) but the mere fact of association. The committee were not, therefore, the agents of the plaintiff, or, indeed, of the other members. It seems to me, therefore, that *Kelly's* case (4) is based on four assumptions which were made without full argument, and which subsequent decisions of this court and of the House of Lords have shown to be fallacious. That is sufficient, I think, to entitle us to disregard the case.

Apart from *Kelly's* case (4) there is only one further point that I need mention. It was said that the action of the secretary in the present case in expelling the plaintiff was unauthorised, and, therefore, a nullity. The court, indeed, has now declared that he is still a member. How, then, it is said, can he sue for damages for exclusion from membership when he has in law been a member all the time? This argument bears no relation to the facts. The exclusion may have been a nullity in law, but it was far from being a nullity in fact. Neither the plaintiff nor anyone else in the musical profession, whether employer or workman, could ignore it. It deprived him of his livelihood and caused him great damage. The union are liable for this damage done by the secretary, just as any corporation

is liable for the breaches of its servants. It is no answer for them to say that the secretary was not authorised to commit the breach. They have put him in his place to do acts of this class, and they must be answerable for the way he conducts himself therein. The present case is different from *Wood v. Wood* (17), where there was no damage in fact.

In conclusion, I would say that Parliament has legalised trade unions and has given them many immunities from the ordinary process of the law. It has exempted them from any liability for tort and for certain contracts, but it has never exempted them from liability for wrongful exclusion of a member. Nowadays exclusion from membership means exclusion from livelihood. No one in this country should be liable to be fully excluded from his livelihood without having redress for the damage thereby done to him. I would, therefore, allow the cross-appeal.

JENKINS, L.J.: Counsel for the plaintiff has argued on grounds, to which I will presently refer, that, although *Kelly v. National Society of Operative Printers' Assistants* (4) was a decision of this court, it is open to us to overrule or decline to follow it. I cannot agree. The decision in *Kelly's* case (4) was a unanimous decision of three lords justices in an appeal arising from an action brought in the county court by a member of a registered trade union against the union in its registered name for a declaration, an injunction and damages in respect of his purported, but wrongful and invalid, expulsion from membership of the union by a resolution of the committee of his branch. There is no distinction for the present purpose between invalid expulsion by a wrongful resolution of a branch committee and invalid exclusion or expulsion by the wrongful action of a branch secretary as in the present case. The members of the court who heard the appeal in *Kelly's* case (4) thus had before them the very question which we are now invited to decide, and they held unanimously that the purported expulsion was invalid, but that, while the plaintiff was entitled to the declaration and injunction claimed, so that the decision of the county court judge and of the Divisional Court, whose members, being equally divided, had dismissed the union's appeal, should to this extent be upheld, the award of damages to the plaintiff by the county court judge should be discharged. To do justice to the argument of counsel for the plaintiff, the reasons given by the three lords justices for disallowing the claim to damages should be quoted at length. SWINFEN EADY, L.J., said (84 L.J.K.B. 2237):

"There remains the question of damages. The plaintiff has obtained judgment for £68 damages upon the footing of a breach of the contract contained in the rules of the society; and although the form of the county court judgment is not quite clear, I gather that the judgment for that sum is against the society, and also against the trustees, although limited in the latter case to the funds of the society. I am not aware of any authority for the proposition that a member of a voluntary [un]incorporated association can recover general damages against the association as such for a breach of the rules, or of the contract contained in the rules. The committee of the society is the agent of all the members of the society, but one member cannot recover from the other members damages for the acts of the committee. For these reasons I am of opinion that the judgment of the Divisional Court must be varied, and so much of the judgment of the county court as adjudged that the defendants respectively should pay £68 damages be discharged."

PHILLIMORE, L.J., said (*ibid.*, 2238):

"There remains the question of damages. This matter was not discussed by HORRIDGE, J., as he thought that the plaintiff failed. The learned county court judge has taken it upon the evidence that the result of the plaintiff's being expelled from the society is practically to prevent him getting

work at his trade as a newspaper printer in London; and whereas before his expulsion he earned some money as a part day porter, and could after his expulsion only at the best make more money as a whole day porter, he has given him the difference over the period before his restoration. And ROWLATT, J., has agreed with him. Damages for tort cannot be given since the Trade Disputes Act, 1906. These damages can only be supported as damages for breach of contract. With whom did the plaintiff contract? Not, I think, with the trade union, which, as LORD MACNAGHTEN says in *Russell's* case (9), is merely an unincorporated society of individuals. I think that the plaintiff contracted with each and every of the members, and if anybody has broken any contract with him, it is each and every member. Further, the officers of the society are agents for him quite as much as for the other members, and if he sues the trade union for what it has done, he is suing himself among others. I am not sure whether, according to the very loose form in which the judgment is drawn up, there is any judgment against the trade union as such. But if there is, it is open to these objections. I also think that there can be no charge upon the funds of the society for any breach of contract, nor any right to treat the trustees as personally liable for breach of an agreement to which they were not apparently parties and which they have not broken, even with a limitation of their personal liability to the funds of the society in their hands, which is the way in which the judgment against them is expressed. I think there may be a further objection. What are these damages?"

And after discussing the difficulty of determining what damages (if any) could be held to flow from the breach of the plaintiff's contract of membership on which the action was based, PHILLIMORE, L.J., continued (*ibid.*):

"It is enough, however, to rest the case on the ground that I have already mentioned, and I think that the judgment was wrong in awarding damages, and that the appeal to that extent should succeed."

BANKES, L.J., after pointing out (*ibid.*, 2239) that the claim must be regarded as a claim founded in contract "otherwise s. 4 of the Trades Disputes Act, 1906, would apply to it", continued (*ibid.*):

"I can find no case in which a claim like the present has ever been made, and it is necessary, therefore, to consider it on principle. A trade union is in a peculiar position. LORD HALSBURY, in *Amalgamated Society of Railway Servants v. Osborne* (7) ([1910] A.C. 93) speaks of it as a legalised combination; LORD MACNAGHTEN in the *Taff Vale* case (10) ([1901] A.C. 438), points out that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who from their position may be taken fairly to represent the body, and later, at p. 439, he says that the registered name of a trade union is nothing more than a collective name for all the members. An action, therefore, against a trade union may be regarded as in its nature a representative action in which all the members are sued in their collective name. It was decided in the *Taff Vale* case (10) that in such an action the funds of a trade union could be made liable for a wrong done to some person outside the society by an authorised agent of the society; but, as FARWELL, J., points out at p. 431, the question in that case was not a question of the rights of members of the society, but of the wrong done to persons outside the society. Here the question is as to the rights of a member of the society; and to succeed in his claim for damages the plaintiff must establish, first, the contract for breach of which he sues; and secondly, a breach either by the other party to the contract or by some duly authorised agent of that party. Here the contract relied on is that contained in the rules. These rules do, in my opinion, constitute a contract as between the plaintiff and the other

members of the trade union. The plaintiff's case is that this contract has been broken not by all the other members personally, but by the London committee of the executive committee acting as the agents of those other members. It is here that the plaintiff fails. It is true that both these bodies were appointed by the general body of members, and as such they are the agents of the members; but they are just as much the agents of the plaintiff as the agents of his fellow members whom he seeks to make liable under their collective name. Further than this, the very ground on which the plaintiff succeeds in obtaining an injunction is fatal to his claim for damages. He succeeds in that claim because he has established that the London committee of the executive committee in expelling him from the society acted without authority and in defiance of the rules. Having established that fact, it is not possible to contend that they were at the same time the authorised agents of his fellow members to do the acts which he complains of as constituting breaches of his contract."

One of the arguments of counsel for the plaintiff was partly founded on *R. v. Cheshire County Court Judge & United Society of Boilermakers. Ex p. Malone* (8), where a member of a registered trade union brought an action in the county court for a declaration and an injunction in respect of an allegedly invalid resolution of the union for his expulsion, but without including any claim for damages. The county court judge held that he had no jurisdiction to entertain the action, because there was no claim for damages and no damages could have been recovered in the action, having regard to *Kelly's* case (4), and he refused an application by the plaintiff to amend by adding a claim for £88 damages. The Divisional Court granted the plaintiff a rule directing the county court judge to hear and determine the action, and the defendant union successfully appealed to this court. In the course of his judgment LORD STERNDALÉ, M.R., after dealing with the county court judge's refusal of leave to amend, and holding in effect that this was a decision to which he could properly come in the exercise of his discretion, continued ([1921] 2 K.B. 702):

"The learned county court judge, at any rate, had a discretion to grant or refuse that application, and he refused it. And he then said, in accordance with the law as it now stands, that, even if the claim for £88 had been made, it could not succeed because of the decision in *Kelly v. National Society of Operative Printers' Assistants* (4). That was a decision of this court, which binds us till the House of Lords reverses it, that such damage as was claimed here cannot be recovered in law, because a member of a voluntary society like this cannot sue the society for damages which he alleges he has suffered by their action. I do not think it necessary to go into the reasons which the court gave for its decision. That is the law until the House of Lords alters it. Therefore the learned county court judge said that, even if he had taken that question of damages into account, there could have been no recovery of any damages at all, and he held that he had no jurisdiction to grant either the injunction or the declaration which was asked for. I think he was right. I myself think—I am prepared to go so far as this—that a claim for such a declaration as this cannot be brought in the county court without anything to limit the money result of it, so as to disregard the limit of the jurisdiction of the county court altogether."

SCRUTTON, L.J., said (*ibid.*, 705):

"... [the plaintiff] did not include any claim for damages. He or his advisers deliberately, and as they thought at the time with astuteness, did that because of a decision of the Court of Appeal, that such a person, a member of an unincorporated trades union, could not recover damages against the union, he himself being a member of the body which he was suing, according to the ordinary principles of law that a man cannot recover

A damages against himself, and for that reason the plaintiff did not include
a claim for damages in his plaint in the county court. When the case came
before the county court judge it at once occurred to him that there was
a question whether, if there was no money claim, he could have any
jurisdiction. The plaintiff's counsel then asked leave to amend by adding
a claim for damages. The learned judge refused the leave to amend on the
ground that the application was made too late, and that it affected the
jurisdiction of the court; and he, therefore, without expressing any opinion
on the merits, and assessing the damages at £88, if he had jurisdiction,
gave judgment against the plaintiff on the ground that he had no jurisdiction
to entertain a claim for a declaration and injunction when no money claim
was made . . . In this case there is no claim for money. There is intentionally
no claim for money. I do not take the view of the Divisional Court that
you make a claim for money when you ask to amend the proceedings in
which there is no claim for money by adding such a claim. What you are
doing is asking to introduce a claim into a proceeding, and if that application
is refused there is no money claim in the proceeding, the proceeding
remains as it was before, without a money claim."

C SCRUTTON, L.J., made this comment on *Kelly's* case (4) (*ibid.*, 709):

D "I am glad it is unnecessary for us in this case to go into the question of the
exact relation of *Kelly's* case (4) and *Osborne's* case (7). I do not understand
them. In *Kelly's* case (4) the court decided that a person in the position of the
present plaintiff could not recover damages against a society of which he
was a member, because he himself was a member of that unincorporated
body, and you cannot, on a contract between yourself and yourself, recover
damages against yourself. But the court in *Kelly's* case (4) did grant a
declaration and injunction to the plaintiff against himself, without apparently
seeing that there was any inconsistency. If they had considered this point
we should have been bound by their decision, whatever the result of it was;
but I cannot find any trace in the judgment that it occurred to anybody
to consider the effect of that action having come from a county court, and
the effect of the limited jurisdiction of the county court upon that point.
In *Osborne's* case (7) a declaration and injunction in the High Court were
granted to the plaintiff, who was a member of an unincorporated body
which he sued, and I do not see that in that case the point taken in *Kelly's*
case (4) about damages was considered by the court, that is whether a man
can get damages or any other relief against himself or against a body by
its trade name which includes himself. It may be that in some future stage
of trade union litigation, which is likely to occupy the court for many years
to come, that that important point may come up for consideration; and I
only desire at present to guard myself from expressing any opinion one way
or the other about it, except by saying that I do not at present understand
the relation of *Kelly's* case (4) and *Osborne's* case (7) to each other."

G YOUNGER, L.J., said (*ibid.*, 711):

H "Now unfortunately for the plaintiff it has been decided by the Court
of Appeal in *Kelly's* case (4) that no court, neither a county court, nor any
other court, is entitled to award damages in respect of such a claim brought
by a member of a trade union against his union. These are not damages
cognizable by any court at all as founding any legal claim to relief. Accord-
ingly until *Kelly's* case (4) is set aside, by some tribunal superior to this, such a
plaintiff as we have here must be in a position to say that his action was
within the jurisdiction of the county court, although it was an action in
respect of which no sum, however small, could have been awarded to him
by the judge, however successful in his claim he might be. In other words
the question that has to be determined on this appeal is this: Whether so

long as *Kelly's* case (4) stands unreversed a plaintiff, a member of a trade union, is entitled to maintain an action in the county court for the relief which the plaintiff in fact obtained in *Osborne's* case (7)—that is to say, for a declaration and an injunction followed by no award of any money compensation."

Counsel for the plaintiff placed considerable reliance on the reference of SCRUTTON, L.J. ([1921] 2 K.B. 709) to the apparent inconsistency in holding, as in *Osborne's* case (7) and in *Kelly's* case (4) itself, that a declaration and an injunction could be granted in an action such as this, while at the same time holding that damages are not recoverable, seeing that the objection that the plaintiff is suing an unincorporated body of which he is himself a member, and, in that sense, suing himself, would appear to be equally applicable whichever form of relief is in question. From this, counsel for the plaintiff argued, in effect, that apart from *Kelly's* case (4) recognition of the plaintiff's right to a declaration and an injunction in a case such as this necessarily involves recognition of his right to damages. But, his argument proceeded, the right of a wrongfully expelled member of a registered trade union to relief by way of injunction in an action against the union in its registered name has been recognised by the House of Lords since *Kelly's* case (4) in *Braithwaite's* and *Ashley's* cases (6), and thereby, as the two things go together, the House of Lords has impliedly recognised the right of such a plaintiff to damages, and *Kelly's* case (4) can, therefore, no longer be regarded as authoritative. I cannot accept this argument. The short answer is that there was no claim to damages in *Braithwaite's* and *Ashley's* cases (6) and the question whether or not damages, if claimed, would have been recoverable was, therefore, never considered by the House of Lords. In *Kelly's* case (4) this court clearly and categorically held that, while relief by way of a declaration and an injunction could be granted, no damages could be recovered. That decision is binding on us until it is held wrong by the House of Lords, and it clearly was not so held in *Braithwaite's* and *Ashley's* cases (6), where there seems to have been no more than a passing reference in argument to *Kelly's* case (4), with no indication that the decision in that case regarding the claim to damages was questioned or even considered. I would again refer to the passage already quoted from the judgment of LORD STERNDALE, M.R., in *Malone's* case (8) ([1921] 2 K.B. 702), in which he said of *Kelly's* case (4):

"That was a decision of this court, which binds us till the House of Lords reverses it, that such damage as was claimed here cannot be recovered in law . . . I do not think it necessary to go into the reasons which the court gave for its decision. That is the law until the House of Lords alters it."

Counsel for the plaintiff further argued that since the decision in *Kelly's* case (4) the law had been materially altered by the Law of Property Act, 1925, s. 82 (1), which had validated and rendered enforceable a covenant or agreement made by a party with himself and another or others by giving it effect as a covenant or agreement by such party with the opposite parties other than himself, and had thereby removed the objection raised in *Kelly's* case (4) to the effect that the aggrieved member was suing himself. I cannot follow this argument. It was not held in *Kelly's* case (4) that the aggrieved member's contract of membership was invalid as a contract with himself and others. The case proceeded on the footing that such contract was a contract between the plaintiff and the other members of the union, and the objection, or, rather, one of the objections, which the court held fatal to the plaintiff's claim in damages was that the breach of contract alleged by the plaintiff against the other members was not a breach committed by them personally, but consisted of a wrongful act on the part of officers of the union for which the plaintiff sought to make the other members vicariously liable as for a breach of contract committed by their

agents, but that, as the offending officers were the agents of the plaintiff no less than of the other members, the plaintiff was claiming damages from the other members as vicariously liable for a breach of his contract of membership committed by persons who were his own agents just as much as theirs, and, consequently, that, in so far as he was seeking to make the other members liable in damages for the breach, he was suing in respect of a wrong done to himself by his own agents, or, in other words, for a wrong done vicariously by himself to himself. I think it was in this sense that PHILLIMORE, L.J. (alone of the three lords justices who decided *Kelly's case* (4)) referred (84 L.J.K.B. 2238) to the plaintiff as "suing himself among others", rather than in the narrow and technical sense that, inasmuch as the registered name of the union, in which it was sued, comprised all its members, the plaintiff was, in point of form, on both sides of the record. Be that as it may, it is, in my opinion, clear that the Law of Property Act, 1925, s. 82 (1), has nothing to do with the case.

I trust that in what I have said I have fairly stated the arguments advanced by counsel for the plaintiff in support of his contention that this court is no longer bound by *Kelly's case* (4) as distinct from his arguments as to the merits of that decision. I find nothing in the former which would justify us in holding that *Kelly's case* (4) is no longer binding on this court, and it is, therefore, unnecessary for me to discuss the latter. But I may, perhaps, permit myself two observations on the merits of the decision in *Kelly's case* (4). First, given the premise that an action by a member of a registered trade union against the union in its registered name for relief in respect of his wrongful exclusion or expulsion from the union in circumstances such as those of the present case is an action against the members of the union (or the members of the union other than the plaintiff himself) based on breach of the contract of membership between themselves and the plaintiff, and not an action against the union as a distinct legal entity based on breach by that entity of a contract of membership between that entity and the plaintiff, the objections to allowing any claim to damages in an action so constituted are, to my mind, unanswerable. Secondly, given the same premise, the alleged inconsistency in granting a declaration and an injunction while refusing damages is by no means clear to me. In claiming a declaration and an injunction in a case such as the present the plaintiff is in effect saying to his fellow members: "Our common agent, the secretary, duly appointed under the rules, has without our authority and in breach of the rules purported to exclude me from membership. I contend that such purported exclusion is a nullity, and that if you treat and act on it as valid you will be committing a breach of the contract of membership subsisting between us. Accordingly, I am applying to the court for a declaration that my purported exclusion is invalid and an injunction restraining you from acting on it in order to protect my rights as a member." To succeed in that claim the plaintiff need not bring home to any individual member any actual breach of his contract of membership, but in claiming damages against his fellow members in the like case, the plaintiff is, in effect, saying to his fellow members: "Our common agent the secretary, duly appointed under the rules, has, without our authority and in breach of the rules, purported to exclude me from membership. I must admit that you did not authorise this wrongful act any more than I did, and that the offending secretary is my agent just as much as yours, and it is, of course, the foundation of my case that my purported exclusion by the secretary is a mere nullity. Nevertheless, I claim damages from each and every one of you on the ground that this wrongful and unauthorised act of the secretary in itself constituted a breach by you as his principals of the contract of membership subsisting between us." It seems to me that the difficulties with which the claim in damages, so stated, is fraught do not attend the claim for relief by way of declaration and injunction. The result might be different if it could be held that in such cases the wrongfully expelled member's contract of membership

was a contract between the wrongfully expelled member and the union as a legal entity distinct from its members, and the action an action against that entity based on breach of that contract, but the decision to the contrary in *Kelly's* case (4) precludes us from so holding. Even if it were open to us so to hold, we could not do so without going the length of attributing full corporate status to a registered trade union, which, speaking for myself, I would hesitate to do.

I would add, in conclusion, that I have not overlooked *National Union of General & Municipal Workers v. Gillian* (12), to which we were not referred by counsel. The question in that case was whether or not a registered trade union could sue in its registered name for a libel on the union as a body. In reaching an affirmative answer to that question SCOTT, L.J., and UTHWATT, J., with whom MACKINNON, L.J., agreed without expressing any reasons of his own, used language which certainly came near to attributing to a registered trade union the full status of a corporate body. But that, like the *Taff Vale* case (10), of which it was in effect the converse, was an action between the union and persons outside its membership, as distinct from an action by a member against the union in respect of an alleged invasion of his rights as a member. No doubt, for that reason *Kelly's* case (4) was not cited, and the position in regard to actions of the latter class was not even considered. In view of *Kelly's* case (4), it clearly would not have been open to the members of this court in *Gillian's* case (12) to hold that such an action was an action against the union as a corporate body distinct from its members on a contract between that body and the member aggrieved. Accordingly, I cannot regard *Gillian's* case (12) as justifying a departure from the law as laid down in *Kelly's* case (4) in regard to actions of the kind with which we are here concerned.

The question whether a member of a trade union wrongfully excluded or expelled from membership should be enabled to claim damages against the union as a body might, perhaps, be thought worthy of consideration by the legislature, but unless and until the law is altered by legislation or *Kelly's* case (4) is overruled by the House of Lords, I conceive that we have no option but to dismiss the plaintiff's cross-appeal, notwithstanding that he has successfully repelled the union's appeal in relation to the other relief claimed.

[After the foregoing judgments had been delivered counsel for the plaintiff informed the court that the plaintiff had died since judgment on the cross-appeal had been reserved. SIR RAYMOND EVERSLED, M.R., said that this information should have been given to the court before the sitting. No judgments would have been delivered because there was no appeal before the court and no order could be made. The fact that the arguments were closed was immaterial because the court might have wanted to hear further argument. If and when the matter was regularised the court would consider what order should be made. His LORDSHIP, however, gave permission for the judgments to be reported. On Mar. 16, 1954, the court ordered judgment on the cross-appeal to be entered for the union, the judgment to be ante-dated Feb. 16, 1954 (being the date of conclusion of the argument), by virtue of R.S.C., Ord. 41, r. 3, *Turner v. London & South Western Ry. Co.* (18), and *Ecroyd v. Coulthard* (19).]

Cross-appeal dismissed.

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the union); *Cecil Altman* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DYAL SINGH v. KENYAN INSURANCE, LTD.

[PRIVY COUNCIL (Lord Porter, Lord Reid and Lord Keith of Avonholme),
February 4, 8, 9, March 16, 1954.]

Privy Council—Kenya—Execution—Sale by bailiff of goods seized which subject of a chattels mortgage—Title of purchaser—Rights of true owner—Bankruptcy Ordinance, 1930 (Laws of Kenya, 1948, c. 30), s. 45 (3).

A By s. 45 (3) of the Bankruptcy Ordinance, 1930: "Where any goods in the possession of an execution debtor at the time of seizure by a bailiff are sold by such bailiff without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to such goods, and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority, for any sale of such goods . . . unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution debtor: Provided that nothing in this subsection contained shall affect the right of any claimant, who may prove that at the time of sale he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff."

C In 1946 N., who owned a motor omnibus, borrowed a sum of money from the respondents on the security of the vehicle, and gave them a chattels mortgage which was registered in accordance with the provisions of the Chattels Transfer Ordinance, 1930. A creditor of N. obtained judgment against him and execution followed with a sale by public auction of the vehicle by the court broker in February, 1948, when it was bought by the appellant. No claim to the vehicle was made by the respondents or anyone else before the sale, and the bailiff sold, or purported to sell, the absolute property in the vehicle. In 1950 the respondents, purporting to act under rights which they claimed to possess under their chattels mortgage and its registration, seized the vehicle while it was in the appellant's possession.

E HELD: the words "person from whom recovery is sought" in s. 45 (3) of the Bankruptcy Ordinance, 1930, related back to the words "no person shall be entitled to recover against such bailiff or any other person acting under his authority", and could not relate back to the words "the purchaser of the goods so sold"; the sub-section gave a good title to purchasers, whether or not they had notice that the goods were not the property of the execution debtor, even though in some cases the true owner might be deprived of one of his remedies; and, therefore, the appellant had secured a clear title in respect of the vehicle.

F EDITORIAL NOTE. The Bankruptcy Ordinance, 1930 (Laws of Kenya, 1948, c. 30), s. 45 (3), reproduces, with minor modifications, the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, for which, see HALSBURY'S G STATUTES, Second Edn., Vol. 2, p. 306.

Cases referred to:

- (1) *Crane & Sons v. Ormerod*, [1903] 2 K.B. 37; 72 L.J.K.B. 507; 89 L.T. 45; 21 Digest 518, 936.
- (2) *Jelks v. Hayward*, [1905] 2 K.B. 460; sub nom. *Jelks v. Hayward, Hackney Furnishing Co. Claimants*, 74 L.J.K.B. 717; 92 L.T. 692; 21 Digest 502, 766.
- (3) *Curtis v. Maloney*, [1950] 2 All E.R. 982; [1951] 1 K.B. 736; 2nd Digest Supp.

H APPEAL by the purchaser from a judgment of the Court of Appeal for Eastern Africa, dated Apr. 10, 1952, affirming a judgment of the Supreme Court of Kenya at Nairobi, dated June 14, 1951, on a Case stated under the Civil Procedure (Revised) Rules, 1948, Ord. 34, r. 1 (a) and (b).

Leonard Caplan for the appellant.

Gahan, Q.C., and *J. G. Le Quesne* for the respondents.

Mar. 16. **LORD REID:** This is an appeal from a judgment of the Court of Appeal for Eastern Africa of Apr. 10, 1952, which affirmed a judgment of the Supreme Court of Kenya at Nairobi of June 14, 1951, on a Case stated by the parties for the decision of the court. The facts as therein stated are these. Njoroge, son of Daudi, owned a motor omnibus, and borrowed from the respondents a sum of Shs.3,600 on the security of this vehicle; on Oct. 12, 1946, he gave to them a chattels mortgage which was duly registered in accordance with the provisions of the Chattels Transfer Ordinance, 1930. A creditor of Njoroge obtained judgment against him and execution followed with a sale by public auction of this vehicle by the court broker on Feb. 3, 1948. The vehicle was purchased at that sale by the appellant for Shs.2,000. Thereafter the appellant spent about Shs.7,000 on the vehicle and obtained a passenger bus licence and operated the vehicle between Nairobi and Limuru. On Apr. 29, 1950, the respondents seized the vehicle while it was in the possession of the appellant.

It was not disputed that, by virtue of their chattels mortgage, the respondents were entitled to seize the vehicle unless the appellant, by purchasing it from the court broker, obtained a title to it good against the respondents. The effect of the chattels mortgage was that the respondents obtained a title to the vehicle, and s. 4 of the Chattels Transfer Ordinance provides:

"All persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this ordinance . . ."

Accordingly, when the appellant purchased the vehicle he must be deemed to have had notice of the respondents' mortgage. But the appellant contends that, by virtue of the provisions of s. 45 (3) of the Bankruptcy Ordinance, 1930, he obtained a title good against the respondents notwithstanding the fact that he was deemed to have had that notice. This case, therefore, depends on the proper interpretation of that sub-section of the Bankruptcy Ordinance. The question submitted to the court in the Stated Case was:

"Has the plaintiff [appellant] secured a clear title in respect of the said bus by virtue of his having purchased the same at a public auction carried out in pursuance of a court order in that behalf, or have the defendants [respondents] any enforceable security against the said bus by virtue of the aforesaid chattels mortgage, having failed to lodge any objection proceedings before the sale?"

Section 45 (3) of the Bankruptcy Ordinance provides:

"Where any goods in the possession of an execution debtor at the time of seizure by a bailiff are sold by such bailiff without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to such goods, and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority, for any sale of such goods or for paying over the proceeds thereof prior to the receipt of a claim to such goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution debtor: Provided that nothing in this sub-section contained shall affect the right of any claimant, who may prove that at the time of sale he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff."

This sub-section is a copy of s. 15 of the English Bankruptcy and Deeds of Arrangement Act, 1913, with minor modifications which are immaterial in this case. There was no question of bankruptcy involved in this case, and, at first

sight, it might seem that a provision in a bankruptcy ordinance taken from an English Act of which the long title was

“An Act to amend the law with respect to bankruptcy and deeds of arrangement”

would not apply. But their Lordships are satisfied that this provision does apply whether or not any question of bankruptcy is involved.

A The respondents argued that the sub-section does not apply to any case where the goods seized are the subject of a chattels mortgage and are in the possession of the grantor of the security, because s. 13 (2) of the Chattels Transfer Ordinance provides:

B “So long as an instrument continues to be registered hereunder, the chattels comprised in that instrument shall not be deemed to be in the possession, order or disposition of the grantor within the meaning of the Bankruptcy Ordinance.”

C So it is said that the vehicle must be deemed not to have been in the possession of Njoroge for the purposes of the Bankruptcy Ordinance and, as s. 45 (3) only applies to goods in the possession of the execution debtor when seized, it does not apply in this case. Their Lordships cannot accept that argument. The phrase “possession, order or disposition” is a well-known and well-understood phrase in the English law of bankruptcy, and it appears to be used in the same sense in the Bankruptcy Ordinance, 1930, s. 42 (c). In certain circumstances, goods in the possession, order or disposition of the bankrupt are treated as the property of the bankrupt although the goods do not belong to the bankrupt, and s. 13 (2) prevents goods which are the subject of a chattels mortgage from being treated as the property of a bankrupt grantor on the ground that they were in his possession, order or disposition. But the phrase “possession, order or disposition” is a single and indivisible phrase. The word “possession” cannot be taken by itself, and s. 13 (2) does not mean that, for the purposes of all other provisions in the Bankruptcy Ordinance, chattels comprised in an instrument shall be deemed not to be in the possession of the grantor. In particular, s. 13 (2) does not limit the application of s. 45 (3) of the Bankruptcy Ordinance.

E In construing s. 45 (3) it is proper to bear in mind the position before the passing of s. 15 of the English Act of 1913 from which it is copied. A bailiff or other officer is only entitled to seize and sell goods which belong to the execution debtor, but it is often difficult for him to ascertain the ownership of goods in the possession of the debtor and he may without negligence sometimes seize and sell goods which do not, in fact, belong to the debtor. He gives no warranty of title of the goods which he sells. A purchaser can seldom know or ascertain to whom the goods belong, but he had to take the risk of the true owner appearing and recovering the goods from him while he could not recover the price which he had paid for them. This was made clear in *Crane & Sons v. Ormerod* (1). And the liability of the bailiff or other officer when he made a mistake was made clear in *Jelks v. Hayward* (2). Section 15 of the Act of 1913 must have been enacted to deal with this position and it does, in fact, purport to confer rights on both the purchaser and the officer.

G It will be convenient now to use the phraseology of the Kenya Ordinance. The conditions for the application of s. 45 (3) are (i) that the goods were in the possession of the execution debtor at the time of seizure, and (ii) that they were sold by the bailiff without any claim to them having been made by anyone. The sub-section then enacts two things: first,

“the purchaser of the goods so sold shall acquire a good title to such goods”,

and, secondly,

“and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority . . .”;

H

and it then adds a qualification:

"unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution debtor".

It was argued that this qualification applies both to the first enactment with regard to the purchaser and to the second enactment with regard to the bailiff. But it is, in their Lordships' judgment, impossible so to construe the words. A If the qualification related back to the first enactment it would read:

"the purchaser of the goods so sold shall acquire a good title to such goods unless it is proved that the person from whom recovery is sought had notice . . ."

The words "person from whom recovery is sought" clearly relate back to B

"no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority",

but they cannot relate back to "the purchaser". Moreover, the realities of the situation make that construction probable: one would expect a bailiff to be required to make reasonable inquiry, but it is difficult to see what reasonable inquiry as to title could be expected of a person who intended to bid for goods at a sale by auction. C

It was then argued that, although this might be the only proper construction of the enactment in ordinary circumstances, there is a principle of construction which requires general words to be limited, if otherwise the enactment would produce highly unjust results, and that it is a very salutary general principle that a purchaser who knows that the seller is not entitled to sell should not be allowed to insist on his bargain. So it was argued that "purchaser" must here be held to mean purchaser without notice of the true owner's rights. But such an argument cannot prevail in the present case. The legislature in this sub-section is conferring rights on two persons, the purchaser and the bailiff (or a person acting under his authority). It expressly provides that the bailiff shall not have this right if he had notice, but it makes no such provision about the purchaser. D It must be inferred that this difference was made deliberately, and their Lordships must, therefore, hold that the sub-section gives a good title to purchasers whether or not they had notice of the true position. It was hardly disputed that "a good title" must mean a title good against the true owner. Their Lordships think it right to add that it is not impossible to find reasons which might have led the legislature to confer such an unusual right on purchasers. E It may have been thought necessary to give every encouragement to bidders at such sales by auction. There would be very few cases where a bidder in fact had notice of the true position, and the possibility of constructive notice may have been neglected. F It may have been thought advantageous to assure all purchasers that they could buy without risk, even if that meant that, in some cases, the true owner would be deprived of one of his remedies. G

Their Lordships now turn to the proviso. A purchaser is "a person other than such bailiff" and the true owner is a

"claimant who may prove that at the time of the sale he had a title to such goods".

So the proviso must mean in this context that nothing in this sub-section shall affect the right of the true owner to any remedy to which he may be entitled against the purchaser. The enactment that the purchaser shall acquire a good title to the goods is in this sub-section: apart from this enactment, one of the remedies of the true owner is that he is entitled to recover the goods or their value from the purchaser, so, if the proviso were read by itself, it would mean that the enactment in the preceding part of the sub-section shall not affect the right of the true owner to recover the goods or their value from the purchaser. H

But that would completely contradict and nullify the enactment. A proviso may limit, and severely limit, the application of an enactment to which it is a proviso, but it could only be held in the most exceptional circumstances that the proviso nullifies the enactment. In the present case, if the enactment stands, it does not nullify the proviso; it merely limits its application. There may be others besides the bailiff and the purchaser against whom the true owner has a remedy, e.g., the execution creditor, and the proviso can apply in such cases.

A Whether the proviso was necessary in any of such cases may be doubtful, but at least giving effect to the enactment with regard to the purchaser does not entirely deprive the proviso of meaning.

Their Lordships agree with the decision of the Court of Appeal on this matter in *Curtis v. Maloney* (3), and would not have thought it necessary to re-examine the matter had it not involved a general question of importance.

B Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be allowed, that the first part of the question submitted to the court in the Stated Case should be answered in the affirmative and the second part in the negative, and that the respondents should pay the appellant's costs in the courts below. The respondents must pay the appellant's costs in this appeal.

C Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellant); *Charles Russell & Co.* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

D HARVELL v. FOSTER AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), March 9, 12, 1954.]

Administration of Estates—Administration bond—Liability of sureties on bond after estate wound-up.

By his will, dated Oct. 24, 1947, the plaintiff's father, who died in February, 1948, left the whole of his estate to the plaintiff and appointed her sole executrix. In April, 1948, the plaintiff married, and in May, 1949, she instructed the defendants, who practised as solicitors, to prove her father's will. As she was under age, her husband was appointed administrator and guardian until she came of age, which she did in March, 1950. An administration bond was entered into by her husband and by the defendants as sureties for him for the due administration of the estate, and in June, 1949, letters of administration were granted to the husband. By July, 1949, the defendants had realised some of the assets of the estate, and they discharged the debts, paid the duties, and sent a sum on account to the husband as administrator. In August, 1949, the plaintiff was turned out of the matrimonial home by her husband, the marriage having broken down, and he gave her a portion of her money. At the end of that month the defendants, having received a further sum of money from the estate, sent it to the husband, together with a full account as between themselves and him, as administrator, accounting for all the money they had received and all the payments they had made. The plaintiff's husband then disappeared. In January, 1952, the bond was duly assigned to the plaintiff by order of the Probate Division, and she claimed the balance of the estate from the defendants on the ground that her husband, not having duly administered the estate, was liable on the bond and the defendants were liable as his sureties.

H

HELD: as soon as the estate had been wound-up and the residue was in the husband's hands the administration was at an end and he ceased to be administrator and held the residue in the capacity of a trustee for the plaintiff until she attained the age of twenty-one: dictum of SARGANT, J.,

in *Re Ponder* ([1921] 2 Ch. 62), applied; the bond could not be held to be a bond to secure the performance of the husband's duties as a trustee; and, therefore, the action failed.

AS TO REMEDIES UPON AN ADMINISTRATION BOND, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 281, 282, paras. 498-500; and FOR CASES, see DIGEST, Vol. 23, pp. 225-228, Nos. 2721-2762.

Cases referred to:

- (1) *Dobbs v. Brain*, [1892] 2 Q.B. 207; 61 L.J.Q.B. 749; 67 L.T. 371; 57 J.P. 22; 23 Digest 226, 2738.
- (2) *Re Ponder*, [1921] 2 Ch. 59; 90 L.J.Ch. 426; 125 L.T. 568; 23 Digest 464, 5357.
- (3) *Eaton v. Daines*, [1894] W.N. 32; 23-Digest 51, 294.
- (4) *Re Gibbs*, [1951] 2 All E.R. 63; [1951] Ch. 933; 2nd Digest Supp.
- (5) *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 43 Digest 563, 126.
- (6) *Re Yerburgh*, [1928] W.N. 208.
- (7) *Canterbury (Archbp.) v. Robertson*, (1833), 1 Cr. & M. 690 (149 E.R. 576); 2 Dowl. 78; 3 L.J.Ex. 101; 23 Digest 226, 2736.

ACTION on administration bond.

The following statement of the facts is taken from HIS LORDSHIP's judgment:—
By his will, dated Oct. 24, 1947, the deceased, William John Askew, left the whole of his estate to his daughter, the plaintiff, then known as Anne Elizabeth Askew, and appointed her sole executrix. The plaintiff was born on Mar. 26, 1929, and would, therefore, come of age on that day in 1950. The testator died on Feb. 8, 1948, when the plaintiff was just under nineteen, and she married her husband, Don Eric Harvell, on Apr. 22, 1948. In May, 1949, the plaintiff instructed the defendants, who practise as solicitors at Barnstaple under the style of Chanter, Burrington and Foster, to prove her father's will. As she was under age it was necessary to appoint an administrator and she elected for her husband to be appointed administrator and curator or guardian until she attained the age of twenty-one. Letters of administration were, accordingly, granted to him on June 13, 1949, a bond dated May 26, 1949, having been entered into by the said Harvell and the defendants as sureties for him for the due administration of the estate. By July 11, 1949, the defendants had received the purchase money, £1,300, for the cottage in which the deceased had lived and 19s. 4d. from the Post Office Savings Bank. They discharged the debts of the deceased, paid the duties and so forth, and, after deducting their costs, sent to the administrator the sum of £950 on account. According to the plaintiff's evidence her husband obtained the cash for the cheque that was sent him and with £350 bought a van which, she said, was registered in their joint names. By Aug. 5, 1949, relations between the plaintiff and her husband had become very strained, and on that day he turned her out of the house and put her on a train to go to London, but he gave her £300 out of her money. By Aug. 24, 1949, the defendants had received a further sum of £28 4s. from some policy of insurance belonging to the deceased and the balance in their hands was £49 13s. 9d., for which they sent a cheque to the husband, as administrator, together with a full account as between themselves and the administrator accounting for all the moneys they had received and payments made. It was, in fact, a complete administration account. Thereafter, the husband disappeared and the plaintiff did not know his whereabouts. She discovered, however, that his mother knew where he was, and she, accordingly, gave her [the mother's] address to the defendants so that they might write to him on her [the plaintiff's] behalf. They did so in December, 1949, and, on Dec. 30, the husband wrote back, still concealing his own address, and gave an account of what he said he had done with the money. The plaintiff brought the present action against the defendants on the bond, on the ground that the husband had not duly administered the estate and he

was liable on the bond and they were liable as his sureties. The bond had been duly assigned to the plaintiff by an order of the Probate Division dated Jan. 25, 1952. The condition of the bond was that

A "Don Eric Harvell, the duly elected curator or guardian of [the plaintiff] and the intended administrator (with the will) of all the estate which by law devolves on and vests in the personal representative of the said deceased for the use and benefit of the [plaintiff] and until she shall attain the age of twenty-one years do, when lawfully called on in that behalf, [do] make or cause to be made a true and perfect inventory of the said estate which has or shall come to the hands, possession or knowledge of the said intended administrator, and the same so made do exhibit or cause to be exhibited into the Principal Probate Registry . . . whenever required by law so to do, and the said estate do well and truly administer according to law and further do make or cause to be made a just and true account of the administration of the said estate whenever required by law so to do, then this obligation to be void and of none effect . . ."

Harold Christie, Q.C., and C. E. Rochford for the plaintiff.

C *S. Pascoe Hayward, Q.C., and J. Monckton for the defendants.*

Cur. adv. vult.

Mar. 12. LORD GODDARD, C.J., read the following judgment. This action is brought by the plaintiff as assignee of an administration bond conditioned for the due administration of the estate of William John Askew, deceased. [His LORDSHIP stated the facts as set out above and continued:] It is contended D on behalf of the plaintiff that the administrator is required well and truly to administer the estate according to law, he has not done so because he has not paid over to her the money to which she was entitled, and so she is entitled to enforce the bond. It was admitted by counsel for the defendants that this was a possible construction of the bond, but he contended that it was not the true construction. He submitted that the object of the bond was only to ensure the E due winding-up of the estate until the residue was ascertained and in the administrator's hands, and that, as soon as the moneys were all received and the debts paid, the administration was finished and his character changed from that of an administrator to that of a trustee. That he was a trustee for his wife, of course, there is no doubt, and it seems to me that, unless I am compelled to do so by authority, it would be wrong to construe this bond so as to make it, in F effect, one for the due performance of his duties as trustee. So to do would certainly seem to put the defendants, as sureties, in a most unenviable position. While they were bound to see that the administrator realised the estate and duly paid the debts, duties and costs, it does not seem to me that they were entering into this bond as sureties for the due performance of the duties of trust whereby they would become liable for the trustee's breaches of trust. Had the beneficiary G been a very young child, such a construction would involve their remaining liable over a long period of years without being able in any way to control the action of the trustee or relieve themselves of this onerous liability.

Counsel for the plaintiff relied on *Dobbs v. Brain* (1). There, an administratrix, having got in the estate, paid the debts and legacies with one exception, a legacy of £50 bequeathed to a minor. She paid this money to her brother-in-law who H did not pay over the money and could not be found, and in an action against the sureties of the bond it was held that, the payment of the £50 out of the estate having become impossible, there was a breach of the condition of the bond to well and truly administer and the sureties remained liable. But in that case it will be observed that the administratrix paid the money out of the estate to someone who had no title to it, and that, in my opinion, amounts to a devastavit. On the other hand, it seems well established that, as soon as an administrator has paid all expenses and debts and cleared the estate, by which I understand is

meant has paid expenses, debts and legacies, he holds the residue, not as administrator, but as trustee for whoever is entitled thereto: *Re Ponder* (2). In that case SARGANT, J., said ([1921] 2 Ch. 62):

"But *Eaton v. Daines* (3), a decision of KEKEWICH, J., shows clearly that when an estate has been wound-up, and the trust property is in the hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee . . ."

The actual point for decision in that case was that a power existed in the court to appoint a new trustee to act jointly with him, but the reference to *Eaton v. Daines* (3) and the cases therein cited seems, as I have said, to make it clear that the administrator holds the residue after the debts and legacies are paid in the capacity of trustee and not of administrator. In this case he was the only person entitled to receive and give a receipt for the money which the estate realised and under the terms of the letters of administration granted to him he held the money to the use and benefit of the minor until she attained the age of twenty-one.

This view is supported, I think, by the judgment of DANCKWERTS, J., in *Re Gibbs* (4), where he said ([1951] 2 All E.R. 67):

"The argument as put forward against the claim of the revenue . . . was that one cannot say that there is any right or claim to the residuary estate or to the enjoyment of it until the residuary estate is ascertained by process of administration. Until that event occurs all that the persons interested in the residuary estate have, according to law, is a right to have the estate of the testator or intestate duly administered. Therefore, when finally the residuary estate is ascertained, and still more when the executors assent to the trusts of the residuary estate and so put off the character of executors and assume that of trustees with the consequences which ensue, such as, for instance, the result which occurred in *Attenborough v. Solomon* (5), there is a change in the rights and title and position of the persons who are beneficially interested in the residuary estate."

I may also refer to the decision of ROMER, J., in *Re Yerburgh* (6). Counsel for the plaintiff cited a decision of the Court of Exchequer, *Archbishop of Canterbury v. Robertson* (7), but that was a case where an administrator, instead of pursuing a course of administration, simply sold securities belonging to the estate and misappropriated the proceeds. In no sense, therefore, did he administer the estate, so the obligation of the administration bond clearly attached. Here, I think, the administration ceased when the estate was realised and was clear of the debts. It does not seem to me that it makes any difference that the sum of £49 13s. 9d. was paid to the administrator by the defendants after he and his wife had parted, nor was it suggested that the sureties knew that they had parted. Even if they did, the only person entitled to receive the money and to whom the defendants were bound to account was the administrator. The estate was then clear, and I think the administration was at an end and that the bond cannot be held to be a bond to secure the performance of the husband's duties as trustee. For these reasons, in my opinion, there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Bailey, Breeze & Wyles* (for the plaintiff); *White & Leonard*, agents for *Chanter, Burrington & Foster*, Barnstaple (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

ROUTLEDGE v. McKAY AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.),
March 9, 10, 1954.]

*Stamp—Document—Unstamped document—Notice by court of omission—
Court of Appeal—Matter not raised in court below—“ Agreement or memo-
randum relating to sale of goods ”—Stamp Act, 1891 (c. 39), s. 14 (1),
sched. I, Agreement or Memorandum, Exemption (3).*

In an action in the county court for breach of an oral warranty on the sale of a motor cycle combination the seller contended, inter alia, that a written agreement excluded the oral warranty. The agreement, which bore no stamp, was put in evidence, no point being raised that the document was not properly stamped. In the Court of Appeal,

HELD: even if the point was not raised in the county court, it was the duty of the Court of Appeal under s. 14 (1) of the Stamp Act, 1891, to take notice of the omission, but the document came within Exemption (3) to the title Agreement or memorandum in sched. I to the Act, as an “ agreement . . . or memorandum . . . for or relating to the sale of any goods, wares or merchandise ”, and was, therefore, not liable to stamp duty.

*Warranty—Breach—Sale of motor cycle—Wrong entry in registration book—
Innocent misrepresentation.*

A motor cycle combination was first registered on Oct. 17, 1930. In the course of time a registration book was issued in which the date of original registration was shown as Sept. 9, 1941. The seller bought the machine after, and was not responsible for, that wrong entry, but he was informed by the makers that it was a 1936 or 1938 model. On Oct. 23, 1949, the seller, in answer to a question by the buyer as to the date of the model, said that it was a late 1941 or a 1942 model. On Oct. 30, 1949, the buyer and seller entered into a contract of sale, and signed a memorandum of agreement which did not refer to the date of the model. On a claim by the buyer for damages for breach of warranty,

HELD: the statement by the seller on Oct. 23, 1949 as to the date of the model and the wrong entry in the registration book amounted only to a false representation and not to a warranty, and, accordingly, in the absence of any allegation of fraud, the action failed.

DICTUM OF LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* ([1913] A.C. 47), applied.

PER DENNING, L.J.: If an entry in a registration book turned out to be false an ultimate buyer could sue an original wrongdoer in fraud, but he could not sue innocent people between him and the original wrongdoer who had merely passed on a statement which was in the registration book.

AS TO WHETHER REPRESENTATION AMOUNTS TO WARRANTY, see HALSBURY, *Hailsham Edn.*, Vol. 29, p. 52, para. 64; and FOR CASES, see DIGEST, Vol. 39, pp. 419-421, Nos. 515-539.

FOR THE STAMP ACT, 1891, s. 14 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 609.

FOR THE STAMP ACT, 1891, sched. I, Agreement Exemption (3), see *ibid.*, Vol. 21, p. 657.

Cases referred to:

- (1) *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 39 Digest 420, 526.
- (2) *Cave v. Coleman*, (1828), 3 Man. & Ry. K.B. 2; 7 L.J.O.S.K.B. 25; 39 Digest 409, 437.
- (3) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 39 Digest 420, 525.

APPEAL by the fifth party against an order made by His Honour JUDGE FRASER HARRISON at Liverpool County Court, dated Dec. 10, 1953.

On Oct. 23, 1949, the fifth party offered to the fourth party for sale a motor cycle combination. In reply to a question by the fourth party as to the date of the combination he said that it was "late 1941 or 1942" and produced the registration book which was dated in 1941. The fourth party agreed to buy the machine, and on Oct. 30, 1949, these parties signed a document, drafted by the fourth party, which was as follows:

"It is agreed between the parties [the fourth party] . . . and [the fifth party] . . . that a . . . motor cycle . . . now [owned by the fourth party] to be exchanged for a . . . combination motor cycle owned by [the fifth party] and further [the fourth party] will pay the sum of £30 to complete the transaction: It is understood that when the £30 is paid over this transaction is closed".

In October, 1950, the fourth party sold the motor cycle combination to the third party. In November, 1950, the third party sold the motor cycle combination to the defendant, and on Mar. 23, 1951, the defendant sold the combination to the plaintiff for £100, payment of this sum being satisfied as to £25 by a payment in cash and as to the balance by the provision of another motor cycle combination. The registration book transferred on the occasion of each sale showed against the heading "Date of original registration under the Road Acts, 1920" the date "9.9.41". In fact, the motor cycle combination was first registered on Oct. 10, 1930.

By his particulars of claim the plaintiff alleged that at the time of the agreement the defendant warranted that the motor cycle combination was a model of the year 1942, which it was not, and he claimed £80 damages for breach of warranty, as being the difference in value between the motor cycle combination as warranted and as delivered. By his defence the defendant denied the allegations. On May 2, 1953, he served a notice on the third party claiming to be entitled to an indemnity. The third party served a similar notice, dated May 15, 1953, on the fourth party, and the fourth party served a similar notice, dated Sept. 4, 1953, on the fifth party. The fifth party was unable to issue any such notice since any claim by him for breach of warranty against the person from whom he had purchased the motor cycle combination would have been statute-barred. Before the county court judge, the defendant, and the third and fourth parties admitted liability, and the fourth party produced in evidence the document dated Oct. 30, 1949. This document was not stamped in accordance with the Stamp Act, 1891, s. 1 and sched. I, sub nom. Agreement or Memorandum of Agreement, but no point was taken in the county court.

The county court judge gave judgment for the plaintiff for £80, and ordered the fifth party to indemnify all other parties for damages and costs of the action. The fifth party appealed.

J. S. Watson for the fifth party.

F. D. Paterson for the fourth party.

SIR RAYMOND EVERSHED, M.R.: In my judgment, it is the duty of the Court of Appeal to pay regard to the provisions of the Stamp Act, 1891, s. 14 (1), regarding the duty of the court to take notice of any omission or insufficiency of a stamp on a document. This court cannot assume that there has been some decision by the court below merely because in that court an unstamped document has been admitted in evidence. On the facts of the present case I think that Exemption (3) to Agreement or Memorandum of Agreement in sched. I to the Act, which reads:

"Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise",

applies. On the authorities that exemption, as I understand it, should be liberally interpreted. Therefore, in my opinion, there has been no infringement of the provisions of the Act.

DENNING, L.J.: I agree.

ROMER, L.J.: I agree.

A Argument on the appeal was then heard and the following judgments were delivered.

SIR RAYMOND EVERSLED, M.R.: The question is whether or not, on a sale of a motor bicycle with a side-car combination, there was a warranty as to the date when the machine was originally put on the market. The classic exposition of the law in regard to warranties is to be found in the speech of LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* (1), where he said ([1913] A.C. 47):

C "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you £100,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare . . . Such collateral contracts . . . must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

E After dealing with the facts of that case and referring to decisions of the Chancery courts, LORD MOULTON said (*ibid.*, 49):

F "On the common law side of the court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation . . . But in respect of the question of the existence of a warranty the courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by HOLT, C.J., with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended' . . . one often sees quoted the dictum of BAYLEY, J., in *Cave v. Coleman* (2) where, in respect of a representation made verbally during the sale of a horse, he says (3 Man. & Ry. K.B. 2) that 'being made in the course of dealing, and before the bargain was complete, it amounted to a warranty'—a proposition that is far too sweeping and cannot be supported".

G Finally, after reference to and disapproval of the language of this court in *De Lassalle v. Guildford* (3), LORD MOULTON said (*ibid.*, 51):

"It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."

In the present case by a certain amount of mechanical ingenuity an earlier possessor of this motor cycle combination, which first left the works of the

makers in October, 1930, proceeded to re-condition and, in a measure, re-make it so that, although substantially it remained the old model, it had acquired certain characteristics which, this ingenious mechanic thought, justified him in attributing to it a later origin. The registration books, which were renewed from time to time, eventually showed on their face that this motor cycle combination was what is called "a late 1941 or 1942 model". It seems clear from the county court judge's notes of evidence that in the case of the sale by the defendant to the plaintiff and of the sales immediately preceding the alleged warranty amounted to that statement in the registration book. I assume that in each case there was an express affirmation of what there appeared, but it does not seem that there was anything more. Yet, so far as I can judge from the evidence before us, that such an express statement, without more, did amount to a warranty seems to have been accepted by all the parties, or their representatives, except the fifth party whose counsel for the first time raised the question whether or not, as between him and the fourth party, there was a warranty. Counsel particularly relied on the circumstance that in the sale between the fourth and fifth parties a written memorandum of agreement was entered into at the time when the transaction took effect. Bearing in mind the passages which I have read from LORD MOULTON's speech, in approaching this matter it is important to observe that, if there was a warranty, there was a contract between the two parties to the effect that the seller, for good consideration, undertook to indemnify the buyer against any loss the buyer might suffer if in truth the origin of this motor cycle was, not 1941 or 1942, but some much earlier date. Such a contractual obligation could be either part of the contract of sale itself or collateral to it. In the present case, for reasons which will appear, if there was a warranty it seems to me that it must have been collateral to the actual contract of sale, though I do not think that matter is necessarily conclusive of the question before us.

I have mentioned these anterior questions partly because of the feeling of regret which I have about the present case and partly because, in fairness to the learned judge, it seems clear to me that his attention was not directed, at any rate at any of the earlier stages, to the essential requirements of a warranty. Particularly, he did not have the advantage of refreshing his memory by looking again at LORD MOULTON's speech, so that, when the matter came to be determined as between the fourth and fifth parties, the reference to what was stated in the registration book had come to be treated as *prima facie* constituting a warranty, with the result that the judgment was confined, in effect, to this. Was that *prima facie* effect of the reference displaced by the written contract? I found that conclusion on this passage from the judge's notes of the judgment:

"I then dealt in some detail with the transaction between the fourth party and the fifth party. I accepted the evidence of . . . the fourth party, and I rejected any evidence given by . . . the fifth party, which conflicted with that given by [the fourth party]. I found as a fact that before the purchase in question . . . the fifth party gave a warranty to the fourth party that the . . . motor cycle combination was a 1942 model. There was no dispute that this [viz., that it was a 1942 model] was incorrect. That, in so far as it is a question of fact, I found, and in so far as it is a question of construction, I held, that the written agreement signed on Oct. 30, 1949, by the fourth party and the fifth party and having therein the words 'that when the £30 is paid over this transaction is closed' was not intended to exclude any warranty."

Counsel for the fourth party has argued that, in so far as that is a matter of fact, a finding by the county court judge, who heard the witnesses, would be conclusive in this court, provided that there was some evidence on which it could be founded. But I think that the learned judge did not really direct his mind to the question whether or not there was, in the reference to the date of origin as it emerged from the evidence, a real intention to contract in the sense which I have already described

and which must be found to be present if what otherwise would be a misrepresentation is to be translated into a warranty. I think he did not apply his mind to that, because, as I have stated, the parties had not during the earlier stages of the battle raised the matter and were content to assume that such a statement did constitute a warranty. I, therefore, do not feel that counsel's submission can be an answer to the appeal.

A The fourth party said in evidence that on Oct. 23, 1949, the fifth party called at the former's house with this motor cycle combination, and continued:

B " [The fifth party] told me it was a 600 c.c. machine instead of 500 c.c. It says 500 c.c. in registration book. I asked the model. He told me it was a late 1941 or 1942. He produced the registration book which was dated late 1941. This was outside the house . . . Two or three days later [the fifth party] came back. I had had a document drafted. He said he had thought it over and the transaction could go through. I produced the money and he produced the registration book."

C It was suggested to him in cross-examination that the fifth party had added to the statements made about the date of origin a statement that he had heard from the manufacturers that the date of the model was not 1941 or 1942, but 1936 or 1938. The fourth party denied that suggestion, and the judge on that matter disbelieved the fifth party. Except on this point, the fifth party said nothing which could be taken to controvert or add to the evidence of the fourth party. On the oral evidence, therefore, the judge found, in effect, that, before the bargain was eventually made, the fifth party specifically stated, in answer to a question, that it was a 1942 model, and pointed to the corroboration of that statement to be found in the registration book, and that he knew, from what the manufacturers told him, the true date to be 1936 or 1938. Of course, it does not follow that the fifth party was deliberately trying to deceive the fourth party, and in any case we are not here trying any action based on fraud.

E The fourth party had caused to be prepared a written memorandum or contract which was signed by himself and the fifth party on Oct. 30, 1949. The significant point is made that there the motor cycle combination is expressly referred to as being of the capacity of 600 c.c., when on the registration book it is stated as having only 500 c.c. capacity. From the evidence I have read the true cubic capacity, according to the fifth party, was 600, and that fact was carefully pointed out by him by showing the discrepancy in that respect in the registration book. This written memorandum represents *prima facie* the record of what the

F parties intended to agree when the actual transaction took place. Counsel for the fifth party contended that the terms of it necessarily exclude any warranty, that is to say, any collateral bargain, either contemporary or earlier in date. I am not sure that I would go so far as that. But I think that as a matter of construction it would be difficult to say that such an agreement was consistent with a warranty being given at the same time so as to be intended to form a part of the bargain then made. I think, with counsel for the fifth party, that the last words "It is understood that when the £30 is paid . . . this transaction is closed" would make such a contention difficult. But I will assume that the warranty was given, not when the bargain was struck, but on Oct. 23, 1949, on which date alone, according to the evidence, any representation about the date of the motor cycle combination was made at all.

H If that representation is to be a warranty it has to be contractual in form. In other words, so far as I can see, once the existence of a warranty as part of the actual bargain is excluded, it must be a separate contract, and the overwhelming difficulty which faces the fourth party is that when the representation was made there was then no bargain, and it is, therefore, in my view, impossible to say that it could have been collateral to some other contract. Even apart from that, it seems to me that on the evidence there is nothing to support the conclusion, as a matter of law and bearing in mind LORD MOULTON'S observations, that in

answering the question posed about the date of the motor cycle combination there was anything more intended than a mere representation.

If that is the right analysis, the problem which the county court judge felt he had to consider never arose. It was not a question whether or not on its construction this agreement negatived or excluded the possibility of an earlier warranty. In my view, there was no evidence before the judge capable of supporting the existence of any earlier warranty, and I prefer to base my conclusion on that ground rather than on the ground that the agreement, according to its language, necessarily excluded a warranty. I have felt compelled to the conclusion that the learned judge here had not before him any evidence which entitled him to conclude that there was given, and intended to be given, a warranty (in the proper sense of that word) when the reference to the date of origin of the motor cycle was made by the fifth party. I add that the written agreement tends to support that view rather than to controvert it. In my judgment, this appeal must be allowed. On the second point of counsel for the fifth party that in any case the award of £80 damages ought not to stand, it is sufficient to say that as at present advised I am not satisfied that there is any ground on which this court could interfere with the award, but, in the circumstances, I need not express any concluded view.

DENNING, L.J.: When a motor car or a motor cycle is bought and sold second-hand by a succession of persons, it often happens that each seller in the chain tells each buyer what year it is, basing his information on the statement in the registration book. Suppose that, unknown to either party, the statement in the registration book is false because some previous and remote seller falsified either the number plate or the book, what is the legal position? Has each seller in the chain warranted the correctness of the entry in the registration book so that each seller is responsible to his buyer in damages? Or has he merely made an innocent representation for which he is not liable in damages?

The answer must depend, of course, on a proper application of the law relating to innocent misrepresentation and warranty as laid down by the House of Lords in *Heilbut, Symons & Co. v. Buckleton* (1), but, in considering this question, it is important to remember that the seller, unless he is the first owner, is not the originator of the statement about the year. He has to accept it from the registration book, and cannot be expected to warrant its accuracy unless he in express terms makes himself responsible for it. In the ordinary way, therefore, the statement is only a representation and not a warranty. If the entry in registration book should turn out to be false, the eventual buyer can sue the original wrongdoer in fraud without any limitation: see the Limitation Act, 1939, s. 26; but he cannot sue the innocent people in between who merely passed on a statement which was in the registration book.

Then I ask myself: Is there anything to take the present case out of the ordinary? It seems to me that, as between the fourth and fifth parties, for the reasons **SIR RAYMOND EVERSHED, M.R.**, has given, this was a representation and not a collateral contract.

Counsel for the fourth party relied on the fact that the fifth party did correct one statement in the registration book in that he corrected 500 c.c. to 600 c.c. No doubt, any seller ought to correct any statement in the book which he knows or has reason to suppose is inaccurate, but that does not turn the representation about the year into a warranty. I cannot see that there was any evidence in the present case, any more than in *Heilbut, Symons & Co. v. Buckleton* (1), on which a warranty could be found. It is unfortunate that none of the five counsel in the case referred the judge to *Heilbut, Symons & Co. v. Buckleton* (1) because it means that the fourth party, an entirely innocent party, is left to bear the whole burden. I agree that the appeal should be allowed.

ROMER, L.J.: I also agree. Having regard to the law as laid down in

Heilbut, Symons & Co. v. Buckleton (1), and especially in the speech of LORD MOULTON, it seems to me impossible to arrive at the view that the statement which the fifth party made to the fourth party amounted to a warranty. I confess that I have come to this conclusion with some reluctance, because, not only did the fifth party think proper to give evidence before the learned judge that was untrue, but it is plain that he knew perfectly well himself that when he told the fourth party that the motor cycle combination was a late 1941 or 1942 model he had already been informed by the makers that it was earlier than that by some years. Indeed, apparently as a result of what he was told by the makers, he seems to have pondered for a time whether or not he would sue the man who had sold it to him, but eventually he decided not to do so. Therefore, as I say, it is with some regret that I have come to the conclusion that the fourth party, who was perfectly innocent in the matter, should lose this appeal. But having regard to the law, that is the result at which one must arrive, for no charge of fraudulent misrepresentation was made against the fifth party.

Appeal allowed.

Solicitors: *Ranger, Burton & Frost*, agents for *G. F. Lees & Son*, Birkenhead (for the fifth party); *Kinch & Richardson*, agents for *Percy Hughes & Roberts*, Birkenhead (for the fourth party).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

D HEALEY AND OTHERS v. A. WADDINGTON & SONS, LTD., AND OTHERS.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 10, 11, 1954.]

Practice—Consolidation of actions—Consolidation up to determination of liability—Separate issues as to damages—Form of order—Eight plaintiffs and three defendants—Similar causes of action alleged—R.S.C., Ord. 49, r. 8.

AS TO CONSOLIDATION OF ACTIONS, see HALSBURY, Hailsham Edn., Vol. 26, p. 57, para. 94; and FOR CASES, see DIGEST, Practice, pp. 658-660, Nos. 2786-2800.

Cases referred to:

(1) *Brady v. McDonald*, [1931] N.I. 345.

(2) *Bailey v. Curzon of Kedleston (Marchioness)*, *Bailey v. Duggan*, [1932] 2 K.B. 392; 101 L.J.K.B. 627; 147 L.T. 269; Digest Supp.

APPEAL by the second defendants against an order of GERRARD, J., dated Feb. 5, 1954, allowing an appeal against an interlocutory order of Master BAKER, ordering consolidation of seven actions.

The plaintiffs were (i) the widows and administratrices of the estates of six deceased workmen and (ii) two other workmen. By their writs they claimed damages against the same three defendants, A. Waddington & Sons, Ltd., C. S. Allot & Son (a firm) and the National Coal Board. The six widows and administratrices claimed (i) under the Fatal Accidents Acts, 1846 to 1908, damages for the negligence and/or breach of statutory duty of the defendants whereby the six deceased men received fatal injuries on July 4, 1952, and died thereof the same day, and (ii) under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss and damage sustained by the estates of the deceased men through the negligence and/or breach of statutory duty of the defendants on and before July 4, 1952, which resulted in the deaths of the men. The two men who were plaintiffs claimed damages for personal injuries and consequential loss caused by the negligence and/or breach of statutory duty of the defendants on and/or before July 4, 1952, at the Point of Ayr Colliery, Flint.

On Jan. 12, 1954, before delivery of the pleadings, the three defendants applied to the master in chambers for an order under R.S.C., Ord. 49, r. 8, for seven of the actions (in that of one plaintiff, Jones, the writ had not then been served) to be consolidated. Master BAKER made an order that six actions be consolidated with that of the plaintiff, Hill, and tried together, one statement of claim to be delivered by the solicitors for the plaintiff, Hill, in twenty-eight days from the date of the order, to include a claim in respect of special damage by each plaintiff and there to be separate issues as to damages. Defences were to be delivered within twenty-eight days. On appeal by the second and third defendants on Feb. 5, 1954, GERRARD, J., set aside this order and ordered that the action of the plaintiff, McPartland,

"be tried first as a test action, all other actions referred to in the order dated Jan. 12, 1954, be stayed, and by consent [the eighth action of the plaintiff Jones] be stayed likewise. And it is further ordered that the statement of claim in the said test action be delivered twenty-eight days from the date hereof . . ."

The second defendants appealed.

Paull, Q.C., and *Stephen Chapman*, for the second defendants (*J. R. Pickering* for the third defendants supporting): Master BAKER made the ideal order: see the note in the *ANNUAL PRACTICE*, 1954 ed., p. 875, relating to personal injuries, and *Brady v. McDonald* (1). Consolidation has been ordered against opposition in the Admiralty Division, but not previously in other Divisions of the High Court. Consolidation would save costs and the plaintiffs could brief separate counsel for issues as to damages. A test action as ordered by GERRARD, J., would not determine the liability in the other actions, and so eventually there would be seven sets of pleadings, with, perhaps, seven trials before seven different judges. A compromise such as calling on all the actions together would not prevent different sets of papers and counsel. Defences available against some plaintiffs might not be available against others. The case for the test action had, apparently, been chosen because the plaintiff in that case had the best chance of success.

Jupp (for the plaintiffs other than the plaintiff, Thompson): The plaintiffs would be bound by the result of the test action.

SINGLETON, L.J.: That is my interpretation of the expression "test action".

M. C. Parker (for the plaintiff, Thompson): The case for the test action was chosen as raising every possible issue.

Paull, Q.C.: In *Bailey v. Curzon* (2) two actions involving slightly different issues were consolidated. The actions should be consolidated up to the determination of the issue of liability, issues as to damages to be tried separately by the same judge in each case in turn. Consolidation would enable any differences in the claims by the different plaintiffs to be brought before the court. Any plaintiff affected by special circumstances could have separate representation.

Jupp for the plaintiffs other than the plaintiff, Thompson (*M. C. Parker* for the plaintiff, Thompson, supporting): A test action would save costs because, once it determined liability, many of the other actions would be settled or would continue, only against defendants held liable, on agreed medical and other reports.

SINGLETON, L.J.: The court would like to make an order by consent, but that is not possible because all the parties are not represented before the court. The court thinks that the actions ought to be consolidated up to determination of the issue of liability, any issue peculiar to one plaintiff to be separately dealt with. In the meantime separate particulars of damage should be delivered,

and, if the plaintiffs are successful, the issues of damages should be separately dealt with. I do not think that will necessarily save costs, indeed, it might do the opposite, but it will satisfy the defendants while the plaintiffs will be protected.

- A** Mar. 11. A minute of a draft order agreed between counsel as representing the intention of the court was submitted to the court, which made an order in the following form as submitted:

“(1) That actions [seven specified by number] be consolidated with action 1953 H. 144 [plaintiff Hill] up to determination of liability.

- B** “(2) Liberty to apply for separate representation if any question arises which appears to put one plaintiff in a different position from other plaintiffs.

“(3) Particulars as to injuries and damage of each plaintiff to be delivered with statement of claim in consolidated action within twenty-eight days.

- C** “(4) When liability determined, if plaintiff succeeds against all or any defendants, court to fix a date to determine question of quantum of damages for each plaintiff in respect of which each plaintiff may be separately represented.

“(5) That the costs of this appeal be costs in the cause.

- D** “(6) Liberty to apply in chambers.”

Solicitors: *Field, Roscoe & Co.*, agents for *Isaac Edwards & Owens*, Rhyl (for the plaintiff, Healey); *Rhys Roberts & Co.*, agents for *Glyn Owen, Ellis & Co.*, Rhyl (for the plaintiffs, Hill, McPartland, Maisey and Thorley); *Layton & Co.*, agents for *Turner & Wayman-Hales*, Chester (for the plaintiff, Thompson); **E** *Robbins, Olivey & Lake*, agents for *Wilding, Earley & Pegge*, Manchester (for the plaintiff, Dempster); *Geo. Thatcher & Son*, agents for *J. Kerfoot-Roberts & Son*, Holywell (for the plaintiff, Jones); *Berrymans*, agents for *Barrell & Co.*, Liverpool (for the second defendants); *Donald H. Haslam* (for the third defendants).

F.A.A.

Re WRIGHT (*deceased*). BLIZARD AND ANOTHER v.
LOCKHART AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), February 18, 19, 1954.]

Res Judicata—Implication—Bequest of residue on trust to take effect after death of tenant for life—Death of testatrix in 1934 and of tenant for life in 1942—Summons, on death of tenant for life, to determine whether bequest a good and charitable gift and for inquiry into practicability of trust—Order made in 1948 for inquiry as to practicability “now or at any future time” —Rest of summons ordered to stand over—Amended summons before court—Right to argue that date of testatrix’s death material date for estimating practicability.

By her will, dated Dec. 2, 1932, the testatrix, who died on Mar. 15, 1933, directed her trustees to stand possessed of her residuary estate on trust thereout to found and maintain a convalescent home for impecunious gentlewomen. In October, 1933, the terms of settlement of a probate action concerning the will were approved by the court, one of the terms being that W., a legatee under the will, was to have a life interest in the residue. On Feb. 15, 1942, W. died, and in 1943 the trustees of the will took out a summons to determine, *inter alia*, whether, on the true construction of the will and in the events which had happened, the gift of residue to found and maintain the convalescent home constituted a good and effective charitable gift. By an order, dated Feb. 2, 1944, the summons was stood over until Feb. 3, 1947. By an order, dated Jan. 27, 1948, the court, without argument on the point, ordered two inquiries to be made which were asked for by the summons, viz. “(i) An inquiry whether it is now or will at any future time be possible to carry into execution the trusts” for the establishment of the convalescent home, and (ii) an inquiry as to next of kin. By the same order the court directed: “The rest of the said originating summons is to stand over.” On July 4, 1952, the master filed his certificate saying that “It is not now possible to carry into execution the trusts”, that he was unable to certify whether it would be possible to do so at any future time, and that the question was left for the consideration of the court. On Sept. 4, 1953, the summons was amended to ask, alternatively to the original questions, whether, on the true construction of the will, the testatrix had shown therein a general charitable intention and the subject-matter of the gift ought to be applied *cy-pres*. When the amended summons came before the court, counsel for the Attorney-General proposed to contend that the material date at which the practicability of the trust should be estimated was the date of the death of the testatrix, and the question arose whether that point was *res judicata* by implication, as the inquiry ordered by the court on Jan. 27, 1948, must have been directed on the footing that the material date was not the date of the testatrix’s death.

HELD: an order for an inquiry should not be regarded as a decision in a case where the question to which the inquiry related was, by the order directing the inquiry, directed to stand over, and, therefore, the doctrine of *res judicata* by implication did not apply so as to preclude argument on the question which was the material date to determine the practicability of the trust.

Re Koenigsberg ([1949] 1 All E.R. 804), considered.

AS TO *RES JUDICATA*, see HALSBURY, *Hailsham Edn.*, Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 156-158, Nos. 191-209.

Cases referred to:

- (1) *Re Koenigsberg*, [1948] Ch. 727; [1948] L.J.R. 1866; *reversd.* C.A., [1949] 1 All E.R. 804; [1949] Ch. 348; [1949] L.J.R. 1098; 2nd Digest Supp.

(2) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

(3) *Re Moon's Will Trusts*, [1948] 1 All E.R. 300; [1948] L.J.R. 778; 2nd Digest Supp.

ADJOURNED SUMMONS to determine questions arising under the will of Alice Marion Wright, deceased.

A By her will, dated Dec. 2, 1932, the testatrix, after giving certain pecuniary and specific legacies, devised and bequeathed all her real and personal estate to her trustees on trust for sale and conversion and directed them, after payment of her funeral expenses, debts and the legacies bequeathed by her will, to stand possessed of the residue (referred to thereafter as the "residuary trust fund") on certain trusts thereafter declared. By cl. 7 of the will she directed the

B trustees to stand possessed of the residuary trust fund on trust therewith to found and maintain a convalescent home to be called "the Alice Marion Wright Convalescent Home", which was to

"be used only as a place in which impecunious gentlewomen who are recovering from illness shall be permitted to stay free of expense to them during convalescence in order to recuperate their health."

C The testatrix died on Mar. 15, 1933. After her death an action was commenced in the Probate, Divorce and Admiralty Division concerning the will, but the parties came to a settlement, and, by an order dated Oct. 25, 1933, the court pronounced for the will and approved the terms of settlement. One of the terms was that a legatee, Mrs. Webb, was to have a life interest in the residue. On

D Feb. 15, 1942, Mrs. Webb died and the testatrix's residuary trust fund then fell to be dealt with. From inquiries made by solicitors it was considered highly improbable that the income of the fund would be sufficient to found and maintain a convalescent home, as directed by the testatrix.

On June 23, 1943, the trustees took out a summons asking:

E "(i) Whether on the true construction of the said will and in the events which have happened the gift therein contained of the proceeds of sale of the testatrix's residuary real and personal estate upon trust thereout to found and maintain a convalescent home . . . for the purposes and in manner therein particularly mentioned constitutes a good and effective charitable gift. (ii) If the answer to question (i) shall be in the affirmative, that a scheme may be directed for the purpose of carrying the said trust into effect or that otherwise directions may be given as to how the plaintiffs, as

F the present trustees of the said will, ought to apply or deal with the subject-matter of the said gift. (iii) If the answer to question (i) shall be in the negative, whether on the true construction of the said will and in the events which have happened the testatrix has died intestate in respect of the subject-matter of the said gift."

G Paragraph (iv) asked for an inquiry, if necessary

"whether it is now or will at any future time be possible to carry into execution the trusts declared by the said will for the establishment in the manner thereby directed of a convalescent home . . ."

The summons went on to ask, inter alia, for an inquiry as to next of kin and for a representation order. The first, second and third defendants were the personal

H representatives of a deceased cousin of the testatrix, and the fourth defendant was the Attorney-General. By an order, dated Feb. 2, 1944, VAISEY, J., ordered the summons to stand over until Feb. 3, 1947. By an order made on the summons and dated Jan. 27, 1948, WYNN-PARRY, J., ordered:

"(i) an inquiry whether it is now or will at any future time be possible to carry into execution the trusts declared by the will of the . . . testatrix for the establishment in the manner thereby directed of a convalescent home . . ."

and (ii) an inquiry as to next of kin, and, after providing for the costs of the application, he ordered that: "The rest of the said originating summons is to stand over". In a certificate made in answer to the inquiry and filed on July 4, 1952, the master said:

"It is not now possible to carry into execution the trusts . . . From the evidence adduced I am unable to certify whether it will at any future time be possible to carry into execution the said trusts and the question is left for the consideration of the court".

On Sept. 4, 1953, on an application which was not opposed, leave was granted to amend the summons by inserting therein, as para. (iii):

"Alternatively, whether on the true construction of the said will the testatrix has shown therein a general charitable intention and the subject-matter of the said gift ought to be applied cy-près."

The original para. (iii) became para. (iv), and its opening words, as amended, were: "If the answer to question (i) and (iii) shall be in the negative . . ."

When the amended summons came before the court, the question arose whether, as the inquiry ordered by WYNN-PARRY, J., must have been directed on the footing that the material date on which to determine the practicability of the trust was not the date of the death of the testatrix, counsel for the Attorney-General was estopped by the doctrine of *res judicata* by implication from contending that the date of the testatrix's death was the material date.

H. A. Rose for the plaintiffs, the trustees.

G. B. H. Dillon for the first, second and third defendants (interested on intestacy).

Denys B. Buckley for the Attorney-General.

ROXBURGH, J.: This summons raises a difficult question relating to the law of *res judicata* by implication. The question is whether or not the present case falls within the decision which the Court of Appeal gave in reversing my decision in *Re Koenigsberg* (1).

[His LORDSHIP stated the facts and continued:] Counsel for the Attorney-General is anxious to argue, if he is allowed to do so, that the material date on which the practicability of the charitable trust should be estimated is the date of the death of the testatrix, and the question which I have to determine today is whether he is to be allowed to argue that point. It is said by counsel for the next of kin that the inquiry which was ordered by WYNN-PARRY, J., must have been directed on the footing that the material date was not the date of the death of the testatrix, and with that I am in entire agreement. No court would ever have directed that inquiry without further argument if any one had suggested that the date of the death of the testatrix was the material date. I would be inclined to go further and say that no court would ever at that stage have directed an inquiry as to next of kin without further argument. If anyone had suggested that the trust was impracticable, then the next question would be whether the fund ought to be applied cy-près. I agree that that is, perhaps, not so obvious an inference as the first inference, but, none the less, I feel that it is one which should be drawn. Therefore, I think that, if I decided this point against the Attorney-General, I might, perhaps, also be compelled to decide that he could not argue the question of cy-près. I have referred to that question, not because it is directly relevant, but because it is always important, when advancing down a comparatively new path, to see whether there is any place where one can safely stop.

The principles of law applicable are stated so concisely in *Re Koenigsberg* (1) that I need read only a few lines. The facts of that case were quite different from those of the present case, though many features were common to both. In the course of his judgment SOMERVELL, L.J., said ([1949] 1 All E.R. 809):

"If an order made by the court necessarily involves a finding (whether

there was argument or not) on the point which is later sought to be litigated, the authorities lay down that that point cannot be raised . . .”

After referring to words used by LORD SHAW ([1926] A.C. 166) in *Hoystead v. Taxation Comr.* (2), SOMERVELL, L.J., said ([1949] 1 All E.R. 809)—and this is very much in point:

A “I agree that the word ‘traversable’ [used by LORD SHAW in *Hoystead’s* case (2)] contemplates pleadings rather than an originating summons, but when a party takes out an originating summons he can make quite clear to those whom he has to bring before the court what point or points he wants decided, and it is for the defendants to raise matters and file evidence which deal with the points which in the originating summons are put before the court for decision”.

B I think that the present case is extraordinarily near the line. At first I was certain in my own mind that counsel for the next of kin was right. Obviously, counsel for the Attorney-General could have submitted to the court that the material date on which to determine the practicability of the trust should first be decided, and I am certain that, if he had done so, the judge would never have directed the inquiry without further argument. I do not think that can be gainsaid. At first it seemed to me that that would bring the case directly within the dicta of SOMERVELL, L.J., in *Re Koenigsberg* (1), but counsel for the Attorney-General has convinced me, though by a very narrow margin, that an order for an inquiry ought not to be regarded as a decision in a case where the very question to which the inquiry relates is, by the very order directing the inquiry, directed to stand over. It is not merely that an order for an inquiry is somewhat different from other kinds of orders, nor is it merely that there is a direction that the question is to stand over, but it is, in my judgment, a combination of both. Undoubtedly, there are cases in which there may be *res judicata* by implication although the litigation from which the *res judicata* springs is still in process of further litigation, but when, as in the present case, the question whether on the true construction of the will the gift is a good and effective charitable gift is expressly directed by the order to stand over and an inquiry is directed as to facts which are thought to be relevant to the answer to that question, it is, in my opinion, carrying this doctrine unwarrantably far to suggest that, because a certain hypothesis of law certainly did underlie the direction for an inquiry, that assumption of law is to be used as a conclusive argument against the further investigation of the question of law which is by the order expressly reserved. It is clear that the doctrine of *res judicata* by implication has never yet been extended to a case like the present, and, if it is to be so extended, I think that it may lead to a considerable increase in the costs of litigation. On the whole, however, I think that the doctrine is not to be extended to such cases.

E
F
G [On the question whether the practicability of the purported charitable trust was to be ascertained at the date of the death of the testatrix or at the date of the death of the tenant for life, HIS LORDSHIP said that, in his judgment, the case was covered by *Re Moon’s Will Trusts* (3) and that, therefore, the date was the date of the death of the testatrix. Accordingly, he would declare (i) that the Attorney-General was not estopped by the doctrine of *res judicata* by implication from contending that the proper date at which to ascertain the practicability of the charitable trust in suit was the date of the death of the testatrix, and (ii) that that was the proper date.]
H

Order accordingly.

Solicitors : *Frank Taylor, Nightingale & Baker* (for the plaintiffs); *Beale & Co.* (for the first, second and third defendants); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law*.]

WILSON AND ANOTHER v. RICKETT, COCKERELL & CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.),
March 3, 4, 8, 1954.]

Sale of Goods—Implied warranty—Merchantable quality—"Goods supplied under a contract"—Unfit goods in consignment—Explosive substance in consignment of fuel—Sale of Goods Act, 1893 (c. 71), s. 14 (2).

The plaintiff, a housewife, ordered from the defendants, coal merchants, "a ton of Coalite" which was duly delivered to her by the defendants. When part of the consignment was put on a fire in an open grate in the plaintiff's house an explosion occurred which caused damage. On a claim by the plaintiff for damages for breach of warranty under s. 14 of the Sale of Goods Act, 1893,

HELD: section 14 applied to all goods delivered in purported performance of a contract of sale, whether they conformed to the contract or not, and, therefore, the section applied to the whole consignment including the explosive piece, and, as the consignment was not of merchantable quality, being unfit for burning, the defendants were liable under s. 14 (2).

Frost v. Aylesbury Dairy Co. ([1905] 1 K.B. 608), applied.

Duke v. Jackson (1921 S.C. 362), not followed.

AS TO FITNESS FOR PARTICULAR PURPOSE, see HALSBURY, Hailsham Edn., Vol. 29, p. 63, para. 73; and FOR CASES, see DIGEST, Vol. 39, pp. 440-449, Nos. 693-764.

AS TO MERCHANTABLE QUALITY, see HALSBURY, Hailsham Edn., Vol. 29, p. 66, para. 74; and FOR CASES, see DIGEST, Vol. 39, pp. 449-451, Nos. 765-788.

FOR THE SALE OF GOODS ACT, 1893, s. 14, see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 993.

Cases referred to:

- (1) *Duke v. Jackson*, 1921 S.C. 362; 58 Sc.L.R. 299; [1921] 1 S.L.T. 190; 39 Digest 448, 1.
- (2) *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608; 74 L.J.K.B. 386; 92 L.T. 527; 39 Digest 445, 733.
- (3) *Chaproniere v. Mason*, (1905), 21 T.L.R. 633; 39 Digest 445, 741.
- (4) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; Digest Supp.
- (5) *Niblett v. Confectioners' Materials Co.*, [1921] 3 K.B. 387; 90 L.J.K.B. 984; 125 L.T. 552; 39 Digest 432, 610.
- (6) *Baldry v. Marshall*, [1925] 1 K.B. 260; 94 L.J.K.B. 208; 132 L.T. 326; 39 Digest 448, 762.
- (7) *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 39 Digest 418, 512.

APPEAL by the plaintiffs against an order of His Honour JUDGE GRANVILLE-SMITH, at Edmonton County Court, dated Dec. 4, 1953.

By their particulars of claim the plaintiffs, who were husband and wife, alleged that in June, 1951, they or one or other of them agreed to buy and the defendants (a firm of coal merchants) agreed to sell a ton of fuel described as Coalite and that the fuel was delivered to their home; that the fuel was purchased by description from the defendants whose business it was to supply such goods; that the plaintiffs or one or other of them made known to the defendants the particular purpose for which the said fuel was required, namely, for burning in their home, and that they relied on the defendants' skill and judgment; that, in breach of the terms and conditions of the said agreement, the fuel was neither reasonably fit for the said purpose nor of merchantable quality because it contained matter which was explosive and unfit to be burned inside a dwelling-house; and that on Nov. 26, 1951, while burning in the grate in the dining-room in the plaintiffs' home, the fuel or some matter contained therein, violently exploded, ejecting into and

scattering about the room the contents of the grate, and causing damage to goods of the plaintiffs. The plaintiffs further alleged that the defendants were negligent and relied on the doctrine *res ipsa loquitur*, and claimed £117 4s. 1d. damages. The defendants denied liability. The second plaintiff stated in evidence that she had been ordering from the defendants Coalite for a number of years as "A half (or one) ton Coalite". The county court judge found that the explosion was due, not to a piece of Coalite itself, but to something which came in the consignment, such as a piece of coal in which was embedded an explosive, and that the explosive piece had not come from the manufacturers of the Coalite, but in the course of transit had become mixed with the consignment before it was delivered. The judge found that there was no negligence on the part of the defendants. He further felt himself bound to follow *Duke v. Jackson* (1), and held that s. 14 (1) of the Sale of Goods Act, 1893, applied only to the Coalite and not to the matter sent with it, and dismissed the action. The plaintiffs appealed.

Ackner for the plaintiffs.

Mocatta, Q.C., Bulger and J. M. Holden for the defendants.

SIR RAYMOND EVERSLED, M.R.: I will ask DENNING, L.J., to deliver the first judgment.

DENNING, L.J., stated the facts and continued: The question is whether or not the plaintiffs can recover their loss from the defendants. The judge would have held that they could recover, but he felt that he ought to follow *Duke v. Jackson* (1). In that case a bag of household coal purchased from a coal merchant contained a detonator which exploded while the coal was being burned in the kitchen fire. The householder lost his eye, but the Court of Session held that, on the facts alleged in the pleadings, there was no breach of the condition implied under s. 14 (1) of the Sale of Goods Act, 1893. The reasoning of the Court of Session was after this wise: The coal as coal was all right; it was fit for its purpose; the trouble was that there was something in it which the householder did not purchase, namely, a detonator; and, as he did not purchase it, he could not complain of it as a breach of contract under s. 14 (1), but only for negligence, if there was any. With all respect to the Court of Session, I must confess that I do not understand this line of reasoning. Coal is not bought by the lump. It is bought by the sack or by the hundredweight or by the ton. The consignment is delivered as a whole and must be considered as a whole, not as separate lumps. A sack of coal which contains hidden in it a detonator is not fit for burning, and no sophistry should lead us to believe that it is fit.

The Court of Session were referred to *Frost v. Aylesbury Dairy Co.* (2), where this court held that the buyer of milk which contained typhoid germs was entitled to recover damages, but the Court of Session distinguished that case on the ground that all the milk was contaminated, whereas none of the coal was unfit—only the detonator. Again, I am afraid I cannot follow the reasoning. I can see no distinction in principle between liquids and solids. If the admixture of an injurious ingredient makes a liquid unfit for drinking, so does the admixture of an injurious detonator make coal unfit for burning. It is no answer for the seller to say that there was nothing wrong with the coal as coal. There was a great deal wrong with the consignment as a consignment. It is to be noticed that the Court of Session were not referred to *Chaproniere v. Mason* (3), where a bath bun contained a stone on which the person who bought it broke his tooth. **SIR RICHARD HENN COLLINS, M.R.,** said (21 T.L.R. 634) that, speaking for himself, he should be inclined to say that such a bun was not reasonably fit for mastication. He was, perhaps, unduly hesitant when he said he was "inclined to say".

In these circumstances, I think that we should not adopt the reasoning of the Court of Session, but should see how the matter stands on the sections of the Sale of Goods Act, 1893. Section 14 reads:

"... there is no implied warranty or condition as to the quality or

fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its . . . trade name, there is no implied condition as to its fitness for any particular purpose: (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality . . . ”

The principal point made before us was that that section does not apply, because both sub-s. (1) and sub-s. (2) refer only to the contract goods, that is, to the goods which are the subject of the contract of sale, and so it refers only to the Coalite proper and not to the explosive piece which was with it. The answer to that argument lies in the opening words of s. 14, which show that the section refers to the “goods supplied under a contract of sale”. In my opinion, that means the goods delivered in purported pursuance of the contract. The section applies to all goods so delivered whether or not they conform to the contract, that is, in the present case, to the whole consignment, including the explosive substance and not merely to the Coalite alone. Nevertheless, counsel for the defendants put forward strong reasons for supposing that s. 14 (1) may be excluded, because that sub-section does not apply in the case of a contract for the sale of a specified article under its trade name. He said that “Coalite” was a trade name, that the second plaintiff simply ordered a ton of Coalite and the defendants purported to supply it. The parties knew, no doubt, that it was to be used as fuel for the fire, but the second plaintiff did not ask the defendants for any assurance as to its fitness for the purpose. She simply specified “Coalite”, which was its trade name, and, if she got Coalite, she could not complain of any want of fitness. It is unnecessary to come to any decision on the merits of that argument. All I would say is that there is a good deal to be said for that point of view.

Putting aside s. 14 (1), the real question is whether or not s. 14 (2) covers the present case. Applying that sub-section to the goods delivered in purported pursuance of the contract, it provides that the consignment which was delivered to the second plaintiff ought to have been of merchantable quality. The proviso in s. 14 (1) as to trade name does not apply to s. 14 (2). This consignment ought to have been of merchantable quality, and clearly it was not. The presence of the explosive piece made it unfit for burning. No one who knew that the consignment contained an explosive piece would buy it. The present case falls within the words of LORD WRIGHT in *Grant v. Australian Knitting Mills, Ltd.* (4) ([1936] A.C. 100):

“ . . . it is not merchantable . . . if it has defects unfitting it for its only proper use but not apparent on ordinary examination ”;

and also within the words of ATKIN, L.J., in *Niblett v. Confectioners' Materials Co.* (5) ([1921] 3 K.B. 404):

“ No one who knew the facts would buy them in that state or condition: in other words they were unsaleable and unmerchantable.”

In my opinion, therefore, this consignment was unmerchantable because of the presence in it of this explosive piece. That is sufficient to decide the case, but I would like to express my concurrence with what SIR RAYMOND EVERSHED, M.R., observed during the course of the argument, that the more counsel for the defendants sought to escape from s. 14 the more he became impaled on s. 13. The second plaintiff ordered Coalite from the defendants, but they did not supply what she ordered. They delivered, not Coalite alone, but Coalite mixed with a

dangerous piece of explosive. I need not say more about that because s. 13 was not pleaded nor relied on. In my judgment, s. 14 (2) clearly covers the present case. That sub-section was not relied on before the Court of Session in *Duke v. Jackson* (1), but it covers the present case. I would allow the appeal on that ground and let judgment be entered for the plaintiffs for the sum claimed.

SIR RAYMOND EVERSLED, M.R.: I agree. What was the contract ?

- A According to the evidence of the second plaintiff, it was her practice, so far as relevant, to communicate her wants to the defendants thus: "Half" or "one ton Coalite". That was all. In the present case it was an order for a ton. In response to that order, the defendants delivered a consignment. It is not in doubt, on the findings of the county court judge, that the explosion was attributable to a charge of high explosive somewhere and somehow secreted in a piece of fuel delivered in pursuance of the order, though not, for the reasons which the judge gave and which I am disposed to accept, in a piece of Coalite. The plaintiffs' claim was preferred under the Sale of Goods Act, 1893, s. 14 (1), alternatively, s. 14 (2). The answer to the claim rests on the proposition that you can sensibly distinguish in regard to the goods delivered in pursuance of the order between pieces of Coalite and something else—as though the contract was to deliver, not a bulk consignment of a ton of fuel called Coalite, but so many individual lumps of Coalite, with the result that, as there could be no complaint about the lumps of Coalite so ordered and delivered, the claim must be treated as referring to something else thrown in, as it were, by the defendants by way, I suppose, of a bonus or gift. It seems to me that such an analysis is wholly divorced from the realities of the case. According to substance and reality there was ordered and delivered a load of fuel. The whole load, to my mind, was defective because, by reason of the hidden presence of the explosive, it was potentially dangerous. The whole, in other words, was infected by the dangerous part, and it matters not that the dangerous part was in fact a piece not of Coalite but some other fuel sent with and in response to the order for the Coalite. Having regard, therefore, to the construction that has been put on the word "merchantable" by LORD WRIGHT in *Grant v. Australian Knitting Mills, Ltd.* (4) ([1936] A.C. 100) and ATKIN, L.J., in *Niblett v. Confectioners' Materials Co.* (5) ([1921] 3 K.B. 404), I have no doubt that the plaintiffs are able to recover under the Sale of Goods Act, 1893, s. 14 (2).

- In my judgment, the present case is indistinguishable, in principle and logic, from *Chaproniere v. Mason* (3). It is true that in that case the bun was, as a bun, defective because of the presence in it of the stone. It was, notwithstanding the stone, still a bun. But if it had been a loaf of bread, it seems to me that the argument put forward by the defendants in the present case must have led to the conclusion that the plaintiff in that case could not have recovered because the bread as bread was without reproach, and it was only the severable, unwanted, stone which caused the damage. It is, accordingly, unnecessary for me to express any final view on the argument based on s. 14 (1). I am bound, however, to say that as at present advised and having regard to the laconic character proved in evidence of the second plaintiff's order, the proviso would appear to me, on the judge's finding that Coalite was a trade name, to be available to the defendants as an answer under that sub-section. The alternative way in which counsel for the plaintiffs sought to escape from that difficulty under sub-s. (1) seems to involve the same unreal dissection of the contract which I regard as fatal to the defendants under sub-s. (2).

I find myself, I confess, unable to accept as valid the reasoning which seems to have underlain the judgments of the Court of Session in *Duke v. Jackson* (1), and it is because of my natural respect for that court that I have thought it desirable to add these few observations of my own to what DENNING, L.J., has said. With the utmost respect to the Scottish judges, it seems to me that they fell into error in making what I have ventured to call an unreal dissection

of the contract which was there before them. It is to be noted that the case was tried and went to the Inner House on what is known as an adjustment of the pleadings before any evidence had been given. It was contended for the defenders that the pursuer had failed in any event to allege the necessary facts to bring himself within the scope of s. 14 (1). Thus, in the course of his judgment, LORD DUNDAS said (1921 S.C. 368):

"... the case as based upon s. 14 (1) of the [Sale of Goods Act, 1893] seems to me to fail utterly, because it is not said or suggested that the coal supplied was not in fact reasonably fit for the disclosed purpose. No complaint is made of the quality of the coal supplied, or any part of it; the complaint is that a foreign substance had found its way into the bag."

On that ground LORD DUNDAS distinguished the case from such cases as *Chaproniere v. Mason* (3). Similarly, LORD ORMDALE observed (*ibid.*):

"I agree with the Lord Ordinary [LORD ANDERSON] that the averments of the pursuer are irrelevant to infer a breach of warranty under the Sale of Goods Act [1893], and I do so on the short ground that, taking it that the coal was supplied for the particular purpose of household consumption, nothing that is said about it leads one to infer that it was other than reasonably fit for that purpose. There is no complaint about the coal as coal."

I am, with the utmost respect, unable to agree with those conclusions, which seem to me to introduce altogether too great a refinement into the pursuer's pleading. The pursuer, according to the report, argued, and I should have thought had pleaded (*ibid.*, 366):

"Here the coal might in itself be quite suitable for domestic use, but the presence of the detonator among it rendered it [the whole of the coal] dangerous to use and consequently not reasonably fit for that purpose".

Assuming, then, that the facts proved supported the averment, it seems to me that the averment did allege the facts necessary to bring the case within s. 14 (1). I have, therefore, found myself unable to accept the answer to that argument which finds its place in the judgments of LORD DUNDAS and LORD ORMDALE, or to feel bound, accordingly, to follow their decision. It is, I think, clear that it was only because the learned county court judge felt himself bound to follow the Scottish decision that he decided the case as he did in favour of the defendants. For these reasons, in addition to those of DENNING, L.J., I think this appeal succeeds and that judgment should be entered for the plaintiffs accordingly.

ROMER, L.J.: I agree with the result which my brethren have indicated. It seems to me clear that the proviso to the Sale of Goods Act, 1893, s. 14 (1) prevents the plaintiffs from relying on that sub-section. Although the learned county court judge held that the fuel was sold under a trade name, he, nevertheless, found that the plaintiffs, in ordering it, relied on the skill and judgment of the defendants. As far as I know, the only evidence which was directed to that point was that of the second plaintiff, who, apparently, rang up the defendants one day and told them to send a ton of Coalite. If, in fact, the plaintiffs did rely on the skill and judgment of the defendants, they only did so, I think, in the sense, which the learned judge himself had in mind, that they were dealing with coal merchants of repute. In the course of his judgment the judge said:

"The plaintiffs clearly ordered this Coalite from the defendants, as reputable coal merchants, and I am sure the defendants will not object if I say that the defendants are coal merchants of very well known repute. There is no need to say: 'Of course, you understand I am relying on your judgment'. That is not how these things are sold. The implication is that when people are buying from reputable coal merchants they rely on them

to send goods to them which are suitable for their household fires . . . I think they [the plaintiffs] were quite clearly relying on the skill and judgment of [the defendants] to send stuff for the fire, the Coalite. They were satisfied with the Coalite as delivered by [the defendants]. They went on relying on [the defendants] to send them good fuel for their fire. That is no doubt about the inference which I should draw, and which I do draw ”.

A All that amounts to is that the plaintiffs were rightly satisfied with the standing and reputation of the defendants, and assumed that any Coalite supplied by the defendants would be of the normal quality and in normally good condition. That, in my view, is the limit to which the plaintiffs relied on the skill and judgment of the defendants, and, as is shown by, amongst other things, the judgment of ATKIN, L.J., in *Baldry v. Marshall* (6), it is insufficient to displace the operation of the proviso to s. 14 (1).

B On the other hand, I am well satisfied that s. 14 (2) does apply. It seems to me that it was not permissible to sever, or to regard as severable, the explosive matter from the Coalite itself, because in fact it was not severable inasmuch as it was not distinguishable from the rest. It is true that the Coalite which was Coalite was suitable for use in a domestic fireplace, but the consignment had in it an element or quality which rendered it wholly unsafe for use. In these circumstances, it seems to me impossible to say that the goods were of merchantable quality. Many illustrations were suggested in argument. If a pound of mixed chocolates includes one chocolate which is indistinguishable in outward appearance from the others but in fact contains a deadly poison, it would surely be impossible to say that the pound of chocolates was merchantable because only one was poisonous.

D The scope of s. 14 (2) is wide, as appears from *Niblett v. Confectioners' Materials Co.* (5), where the goods ordered were condensed milk which arrived bearing a name or brand which was an infringement of the registered trade mark of certain manufacturers of condensed milk at whose instance the Commissioners of Customs impounded the goods. The question was whether or not the buyers were liable to pay for them, and all the members of this court held that the sellers had broken the implied conditions of s. 12 (1) of the Sale of Goods Act, 1893, but, apart from that, it was held by BANKES and ATKIN, L.J.J., that they had also broken the implied condition in s. 14 (2) that the goods should be of merchantable quality. I think that case was interesting, because the inherent quality of the milk was beyond reproach. It was a collateral circumstance which rendered the goods unmerchantable. ATKIN, L.J., said ([1921] 3 K.B. 403):

E “Then were the goods of merchantable quality? Applying the passage read by BANKES, L.J., from *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (7) it seems to me that these goods were in such a state or condition that no reasonable man would in the circumstances accept them in performance of an offer to buy sweetened full cream condensed milk. If he knew the real facts he would refuse the goods on the ground that they were in such a state or condition as to expose him to an injunction. No one who knew the facts would buy them in that state or condition; in other words they were unsaleable and unmerchantable ”.

G If goods which a man buys are unmerchantable because their use will lay him open to an injunction, all the more, I should say, are goods which will blow him up if he uses them. Accordingly, it appears to me plain that the present case falls within s. 14 (2), and the appeal should, therefore, in my judgment, be allowed.

H *Appeal allowed; judgment for the plaintiffs.*
Solicitors: *Carpenters* (for the plaintiffs); *J. G. Bosman, Robinson & Co.* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

SOLOMON v. ORWELL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), March 10, 11, 1954.]

Rent Control—Accommodation shared by tenant and sub-tenant—Vacation of premises by tenant—Landlord's right to possession against sub-tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 7.

The statutory tenant of a dwelling-house within the Rent Restrictions Acts let to a sub-tenant three rooms in the dwelling-house with the right to share with the tenant the kitchen-scullery. The statutory tenant having vacated that part of the premises occupied by her by removing therefrom and giving up the keys to the landlord, the landlord claimed from the sub-tenant possession of the part sub-let. The sub-tenant submitted that after the surrender of the statutory tenancy she, the sub-tenant, had the same right given her under s. 7 of the Landlord and Tenant (Rent Control) Act, 1949, against the landlord as she had had against the statutory tenant and that that right could only be terminated by notice to quit in the ordinary manner.

HELD: by reason of her "sharing" with the tenant, the sub-tenant could not as against the landlord rely on s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; a statutory tenant had no interest capable of existing in law as an estate, but merely a statutory right of occupation which could not be the subject of a surrender at common law; and, therefore, when the tenant vacated the premises, the sub-tenant's right of occupation automatically came to an end, and the landlord was entitled to possession.

AS TO EFFECT OF SURRENDER ON UNDER-LESSEES, see HALSBURY, Hailsham Edn., Vol. 20, p. 273, para. 306; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 586-588, Nos. 7059-7071.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1102.

Cases referred to:

- (1) *Doe d. Beadon v. Pyke*, (1816), 5 M. & S. 146; 105 E.R. 1005; 31 Digest, Replacement, 585, 7057.
- (2) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388; 31 Digest, Replacement, 664, 7641.
- (3) *Shackleton v. Greenhalgh*, [1950] 2 All E.R. 1223; 31 Digest, Replacement, 645, 7506.
- (4) *Stanley v. Compton*, [1951] 1 All E.R. 859; 3rd Digest Supp.

APPEAL by the sub-tenant against an order of His Honour JUDGE GRANVILLE-SMITH at Barnet County Court, dated Dec. 15, 1953.

On Sept. 23, 1952, the statutory tenant of a dwelling-house within the Rent Restrictions Acts left the premises, removing her property therefrom and surrendering to the landlord the keys of the premises. At some prior date the tenant had sub-let to a sub-tenant three rooms of the dwelling-house together with the use in common with the tenant of a scullery which contained cooking facilities. On a claim by the landlord against the sub-tenant for possession of the three rooms on the ground that the sub-tenancy was terminated by operation of law on the statutory tenant quitting the dwelling-house, the county court judge made an order for possession.

Eley for the sub-tenant.

J. H. Gower for the landlord.

SIR RAYMOND EVERSLED, M.R.: The sub-tenant was granted some few years ago a sub-tenancy of three rooms on the first floor of certain premises, together with a right to share with the tenant a further room which was essential to the accommodation as a dwelling-house, namely, the kitchen or scullery.

A The effect of a contract of that nature, before the passing of the Landlord and Tenant (Rent Control) Act, 1949, was not to give to the so-called sub-tenant any right to the protection of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, but in the Act of 1949 a distinction was drawn between a sharing by the tenant with the landlord, on the one hand, and a sharing with other tenants, on the other. By s. 8 of the Act of 1949 it was provided that the tenant who "shared" with other tenants had a "dwelling-house" let to him or her so as to invoke the protection of the Acts. Where, however, the tenant "shared" with the landlord, s. 7 of the Act of 1949 did not say that a "dwelling-house" had been let, so in such a case the tenant did not get the protection of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, although he got the considerably more limited right to invoke certain of the provisions of the B Furnished Houses (Rent Control) Act, 1946. The rights, therefore, which the sub-tenant here acquired as a result of her contract with the tenant would not give to her (the sub-tenant) the protection of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. If, in other words, the sub-tenant can now resist the landlord's claim for possession she must do so, not in reliance on anything in the Rent and Mortgage Interest Restrictions C Acts, 1920 to 1939, but by virtue of some common law right, and that is the basis of her appeal in this court. She says that, by the general law of the land, she has a right to persist in occupation at least of the three rooms on the first floor until, by an appropriate notice to quit, that common law right is terminated. If she is right, since no notice to quit has been given, it will at least give her time to D invoke such remedies as the Act of 1946 may give her, and she will, therefore, be able to gain some advantage as against the landlord, though not, of course, anything like the full advantage to which she would be entitled if she could claim to be a protected or statutory tenant.

E Having stated, so far, the claim of the sub-tenant, it is, I think, clear that in order that there should be some common law right in the sub-tenant there must have been a corresponding common law right in the tenant when the contract of sub-tenancy was made. The facts appearing from the pleadings indicate that many years ago the whole dwelling-house was let to the tenant by the landlord, and that that tenancy (that is, the original contractual tenancy) was terminated by the service on the tenant of a statutory notice of increase of rent, with the result that the tenant became a statutory tenant and remained in occupation as such until Sept. 23, 1952, when she gave up her rights of occupation to the F landlord. If those allegations are correct, it follows that at any rate when she gave up her right of occupation (and I think also, if I understand the pleadings aright, when she granted the sub-tenancy to the sub-tenant) she was a statutory tenant, a person who has been said time and time again to have no estate or interest in the land of the kind understood by the common law. Her right was one which was exclusively derived from the Acts of 1920 to 1939 and was a right G to remain (subject to conditions) in occupation.

H Counsel for the sub-tenant, in opening this case, observed that, if a tenant has his interest determined as on forfeiture, it follows that (subject to any special statutory rights there may be under the Law of Property Act, 1925, or otherwise) an interest derived out of the tenant's estate will fall with the tenancy, but there is, he said, a well-established exception to that principle, namely, the case of voluntary surrender. The matter is stated in FOA'S GENERAL LAW OF LANDLORD AND TENANT, 7th ed., p. 627, plainly and (as far as I can see from looking at the cases) accurately, thus:

"Hence, where the lessee underlets a portion of the demised premises, and afterwards surrenders his lease to the lessor, the latter cannot dispossess the under-lessee without determining his interest in a regular manner, notwithstanding that the under-lessee has notice of the surrender, or that the lease itself was at the time of surrender liable to forfeiture".

Counsel's first argument was that that passage applies here even though the transaction was, not a surrender of an estate by a lessee, but a surrender, so called, by a statutory tenant of his statutory right, that is to say, a giving up voluntarily of the statutory right of occupation. I am unable to accept that argument. A reference to the cases seems to me to indicate plainly that the proposition which I have cited from *FOA* rests on the existence of an estate and on a surrender in the true sense of the term—that is, a voluntary giving up of an estate so as to permit it to merge in the superior estate—and, further, on the proposition that, for the protection of a sub-tenant who has been granted a subsidiary interest, the estate which otherwise would be surrendered and would disappear persists so as to permit the continued existence, until proper determination, of the subsidiary interest.

The matter is stated clearly by LORD COKE in a passage cited by LORD ELLENBOROUGH, C.J., in *Doe d. Beadon v. Pyke* (1). LORD COKE's observation (Co. Litt. 338, b.) is quoted as follows (5 M. & S. 154):

"LORD COKE, after noticing, that as between the parties to a surrender the estate is absolutely drowned, says, 'But having regard to strangers who were not parties or privies thereunto, [i.e., to the surrender] (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender,) the estate surrendered hath, in consideration of law, a continuance . . .'"

Unless it can be said that the tenant had, either at the time of the grant of the tenancy, or of the surrender, or both, some interest capable of existing in law as an estate, out of which interest was carved or created the sub-tenant's interest, the proposition which I have cited from *FOA*, on which the appeal rests, falls altogether to the ground.

The answer to this appeal seems to me to be that the essential premise in fact does not exist. For I am satisfied not only that counsel for the sub-tenant cannot now claim in this court that the tenant had anything other than a statutory tenancy at any relevant date, but also that she had not as a fact. It is to be noted that the defence does not put in issue the allegation that the dwelling-house was let to the tenant on a weekly tenancy which was terminated by a notice of increase of rent. The defendant merely says that she has no knowledge of those facts save as to the original letting (which inferentially she concedes). I think it is clear that in the county court the matter proceeded without there being any attention directed to what, in the end, was an essential matter of fact. I have no doubt that the learned county court judge proceeded on the view that the tenant was at all relevant dates a statutory tenant, and I think clearly that is the right inference, even apart from what I think was in effect conceded on the pleadings. The tenant eventually retired from the premises at the age of eighty, having been there a very long time.

On general principles, and paying due regard to common sense, as DENNING, L.J., pointed out in *Brock v. Wollams* (2) that the inevitable inference is that the tenant at all material dates was a statutory tenant. That being so, as I have said, I think that the basis for counsel for the sub-tenant's attractive and forceful argument is removed, for it is significant at once that, though you may talk of a surrender, what happened was not a surrender as properly understood by the law. It was not an attempt to drown an estate. It was a mere voluntary giving up of a statutory right of occupation, and, therefore, the premise on which the proposition in *FOA* is rested is found in this case to be absent. I, therefore, think that this appeal fails and must be dismissed.

DENNING, L.J.: When a statutory tenant sub-lets a part of the premises, he does not thereby confer any estate or interest on the sub-tenant. A statutory tenant has no estate or interest himself, and he cannot carve something out of nothing. The sub-tenant, like the statutory tenant, has only a personal right or

A privilege. The question is: What is the position of the sub-tenant when the statutory tenancy comes to an end? A statutory tenancy may, of course, come to an end without a notice to quit, e.g., by death (if there are no entitled relatives) or by the delivery up of the premises to the landlord. When the statutory tenancy comes to an end, the sub-tenant's right automatically comes to an end unless there is some statutory protection afforded to him. An ordinary sub-tenant is protected under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and becomes the direct tenant of the head landlord, on the same terms as those on which he would have held from the previous tenant. But a sub-tenant who has been sharing with the tenant is not protected. That is shown by *Shackleton v. Greenhalgh* (3) and *Stanley v. Compton* (4). In the present case the sub-tenant was a sharing sub-tenant and her right came to an end as soon as the statutory tenant surrendered the premises to the landlord. B It was suggested that the sharing sub-tenancy might have been created during the contractual tenancy. But even so, when the contractual tenancy came to an end by notice of increase or notice to quit, the contractual sub-tenancy also came to an end. Thereafter the position was the same as if the sub-tenancy had been created during the statutory tenancy. On the statutory tenancy coming to an end, the sharing sub-tenancy also came to an end. C I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree. Counsel for the sub-tenant's argument was founded on the conception that the tenant was a contractual tenant at all material times, and he relied, therefore, on the principle that a sub-tenancy which is created out of a contractual tenancy survives the destruction of the D tenancy if the tenancy comes to an end by surrender. But once he found himself, as he did, driven from the basis that the tenancy was a contractual tenancy, he was, I think, in an impossible position, because it is plain that a statutory tenant has no legal or equitable estate which can be the subject of a surrender to the reversioner or out of which a subsidiary estate may be taken by a sub-tenant. All he has is a personal right of occupation which he can bring to an end by E relinquishing possession. That is different from surrendering an estate which will merge in the superior estate of the reversioner. I, accordingly, agree that the appeal fails.

Appeal dismissed.

Solicitors: *Donovan J. Smalley*, Whetstone (for the sub-tenant); *Ellis & Ellis* (for the landlord).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* BROADWAY
COTTAGES TRUST. INLAND REVENUE COMMISSIONERS *v.*
SUNNYLANDS TRUST.

[CHANCERY DIVISION (Wynn-Parry, J.), March 4, 5, 11, 1954.]

Settlement—Uncertainty—Imperative direction to trustees to distribute income—Unascertainable class of beneficiaries.

Income Tax—Settlement—"Income" of beneficiaries—Uncertainty—Imperative direction to trustees to distribute whole income—Unascertainable class of beneficiaries.

A clause in a settlement declared trusts of the capital of a trust fund for a class of beneficiaries the members of which were agreed to be unascertainable at any given moment, with the result that the clause was void for uncertainty. By another clause, during a defined period, the trustees were to hold the income of the trust fund "upon trust to apply the same for the benefit of all or any one or more of the donor's said wife and the beneficiaries in such shares proportions and manner as the trustees in their discretion from time to time think fit," and the discretion was further declared to be "absolute and uncontrolled".

HELD: the second clause was an imperative direction to the trustees to distribute the whole of the income from the trust fund (subject to an immaterial qualification) among such members of an unascertainable class as they might in their absolute and uncontrolled discretion think fit, and was, therefore, void for uncertainty, and a payment to a charity under it was not income of the charity exempt from income tax under s. 37 (b) of the Income Tax Act, 1918.

Re Ogden ([1933] Ch. 687), applied.

AS TO POWERS OF APPOINTMENT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 513-525, paras. 929-953; and FOR CASES, see DIGEST, Vol. 37, pp. 426-429, Nos. 345-366.

FOR THE INCOME TAX ACT, 1918, s. 37, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 31.

Cases referred to:

- (1) *Re Ogden*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- (2) *Re Gestetner (dec'd.)*, [1953] 1 All E.R. 1150; [1953] Ch. 672.
- (3) *Houston v. Burns*, [1918] A.C. 337; 1918 S.C. (H.L.) 88; 87 L.J.P.C. 99; 118 L.T. 462; 44 Digest 542, 3593.
- (4) *Re Deakin*, [1894] 3 Ch. 565; 63 L.J.Ch. 779; 71 L.T. 838; 44 Digest 821, 6721.
- (5) *Grant v. Lynam*, (1828), 4 Russ. 292; 6 L.J.O.S.Ch. 129; 38 E.R. 815; 37 Digest 458, 594.
- (6) *Salisbury v. Denton*, (1857), 3 K. & J. 529; 26 L.J.Ch. 851; 30 L.T.O.S. 63; 21 J.P. 726; 69 E.R. 1219; 37 Digest 526, 1173.
- (7) *Re Scarisbrick*, [1951] 1 All E.R. 822; [1951] Ch. 622; 2nd Digest Supp.
- (8) *Re Jones*, [1945] Ch. 105; 115 L.J.Ch. 33; 173 L.T. 357; 2nd Digest Supp.

CASES STATED by the Special Commissioners of Income Tax.

The taxpayers, two trusts established for charitable purposes only, applied to the commissioners to hear and determine their claims for exemption from income tax for 1950-51 and (the first trust only) 1951-52, relating to sums of money received from a settlement dated July 14, 1950, and made between a Mr. Alan Geoffrey Timpon, the settlor, and trustees. The taxpayers contended that the sums were income of the taxpayers, and it was common ground that the question depended on the validity of provisions in the settlement. The settlement provided:

"(1) In this settlement the following expressions shall where the context

so admits have the following respective meanings and shall be construed in the following manner, viz.: . . . (c) 'The appointed period' means a period beginning on the date hereof and continuing until terminated under the power hereinafter contained or if not so terminated until twenty years after the death of the last survivor now living of the issue of his late Majesty King George V. (d) 'The beneficiaries' mean the persons specified in the schedule hereto and 'beneficiary' means one of the beneficiaries . . . (4) The trustees shall hold all such investments as aforesaid and the varied investments and property and interests in property from time to time representing the same and all other investments and property and interests in property (if any) from time to time subject to the trusts hereof (all of which are hereinafter included in the expression 'the trust fund') upon trust for such of the beneficiaries as shall be living or (being a charitable trust) existing at the termination of the appointed period and if more than one in equal shares. (5) The interest to be taken under the last preceding clause hereof by any beneficiary at the termination of the appointed period shall be an absolute interest. (6) [Trustees' powers to declare the appointed period to be terminated as to whole or part of the trust fund at an earlier date with effect as if terminated by effluxion of time]. (7) And if all the beneficial trusts hereinbefore declared shall fail . . . then the trust fund and the income thereof shall be held upon charitable trusts to be declared by the trustees . . . to the intent that neither the donor or any wife or widow of his shall in any event whatsoever take any interest by way of resulting trust or otherwise in the trust fund or the income thereof or any accretions thereto or in any part of the same. (8) During the appointed period the trustees shall hold the income of the trust fund from the date or respective dates from which the trustees shall be entitled to such income upon trust to apply the same for the benefit of all or any one or more of the donor's said wife and the beneficiaries in such shares proportions and manner as the trustees in their discretion from time to time think fit (and so that such moneys as the trustees may from time to time think fit to apply for the benefit of any of the beneficiaries who shall have attained the age of twenty-one years be paid to him or to her on his or her receipt which shall be a completed discharge to the trustees) . . . (15) Every discretion hereby conferred on the trustees shall be an absolute and uncontrolled discretion and may (if and so far as circumstances permit) be exercised from time to time.

"The Schedule: 1. All persons (other than the settlor and any wife of his and any infant child of his) who have been in the past or (as the case may be) at the date of these presents or subsequently thereto at any time during the period ending on Dec. 31, 1980, or during the appointed period whichever shall be the shorter employed by:—(a) the settlor (b) the wife of the settlor (c) William Timpson deceased (father of the settlor and who died on Jan. 20, 1929) (d) Katherine Chapman Timpson deceased (mother of the settlor and who died on Dec. 16, 1940) (e) William Timpson, Ltd., or by any other limited company which may succeed to the business of William Timpson, Ltd. (f) any other limited company of which the settlor is a director at the date of these presents. 2. The wives and widows of any such persons as is specified in cl. 1 of this schedule. 3. All persons (other than the settlor and any wife of his and any infant child of his) who are the issue however remote of the said William Timpson deceased (father of the settlor and who died on Jan. 20, 1929) and Charles Henry Rutherford deceased (father of the wife of the settlor and who died on Feb. 17, 1930). 4.-11. [various named persons and in particular cases their issue and spouses.] 12. Broadway Cottages Trust and Sunnylands Trust (both being charitable foundations)."

According to the evidence of the accountant of William Timpson, Ltd., which

the commissioners accepted, the original business was founded in 1870 by William Timpson, who died in 1929. A private company, William Timpson, Ltd., was registered in 1912, and the present public company of the same name was incorporated in 1929. The present company had complete records of all employees since its incorporation with addresses of past employees at the time of leaving the company's service, but no record of whether any had married after leaving such service.

The Crown contended that, in construing the deed, the whole deed must be looked at, including the clauses relating to the capital and those dealing with the income of the settled fund; that a complete and exhaustive list of all the beneficiaries entitled to participate in a distribution of the capital could not be provided; that the deed was void for uncertainty; and, therefore, that the sums received by the taxpayers from the trustees were not income of the taxpayers, who were not entitled to exemption from income tax in respect of them under the Income Tax Act, 1918, s. 37 (b). The taxpayers contended that the validity of the trusts affecting the income of the settled fund was not affected by the validity or otherwise of the trusts relating to the capital of the settled fund; that the proper test of the validity of the power of selection in regard to the income of the trust fund among the beneficiaries given to the trustees by cl. 8 of the settlement was whether the qualification of the class was such that it could be determined whether any given person possessed the qualification, and the qualification required was neither mental nor moral but in the nature of facts which could be determined by the court; and that the power to appoint the income was valid and the sums received by the taxpayers were their income in respect of which they were exempt from income tax. The commissioners held that the trusts so far as relating to the income were not void for uncertainty, but the trustees had a power of selection and there was a valid and effective trust of the income of the trust fund, with the attendant consequence that the sums of money were income of the taxpayers and were exempt from income tax. The Crown appealed.

Cross, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.
Pennycuik, Q.C., and Brennan for the respondent taxpayers.

Cur. adv. vult.

Mar. 11. **WYNN-PARRY, J.**, read the following judgment. These two cases are indistinguishable. They were heard together, and I propose to give one judgment covering both. I propose first to construe, so far as necessary, the settlement of July 14, 1950, which has given rise to the dispute. Clause 1, which is a definition clause, contains a definition as beneficiaries of those who are to be regarded as objects of the powers and trusts established by the document. The definition is by way of reference to the schedule. I need not refer to that schedule, because it is common ground that the class there defined is a class, the members of which are unascertainable at any given moment. The subject of the settlement is the sum of £80,000 mentioned in the recital and in cl. 2 and cl. 3. Clause 4 declares the trusts relating to the capital of the trust fund, namely:

"for such of the beneficiaries as shall be living or (being a charitable trust) existing at the termination of the appointed period and if more than one in equal shares".

The appointed period is within the perpetuity period. By cl. 5 the interests of the beneficiaries under cl. 4 are declared to be absolute interests. It is agreed that, as the class of beneficiaries is one the members of which are unascertainable at any given moment, cl. 4 is void for uncertainty. I need not and do not decide what in those circumstances is the destination of the trust funds.

The critical clause for the purpose of this appeal is cl. 8. I read this clause as containing an imperative direction to the trustees to distribute the whole of the

income from the trust funds, subject to the provisions of cl. 9, which do not affect the question before me, among such of the members of an unascertainable class as they may in their discretion from time to time think fit, a discretion which having regard to cl. 15 is an absolute and uncontrolled discretion. On this view of the clause, these two cases would appear *prima facie* to be covered by the judgments of LORD TOMLIN in *Re Ogden* (1), and of HARMAN, J., in *Re Gestetner (decd.)* (2). In *Re Ogden* (1) the relevant bequest was in the following language ([1933] Ch. 679):

“Four per cent. [of his residuary estate] to the Right Honourable Sir Herbert Samuel to be by him distributed amongst such political federations or associations or bodies in the United Kingdom . . . having as their objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select, and in such shares and proportions as he shall in the like discretion think fit”.

Now, I agree with HARMAN, J. (see [1953] 1 All E.R. 1154), that the direction in that bequest was absolute and it is clear that the judgment of LORD TOMLIN proceeded on this basis. He says ([1933] Ch. 682):

“Now, applying these principles to this case, and leaving out of account the question whether there is an illegal trust, all that I have to consider is, whether there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select. If so, the bequest is bad on the ground of uncertainty. The question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad. Now, it is to be observed that in the present case the field of selection is: ‘Political federations or associations or bodies in the United Kingdom, having as their objects or one of their objects the promotion of Liberal principles’”.

In other words, LORD TOMLIN is saying that, if the selector can draw up a complete list of the objects from whom he is to select, then there is certainty and the trust is good: if he cannot do so, the trust is void for uncertainty. It is on the basis of this test that he proceeds (*ibid.*):

“I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and who states that, in fact, he can ascertain by inquiry all the bodies that can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection. It comes within the words of LORD ATKINSON in *Houston v. Burns* (3) ([1918] A.C. 345): ‘I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all’. Now, it seems to me that here you have a class capable of ascertainment, and in a specified area, and in my view the bequest is not void on the ground that the field is too vague. I hold that the gift is not void for uncertainty.”

It is argued that the words ([1933] Ch. 682): “If so, the bequest is bad on the ground of uncertainty” are mere obiter dicta. I cannot so regard them. It is true that, in fact, there was evidence before the court which enabled LORD TOMLIN to conclude that there was no uncertainty, but it was because, and only because, of that circumstance that he was able to reach that conclusion. The statement of principle which, in my opinion, emerges from the judgment is that an imperative trust for the distribution of a fund (whether capital or income appears to me to be immaterial) among a class or such members thereof as the

selector may select depends for its validity on the answer to the question: Is the class capable of ascertainment? If the answer is "Yes", the trust is valid. If the answer is "No", it is void for uncertainty.

This is the view of the matter which was taken by HARMAN, J., in *Re Gestetner* (2). In his judgment he says ([1953] 1 All E.R. 1154):

"That decision [*Re Ogden* (1)] turned on the view of the judge that he could accept the evidence of Sir Herbert Samuel that the totality of the objects was ascertainable; had he not had that evidence, he would have held the power to be bad. There was no gift over, and Sir Herbert Samuel had an absolute duty to distribute a share of the residue. He merely had the right to say to whom, among a number of persons, he would distribute it. If, therefore, all those persons had joined together and had agreed to take it in equal shares, they could have put an end to Sir Herbert's discretion. They could have come to the court and had the fund distributed equally between them. That being so, it was in effect a gift to all of them in such proportions as Sir Herbert should select. One can see, therefore, that certainty among the objects was a necessity".

This passage shows clearly the reason why the rule has emerged that, in cases of an imperative trust to distribute, there must be certainty as to the objects. HARMAN, J., in *Re Gestetner* (2) was able to distinguish the case before him from *Re Ogden* (1), because he found, as a matter of construction, that the document in question conferred a bare power as opposed to a duty to distribute. He says (*ibid.*, 1155):

"... there is in this case an express power in the trustees to exclude members from the specified class, but not so that no members of the specified class remain. In other words, they are not entitled entirely to release the power. That means that they are bound to consider at all times during which the trust is to continue whether or no they are to distribute any, and, if so, what, part of the fund, and to whom they should distribute it. To that extent I have no doubt that there is a duty on these trustees, and that a member of the specified class might, if he could show that the trustees had deliberately refused to consider any question of the want or suitability of any member of the class, procure their removal. However, there is not, as in *Re Ogden* (1), any duty on the trustees to distribute either income or capital among the members of the specified class, and, if all those members joined together, they could not divide the fund between them, because there is still the class to take in default of appointment, and the deed shows on the face of it that there is no obligation on the trustees to do more than consider from time to time the merits of such persons of the specified class as are known to them, and, if they consider them meritorious, to give them something. The settlor had good reason to trust the persons whom he appointed as trustees, I have no doubt, but I cannot see that there is here such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field and consider whether A is more deserving of bounty than B. That is a task which is, and which must have been known to the settlor to be, impossible, having regard to the ramifications of the persons who might be members of this class. If, therefore, there is no duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust or this whole power is bad".

On the view which I take of *Re Ogden* (1) and the fact that the same view of it is taken by HARMAN, J., in *Re Gestetner* (2), I say again that, *prima facie*, the present two cases would appear to be covered by *Re Ogden* (1). It is said, however, by counsel for the taxpayers, first, that, so far as the points raised in the present appeals are concerned, the judgments of LORD TOMLIN in *Re Ogden* (1) and the

remarks thereon of HARMAN, J., in *Re Gestetner* (2) are obiter dicta, and that, if the line of cases, conveniently called "the relations cases", had been cited to LORD TOMLIN, he would not have said, as according to counsel for the taxpayers he need not have said: "If so, the bequest is bad on the ground of uncertainty".

In *Re Deakin* (4) STIRLING, J., said of this line of cases ([1894] 3 Ch. 575):

A "The law on that point is certainly in a peculiar state, and I do not express any opinion as to whether it is entirely satisfactory or not; I simply have to administer it as I find it".

That is a plain indication that, in the view of that learned judge, the cases embody a principle, which, though useful, should not be extended, certainly not more than is necessary, to effect the limited purpose for which the principle was introduced.

B It appears to me that counsel for the Crown is right when he submits that, when examined, all these cases are found to be examples of a mere power to distribute and not of an imperative direction, as in this case. *Grant v. Lynam* (5), *Salisbury v. Denton* (6), *Re Deakin* (4), *Re Scarisbrick* (7) and *Re Jones* (8) are all examples of mere powers of distribution. On this view of the matter it becomes impossible, in my view, to place any qualification on the principle on which, as it appears to me, the judgment in *Re Ogden* (1) proceeded, and if it
C be remarked, as it was in argument, that the relations cases were not cited in that case, the short answer can be given that that omission can be justified on the best of all grounds—they were irrelevant.

If a reason be asked for the existence of the principle stated in *Re Ogden* (1), it is to be found, I think, in a sentence from the judgment of HARMAN, J., in *Re Gestetner* (2) ([1953] 1 All E.R. 1153):

D "It may often be uncertain what objects are in existence, but, in an ordinary family settlement, the fact that a settlor did not know whether one of his sons had married and had children could not possibly make the exercise by him of a power of appointment in favour of those grandchildren of whose existence he did know bad. On the other hand, if it be the duty of
E the trustee to distribute the fund among a certain number of persons, his task being to select which of those persons shall be the objects of bounty, it seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly".

For these reasons I come to the conclusion that these two appeals are covered by *Re Ogden* (1), by which I am bound, but with the judgment in which and the
F observations thereon of HARMAN, J., in *Re Gestetner* (2) I respectfully agree. It follows that I must treat the trust of income in cl. 8 of the deed as void. On this view of the matter, it becomes unnecessary to consider the second point put forward by counsel for the Crown. The appeal of the Crown in these two cases will be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Boxall & Boxall*, agents for *Wilson & Wilson*, Kettering (for the taxpayers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INNES (INSPECTOR OF TAXES) *v.* HARRISON.

[CHANCERY DIVISION (Wynn-Parry, J.), March 4, 5, 11, 1954.]

Perpetuities—Rule against perpetuities—Settlement—Trust fund distributable “at such time or times” as the trustees think fit—Objects not limited to lives in being—Trustees “means . . . the first trustees and . . . the trustees or trustee for the time being”—Single indivisible trust.

Income Tax—Settlement—“Income” of beneficiaries—Trust offending against rule against perpetuities.

A

The objects of a trust were individuals living within a period terminating in 1959 or on the death of the settlor if earlier, who were inter alia the relatives of the settlor and of others (defined as the descendants of their grandparents, with their wives and husbands). The deed contained the following provisions: “‘The trustees’ means and includes the first trustees [named in the statement of parties to the deed] and the survivor of them and the trustees or trustee for the time being of this deed . . . The trustees shall pay or apply the trust fund to or for the benefit of such one or more of the objects of the trust . . . at such time or times . . . as the trustees in their discretion shall from time to time think fit.”

B

HELD: (i) the deed could not be read as impliedly meaning that the trustees must distribute within a reasonable time which could not extend beyond twenty-one years;

C

(ii) having regard to the definition of trustees as meaning the first trustees and (not or) the trustees for the time being, the trust was a single indivisible trust and not two trusts, the first to the first trustees, distribution by whom would be limited to their lifetime, and the second to their successors;

D

Re De Sommersy ([1912] 2 Ch. 622) and *Attenborough v. Attenborough* (1855) (1 K. & J. 296), distinguished.

(iii) the trust was, therefore, void as offending against the rule against perpetuities and a payment made under it was a gift to, and not income of, the recipient, entitling him (an infant) to claim personal allowances in respect of income tax relating thereto.

E

AS TO THE RULE AGAINST PERPETUITIES AS AFFECTING EQUITABLE INTERESTS AND AS AFFECTING SEVERABLE POWERS, see *HALSBURY*, Hailsham Edn., Vol. 25, pp. 104-108, paras. 193-197, and p. 150, para. 253; and FOR CASES, see *DIGEST*, Vol. 37, pp. 76-79, 107, 108, Nos. 172-194, 413-415.

Cases referred to:

F

(1) *Inland Revenue Comrs. v. Broadway Cottages Trust*, *Inland Revenue Comrs. v. Sunnylands Trusts*, ante, p. 878.

(2) *Re De Sommersy*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 253, 823; 37 Digest 107, 414.

(3) *Attenborough v. Attenborough*, (1855), 1 K. & J. 296; 25 L.T.O.S. 155; 69 E.R. 470; 37 Digest 107, 413.

G

CASE STATED by the General Commissioners of Income Tax for the Desborough division, Buckinghamshire.

The taxpayer, as parent and on behalf of G. J. C. Harrison, appealed under the Income Tax Act, 1918, s. 27 (5), against the Crown's objection to a claim for repayment of income tax for 1949-50 and 1950-51 in respect of payments made under a deed of settlement dated May 1, 1949, to G. J. C. Harrison. The deed provided:

H

“(1) In this deed the following expressions shall have the following respective meanings: (a) ‘The trustees’ means and includes the first trustees and the survivor of them and the trustees or trustee for the time being of this deed. (b) ‘The appointed period’ means a period beginning on Apr. 6, 1949, and terminating on Mar. 31, 1959, or the death of the settlor (whichever

shall be the earlier date). (c) 'Relatives of the settlor' means and includes all the descendants of the settlor's grandparents (other than the settlor himself) and the wives and husbands of such descendants (other than any wife of the settlor). (d) 'Relatives' in relation to any person other than the settlor means and includes all the descendants of such person's grandparents (other than such person himself or herself) and the wives and husbands of all such descendants (including any wife or husband of such person himself or herself). (e) 'The objects of the trust' means and includes such of the following individuals as shall from time to time during the appointed period be living (that is to say): (i) relatives of the settlor (including in particular the lawful children of the settlor's three daughters each child to receive not less than £50 per annum) . . . (ii) individuals who have at any time been or are at the date of this deed or shall at any time during the appointed period be in the employment of any company of which the settlor is at the date of this deed or shall at any time during the appointed period be a director . . . (iii) relatives of the individuals mentioned in the last preceding sub-paragraph; (iv) such other individuals as the settlor shall from time to time name by a deed expressed to be supplemental to these presents Provided always that neither the settlor nor any wife of his shall in any event be included among the objects of the trust. (2) The settlor hereby covenants with the trustees that during the appointed period he the settlor will pay to the trustees the monthly sum of £166 13s. 4d. without any deduction except for income tax by equal monthly payments on the last day of each calendar month [commencing Apr. 30, 1949] . . . (3) The trustees shall pay or apply the trust fund to or for the benefit of such one or more of the objects of the trust in such shares (if more than one) at such time or times and in such manner as the trustees in their discretion shall from time to time think fit. (4) The discretion hereby conferred on the trustees shall be an absolute and uncontrolled discretion and may (if and so far as circumstances permit) be exercised from time to time . . ."

On Mar. 28, 1950, the trustees paid £700 less £315 tax at 9s. in the pound, or £385, under the settlement to G. J. C. Harrison, a grandchild of the settlor, for whom a claim for reliefs under the Income Tax Acts was made. The taxpayer contended that the deed was a settlement within the meaning of the Finance Act, 1938, s. 41 (4) (b), that the objects of the trust were sufficiently certain to enable it to be enforced, and that the taxpayer, as parent of G. J. C. Harrison, was entitled to claim personal allowances. The Crown contended that the deed was void for uncertainty and there was a resulting trust of income in favour of the settlor, with the consequence that the property reverted to the settlor and the sum paid was income of the settlor and there was no right to claim reliefs. The commissioners held that the deed was a settlement as defined by the Finance Act, 1936, and the Finance Act, 1938, and that recipients of moneys from the trustees were entitled to claim repayment of personal allowances. The Crown appealed.

Cross, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.
J. A. Wolfe for the taxpayer.

Cur. adv. vult.

Mar. 11. WYNN-PARRY, J., read the following judgment. The judgment in *Inland Revenue Comrs. v. Broadway Cottages Trust*, *Inland Revenue Comrs. v. Sunnylands Trust* (1) covers this case also, but, perhaps, I ought shortly to state my views on the further point taken by the Crown in this case, namely, that the trust in cl. 3 of the deed of May 1, 1949, offends against the rule against perpetuities, because that clause provides that the application of the fund may be made "at such time or times" as the trustees may think fit. The trustees, it is said, cannot be compelled as to when they distribute, and, further, the objects of the power are not necessarily lives in being and there is nothing in the trust

to confine the period to the lives of objects. If this is well taken, it is clear that the clause offends against the rule against perpetuities.

Counsel for the taxpayer, in an endeavour to avoid this consequence, submitted that I should read cl. 3 as carrying an implication that the trustees must distribute within a reasonable time, and that such a reasonable time could not extend to twenty-one years. I cannot accept this. Apart from the consequences of the application of the rule, there is no ground for implying any such qualification, and the fact that, unless that implication is made, the rule will apply, is no ground for making the implication. A

Counsel also contended that the case fell within the last example given by PARKER, J., in *Re De Sommery* (2), where he said ([1912] 2 Ch. 631):

"Lastly, where the settlor has used language from which the court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the court will avoid the latter only and will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has, so far as I can discover, been uniformly looked on as a single and indivisible power, it may be otherwise if the power be limited to A and B or other the trustees of the settlement for the time being. In this case the court may treat the settlor as having created one power vested in A and B while trustees, and a distinct power vested in their successors, in which case the power vested in A and B would be open to no objection on the ground of remoteness: *Attenborough v. Attenborough* (3)." B C

I cannot see any room for the application of that last example in this case. It is true that the settlor defines Messrs. Wells and Stone as "the trustees" in the statement of the parties, but in cl. 1 (a) he enlarges the definition of "the trustees" and directs not only that it shall "include" but shall "mean" the two gentlemen, Messrs. Wells and Stone, to whom the draftsman is now constrained to refer as "the first trustees" and the survivor of them, and—not or—the trustees or trustee for the time being of the deed. It appears to me that the effect of that language is to create a single and indivisible trust and not two trusts, one in the first trustees and a second in future trustees. I am of the view, therefore, that cl. 3 of the deed is void as offending against the rule against perpetuities. In this case also, therefore, the appeal will be allowed with costs. D E

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Tyrrell, Lewis & Co.* (for the taxpayer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BRITISH SCHOOL OF EGYPTIAN ARCHAEOLOGY.
MURRAY AND OTHERS v. PUBLIC TRUSTEE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 4, 5, 1954.]

Charity—Education—British School of Egyptian Archaeology—Diffusion of, and education of students in, special branch of knowledge—Contributors to be supplied with school's publications—Discontinuance of school—Application of surplus assets.

A The British School of Egyptian Archaeology was an unincorporated body, founded in 1905 by Sir Flinders Petrie, its objects, as stated in reg. 3 of its regulations, being "A. To conduct excavations and to pay all expenses incidental thereto. B. To discover and acquire antiquities and to present the same to public museums. To hold exhibitions, when practicable. C. To publish works. D. To promote the training and assistance of students. All of these objects shall be carried on in relation to Egypt and any part of the former kingdom of Egypt." By reg. 4: "All money received by contribution, bequest, or sales of books, shall be applicable to the above purposes only." Regulation 9, which was headed "Of Contributors", provided: "All contributors of one guinea or two guineas annually are members of the school and shall receive the corresponding publication of work free. Those who contribute a larger amount annually or at once shall receive a corresponding value of publications when such be issued, or antiquities may be allocated to such public museums as they desire." The list of contributions which accompanied the school's report and balance sheet for the year 1928-29 showed that individual contributions varied from one guinea to £500. At the end of the report there appeared: "Annual payments made by contributors to the British School of Egyptian Archaeology: Ordinary annual contribution to receive the volume or volumes, two guineas. Contribution to receive other volumes or in part payment of annual volume, one guinea." The outbreak of war in 1939 put an end to the school's main activities and after the death of Sir Flinders Petrie in 1942 it was never a going concern. After the war, owing to the uncertainty of the political situation in the Middle East, it was impossible to carry out most of the school's objects, and the committee wished to wind-up its affairs. The assets amounted to about £4,000. On a summons to determine, inter alia, (i) whether the funds were held on valid charitable trusts, and (ii) if not, whether they should be re-paid to the contributors in proportion to their respective contributions,

HELD: (i) the object of the school being the diffusion of a certain branch of knowledge, viz., Egyptology, and the training of students in Egyptology, the school had a direct educational purpose, and, therefore, it was a charitable institution.

G *Beaumont v. Oliveira* (1869) (4 Ch. App. 309), applied.

(ii) although the contributions were given on a contractual basis to the extent that a contributor was entitled, within the value of his contributions, to such works as the school decided to publish, he was entitled to nothing further and must be taken to have parted with his money once and for all when he gave his contributions, and, therefore, the contributions were held on valid charitable trusts, and, on the winding-up of the school's affairs, the surplus funds should be applied cy-près.

H *Re Welsh Hospital (Netley) Fund* ([1921] 1 Ch. 655) and *Re North Devon & West Somerset Relief Fund Trusts* ([1953] 2 All E.R. 1032), applied.

AS TO CHARITABLE INTENTION, see HALSBURY, Simonds Edn., Vol. 4, p. 267, para. 562; and FOR CASES, see DIGEST, Vol. 8, pp. 291-297, Nos. 686-740.

Cases referred to:

- (1) *Re Norwich Town Close Estate Charity*, (1888), 40 Ch.D. 298; 60 L.T. 202; 8 Digest 406, 2414.
- (2) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (3) *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp. A
- (4) *Beaumont v. Oliveira*, (1869), 4 Ch. App. 309; 38 L.J.Ch. 239; 20 L.T. 53; 33 J.P. 391; 8 Digest 257, 193.
- (5) *Re Slevin*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 8 Digest 346, 1404.
- (6) *Re Hillier*, [1953] 2 All E.R. 1547.
- (7) *Re Welsh Hospital (Nelley) Fund*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest 349, 1444. B
- (8) *Re North Devon & West Somerset Relief Fund Trusts*, [1953] 2 All E.R. 1032.

ADJOURNED SUMMONS to determine, inter alia, (i) whether the funds and investments the property of the British School of Egyptian Archaeology were held on valid charitable trusts, and, if so, that it might be referred to chambers to settle a scheme for the application of so much of the said funds and investments as were not required by the school to defray the cost of publication of a work by the late Sir Flinders Petrie to the foundation at University College, London, to the creation of scholarships for the study of Egyptian archaeology to be known as "Flinders Petrie scholarships"; (ii) if the funds were not held on valid charitable trusts, whether, in the events which had happened, so much of the said funds and investments as were not required by the school to defray the costs of the publication of the said work ought to be repaid to the donors and subscribers to the school in proportion to their respective donations and subscriptions. C D

The school was an unincorporated body, founded in 1905 by the late Professor Sir Flinders Petrie. Its regulations, which were adopted by a meeting of constitution of the school on July 21, 1905, and revised by the executive committee of the school on Apr. 24, 1936, were as follows: E

"1. The name of this association is the British School of Egyptian Archaeology. 2. . . . The office of this association is at University College, London. 3. The objects of this association shall be any or all of the following:—A. To conduct excavations and to pay all expenses incidental thereto. B. To discover and acquire antiquities and to present the same to public museums. To hold exhibitions, when practicable. C. To publish works. D. To promote the training and assistance of students. All of these objects shall be carried on in relation to Egypt, and any part of the former kingdom of Egypt. Exceptions may be considered. 4. All money received by contribution, bequest, or sales of books, shall be applicable to the above purposes only . . . 7. Publication of results shall be as rapid as practicable; and all drawing and writing shall be finished for this purpose before fresh work be undertaken, unless the executive determines otherwise. 8. Students joining the school shall devote most of their time to such work, and in such manner, as the director and assistant director shall agree upon with them. Their notebooks shall be inspected by the director, and shall revert to the school. They shall report the results of their work, and prepare them for publication, if required, before undertaking fresh subjects of work . . . 9. Of Contributors: All contributors of one guinea or two guineas annually are members of the school and shall receive the corresponding publication of work free. Those who contribute a larger amount annually or at once shall receive a corresponding value of publications when such be issued, or F G H

antiquities may be allocated to such public museums as they desire. Contributors of 7s. or 10s. are associates, and shall receive the half-yearly bulletin."

The school's report for the year 1928-29, which was before the court, and a copy of which had been sent to contributors, contained a list of the school's patrons and the members of the general and executive committees. It stated that Sir Flinders Petrie was honorary director and that his wife was the organising secretary. The report set out the school's activities and contained a list of the contributions for the year which amounted to nearly £3,000, the individual amounts ranging from one guinea to £500, one guinea being the most usual amount. The report ended:

"Annual payments made by contributors to the British School of Egyptian Archaeology: Ordinary annual contribution to receive the volume or volumes, two guineas. Contribution to receive other volumes or in part payment of annual volume, one guinea. Ancient Egypt and illustrated quarterly journal, four parts, post free 7s. Associateship of school, journal supplied post free, 10s."

There was appended a balance sheet which showed the school's assets, represented by investments, to be worth about £8,000.

In 1935 Sir Flinders Petrie removed the main activities of the school to Palestine. The outbreak of war in 1939 put an end to the work of excavation. In 1942 Sir Flinders died. He left a large amount of material which was considered worthy of publication, and after the war two volumes were published and distributed among contributors. They were also sold to the public, the retail price of each being two guineas. At the date of the summons a third volume was in the course of being printed. Since Sir Flinders' death the school had never been a going concern. After the war, owing to the uncertainty of the political situation in the Middle East, it was found impossible to carry out objects A., B., and D., in reg. 3 of the school's regulations, and those responsible for the conduct of the school came to the conclusion that it had reached the end of its useful life and that its affairs should be wound-up. In 1950 a new committee was formed for the purpose of administering the remaining funds, and in 1951 they sent a circular letter and a copy of the balance sheet for 1950 to the contributors, informing them that the amount of their subscriptions in the school's hands was in excess of the nominal value of the publications which they had received, and asking them if they wished to have the excess money returned. Some of them said that they did, and a certain amount of money was returned to those who had asked for it. At the date of the summons there was some £4,000 in cash and investments, standing to the credit of the treasurer of the school.

Tonge for the plaintiffs, the chairman, vice-chairman, and treasurer of the school.

Hunter-Brown for the first defendant, the Public Trustee, the personal representative of a deceased donor.

Lucking for the second defendant, a subscriber.

Denys B. Buckley and *N. S. S. Warren* for the Treasury Solicitor and the Attorney-General.

HARMAN, J.: This is an originating summons issued under the Charitable Trusts Act, 1853, s. 28, by the officials now responsible for the conduct of an institution known as the British School of Egyptian Archaeology (referred to hereinafter as "the school"). The question before me is whether or not the school is to be accounted a charity and this question can be raised under the Charitable Trusts Acts in proceedings entitled: "In the matter of the charity . . .",

as was decided by the Court of Appeal in *Re Norwich Town Close Estate Charity* (1). The headnote to that case reads:

"On a summons issued under the Charitable Trusts Acts the court has jurisdiction to decide the question whether the property which is the subject of the summons is held upon a charitable trust or not."

[His LORDSHIP stated the facts and continued:] I have to decide what, in truth, is the nature of this body. If it be a charity, it is immaterial that in 1951 a certain amount of the contributions was returned to those contributors who asked for it. The question what are "charitable purposes" provides an endless subject of discussion. If a purpose is within the "spirit and intendment" of the preamble to the statute 43 Eliz. c. 4, it is charitable in law: [see per LORD HALSBURY, L.C. ([1891] A.C. 543) in *Income Tax Special Purposes Comrs. v. Pemsel* (2)]; although, as LORD MORTON OF HENRYTON pointed out ([1952] 1 All E.R. 992) in *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (3):

"That statute was not passed for the purpose of giving a definition of 'charity' . . ."

To be charitable the purpose should be beneficial to the public, and it may rank as benefiting the public by the spread of knowledge or the advancement of education. Counsel for the Attorney-General drew my attention to *Beaumont v. Oliveira* (4) where it was held that the Royal Society and the Royal Geographical Society were charities. SELWYN, L.J., giving the judgment of the court, said (4 Ch. App. 313):

"The Royal Geographical Society is a corporation, and its objects are stated to be and are, 'the improvement and diffusion of geographical knowledge'. The Royal Society is also a corporation, and its objects are 'for improving natural knowledge'. The objects of both these societies are public, and they are both societies for the advancement of objects of general public utility . . ."

He, therefore, decided that both societies were charities. The objects of the British School of Egyptian Archaeology are not stated so succinctly as in those two admirable instances, but they amount, in my view, to this. The school is a body whose objects are, and whose funds are devoted to, the discovery of knowledge connected with ancient Egypt and its kingdom, to publishing works in that connection, and in the course of its activities to training students in the craft or art of excavation.

Two criticisms are urged against the view that the school was an educational body or a body for the promotion of knowledge. First, it was said that there was no obligation to diffuse the knowledge outside the ranks of the school itself, and that a mere body for study and the discussion of the subject of study among its members did not necessarily confer any benefit on the public. In my view, that would be a valid criticism if it were not for the fact that I read the objects as clearly showing an intention of making the knowledge public. The antiquities acquired are to be presented to public museums, and it is an object to hold exhibitions when practicable and to publish works. The second criticism is a criticism of these last words. Although it is an inelegant phrase and might, in some contexts, be too vague to mean anything in particular, a "work" is something done in relation to whatever the object of study may be. A musical composition is a "work", and one usually hears the word "opus" in that connection. In reg. 3 C, the word "works" means, in my opinion, works in relation to Egypt and the former kingdom of Egypt, and the phrase "to publish works", when read in connection with excavations, means that the works to be published are works which shall discover to the public the results of the excavations which it is the school's object to carry out. I cannot doubt

that this was a school for the diffusion of a certain branch of knowledge, namely, knowledge of the ancient past of Egypt, and that the school has a direct educational purpose, namely, to train students in that very complicated branch of knowledge known as Egyptology. On that view, the school is clearly a charity.

It will be observed that, by reg. 4:

“All money received by contribution, bequest, or sales of books, shall be applicable to the above purposes only.”

A It is in connection with that regulation that one must read reg. 9 concerning contributors. The correspondence in 1951 does, indeed, show that many contributors supposed that they contributed their annual two guineas as the price of the book which they would receive during the year, and, therefore, it is contended that there was merely a contractual relationship between the school and a contributor, that the school held itself out as willing to supply a book at the retail price of two guineas in return for a subscription, and that, if the subscription were half that amount, namely, one guinea, the contributor would have to wait two years before he could receive a book. That was, apparently, the nature of the relationship with a large number of the contributors, many of whom were museums and places of learning. In my judgment, however, that cannot override the regulation which provides that the contributions are to be devoted to the objects of the school. One of the objects is the publication of these very works. It seems to me that the contributors contribute towards the objects of the school, and that, in return, the school, as it is entitled to do, lets them have free of charge something which would otherwise cost them two guineas, namely, the annual or the biennial volume of what may be called the transactions of the school. I think that that has a bearing on the other part of the case, because, even though the school be a charity, there remains the question: When persons contributed to the school their guinea, or two guineas, or £500, did they do so on the footing that they should receive so much published work and that the objects should be carried out to such and such an extent, with the added implication that, if those objects ceased to be possible or practicable, the money should be returned to them as on a failure of consideration, or did they pay their money out and out as contributions to a learned society? If the former, then there may well be a resulting trust in favour of the donors and subscribers; if the latter, then the money was devoted once for all to a charitable purpose, and the fact that the charity has come to the end of its useful life and that its affairs must be wound-up entitles no one to have any money back.

F *Re Slevin* (5) shows that, if money has been given by will to a charity, it does not matter that the charity comes to an end shortly after the death of the testator and before the bequest is assented to by the executors; after the testator has died, his money is devoted to the charity, subject to the rights of creditors, and it makes no difference if the charity be dissolved thereafter. It is not so easy to apply that principle to subscriptions or to gifts *inter vivos*. G In my judgment, the contributions in the present case were given on a contractual basis to the extent that the contributor had a right to say to the school: “To the extent of the value of my contribution you have promised to supply me with copies of your publications”, but further or otherwise there was no contract. In my view, there was no obligation on the school either to continue to publish works up to the value of the contributions or to return the contributions. The only contract was to supply contributors with copies of such works as the school decided to publish. That is made clear in reg. 9, which provides that those who contribute a larger amount than two guineas a year are to receive a corresponding value of publications when such shall be issued, or they can take their money out by directing “antiquities”, i.e., objects of art or vertu, to be sent by the school to museums of their choice. There are now no antiquities remaining in the school’s hands, and there will be no more publications after the one now in the press, and, therefore, it is clear that those who contribute a larger amount

have no further rights. In my judgment, the contributors of one and two guineas a year are in no stronger a position. The rules are loosely drawn, but I cannot think that they have any right by contract to have their money returned. Have they any other right? In my judgment, on the true view of the whole transaction, they must be taken to have parted with their money once for all. It is, of course, possible to give or to offer money for a purpose which fails ab initio, and thereafter to have it repaid. That was recently decided by UPJOHN, J., in *Re Hillier* (6), where the project of building a voluntary hospital never materialised, and the learned judge held that the contributions specially earmarked for the proposed hospital must be paid back to the donors. There are other cases, in particular *Re Welsh Hospital (Netley) Fund* (7) decided by P.O. LAWRENCE, J., in 1921, and *Re North Devon & West Somerset Relief Fund Trusts* (8), decided in 1953, where it was held that the money had been given out and out and could not be re-paid. In my judgment, this case is more on the lines of the two which I have just mentioned than of *Re Hillier* (6), but no case of this sort is binding on me, and I have to decide the present case on its own merits.

It is submitted that, if the court decides that a contributor did not intend to have his money returned in any event, then he must be taken to have had a general charitable intent. I am not sure that the two things are the same. I think that a contributor may well say: "I parted with my money to the school and did not reserve any right to have it back", without having any positive intention that his contribution should go to an analogous body or, indeed, to some institution to which the court may think proper to devote the money. But I do not think that that matters. In my judgment, it is only necessary to be able to draw the inference that the contributor or donor cannot be supposed to have expected or to have contracted impliedly to have his money returned. The value of the assets is about £4,000, and it is proposed to establish with that money a Flinders Petrie Scholarship in Egyptian Archaeology at University College. There could be no better memorial to a great man, and, although the scheme is still tentative, it is, I doubt not, one of which something can be made. In answer to question (i) of the summons, I shall declare that the funds and investments are held on valid charitable trusts, and I propose to refer the matter to chambers to settle a scheme for the application of the assets to the creation of a Flinders Petrie Scholarship for the study of Egyptian archaeology.

Declaration accordingly.

Solicitors: *Pyke, Middleton & Brown* (for the plaintiffs and the second defendant); *Powell, Skues & Graham Smith* (for the first defendant); *Treasury Solicitor*.

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re SHERMAN (deceased). TREVENEN AND ANOTHER v.
PEARCE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 16, 1954.]

Trust and Trustee—Breach of trust—Sale by trustee of trust property to own nominee—Declaration of trust by nominee in favour of trustee—Specific devise of property by will of trustee—Avoidance of sale—Right of specific devisee to repaid purchase money.

Will—Specific devise—Property purchased from trust estate while testatrix a trustee—Conveyance avoided by beneficiaries after death of testatrix—Right of specific devisee to repaid purchase money.

By her will dated Apr. 5, 1923, S., after appointing her husband, T., to be her executor and trustee, gave all her residuary estate on trust for sale, the income of the proceeds thereof to be paid to T. for life and thereafter the capital to be divided between the children of her brother in equal shares absolutely. At the date of her death (April 21, 1928) S. was seised in fee simple of a dwelling-house known as "Hyland". T. died on Aug. 2, 1935, and by his will dated Apr. 23, 1935, appointed W. to be his sole executrix and trustee. T. did not execute any assent in respect of "Hyland" which, accordingly, vested in W. as executrix by representation of S. The dwelling-house "Hyland" was subsequently purchased at an auction by W.'s nominee, J.S., for £400, and by a conveyance dated Nov. 16, 1935, W. conveyed the legal estate in the property to J.S. By a trust deed dated Nov. 27, 1935, J.S. declared that the purchase price was provided by W. and that he held the property in trust for W. beneficially in fee simple. By her will dated Mar. 10, 1942, W. devised "Hyland" to her husband for life, thereafter to S.B. for life, and thereafter to the second defendant absolutely. S.B. predeceased W., who died on Jan. 2, 1949, and W.'s husband died on Jan. 14, 1952. The residuary legatees under the will of S. claimed their right to set aside the conveyance to J.S. as trustee on repayment of the purchase money to W.'s estate and their claim was admitted by the second defendant. On a summons to determine whether any sums so becoming due to the estate of W. devolved on the second defendant or formed part of W.'s residuary estate,

HELD: W. had died possessed of an equitable estate in the property "Hyland" which was devisable and passed under the terms of her will to her specific devisee, the second defendant, and, although he was not entitled, in the events which had happened, to the property in specie, he was entitled to the purchase price of £400 paid by W. and interest on that sum from the date of W.'s death. The interest that accrued before that date fell into W.'s residuary personal estate.

Stump v. Gaby (1852) (2 De G.M. & G. 623), applied.

Laves v. Bennett (1785) (1 Cox, Eq. Cas. 167), considered.

AS TO SETTING ASIDE OF PURCHASE BY A TRUSTEE, see HALSBURY, Hailsham Edn., Vol. 33, p. 285, para. 501; and FOR CASES, see DIGEST, Vol. 43, pp. 783, 784, Nos. 2230-2245.

Cases referred to:

- (1) *Re Calow*, [1928] Ch. 710; 97 L.J.Ch. 253; 139 L.T. 235; Digest Supp.
- (2) *Laves v. Bennett*, (1785), 1 Cox, Eq. Cas. 167; 29 E.R. 1111; 20 Digest 338, 807.
- (3) *Stump v. Gaby*, (1852), 2 De G.M. & G. 623; 22 L.J.Ch. 352; 20 L.T.O.S. 213; 42 E.R. 1015; 25 Digest 281, 1063.

ADJOURNED SUMMONS to determine, inter alia, whether any sums due to the estate of Mrs. Rose Aletha Walters in respect of the dwelling-house known as "Hyland" devolved under the provisions contained in cl. 3 and cl. 4 of her will or formed part of her residuary estate.

Ellen Jane Sherman, by her will dated Apr. 5, 1923, after appointing her husband, Thomas Sherman, to be her executor and trustee and after bequeathing certain pecuniary legacies, gave all the residue of her estate on trust for sale, the income of the proceeds thereof to be paid to Thomas Sherman for life and thereafter the capital to be divided between the children of her brother William Henry Pearce in equal shares absolutely. At the date of her death on Apr. 21, 1928, Mrs. Sherman was seised for an estate in fee simple of a dwelling-house known as "Hyland". Thomas Sherman died on Aug. 2, 1935, having by his will dated Apr. 23, 1935, appointed Mrs. Rose Aletha Walters (then Rose Aletha Sherman) sole executrix thereof. He did not execute any assent in respect of "Hyland" and the same, accordingly, vested in Mrs. Walters as personal representative by representation of Mrs. Sherman. By a conveyance and assignment dated Nov. 16, 1935, Mrs. Walters conveyed the legal estate in "Hyland" to the fifth defendant, John Sibly, such conveyance purporting to be made in pursuance of a sale of the said property by her as personal representative of Mrs. Sherman to the said Sibly for £400. The said sale was made at an auction of "Hyland", the said Sibly being the highest bidder. By a trust deed dated Nov. 27, 1935, under the hand and seal of Sibly and expressed to be supplemental to the said conveyance, it was recited that the purchase price of £400 was provided by Mrs. Walters out of her own moneys and that "Hyland" was conveyed to Sibly as trustee for Mrs. Walters, and he declared that he held the property in trust for Mrs. Walters beneficially in fee simple. A B C

By her will dated Mar. 10, 1942, Mrs. Walters, after appointing the plaintiffs executors and trustees thereof, devised "Hyland" to her husband, Edward Walters, for life and thereafter to Sophie Boston for life and thereafter to the second defendant, Frank Boston, absolutely. She devised and bequeathed the residue of her estate on trust for sale, the income of the proceeds thereof to be paid to her husband for life, thereafter to Charles Pearce for life, and subject as aforesaid on trust equally between such of her cousins as should be living. D

Mrs. Walters died on Jan. 2, 1949, Sophie Boston and Charles Pearce predeceased Mrs. Walters, and the said Edward Walters died on Jan. 14, 1952. There were living at the date of the summons six nephews and nieces of Mrs. Sherman entitled to share in her residuary estate of whom the first defendant was one. E

M. J. Albery for the plaintiffs, the trustees of the will of Mrs. Walters.

A. F. M. Berkeley for the first defendant, a residuary legatee under the will of Mrs. Sherman. F

A. C. Sparrow for the third and fourth defendants, who were entitled to share in the residuary estate of Mrs. Walters, and the fifth defendant, John Sibly, in whom the legal estate of "Hyland" was registered.

The second defendant, the specific devisee of "Hyland" under the will of Mrs. Walters, did not appear. G

HARMAN, J., stated the facts and continued: The beneficiaries under the will of Mrs. Sherman have now asserted their right to set aside the conveyance to Sibly as trustee for Mrs. Walters on the ground that such a purchase is contrary to the policy of the law. It is admitted that there is no answer to that claim, but the beneficiaries can reclaim the property only by paying the cost paid for it by Mrs. Walters, viz., £400, with interest at four per cent. from the time when she paid that money. Against that must be set the rents and profits or occupation rent for the property during the time of its ownership by her. I am asked whether, in those circumstances, the right to this £400 passes to the specific devisee under the will of Mrs. Walters or falls into her residue. There appears to be no direct authority on this subject. It was first suggested to me that this was similar to a case of redemption, where a man, having real property, contracts to H

sell it and then, although the purchase be uncompleted till after his death, the subject-matter of the contract in the ordinary way passes as personalty and not under a specific devise. If the will be made after the date of the contract in circumstances in which it is clear that the testator had the contract in mind when making his will, the contrary view may be taken, but that seems to me to be a matter of construing the will in the light of the circumstances known to the testator when he made it. Perhaps that is exemplified by *Re Calow* (1). It does not seem to me, however, that the cases concerning ademption have any bearing on the present case. Cases concerning options seem to me much more nearly in point. The general doctrine, which is stated in THEOBALD ON WILLS, 11th ed., p. 244, is known as the rule in *Lawes v. Bennett* (2). The learned editor says (*ibid.*):

"The doctrine of conversion by a contract for sale has been extended to cases where there is an option of purchase which is afterwards exercised. Thus where land included in a general devise is subject to a lease with a power for the lessee to buy the land, and the option of purchase is exercised by the lessee after the testator's death, the land is converted as from the date when the option is exercised and the proceeds of sale fall into the personal residue."

That, it will be observed, applies to general devises. I can understand that where there is a general devise of real property one way and a bequest of personalty the other way, and there is an option to purchase the realty which is not exercised until after the death, one must wait to see whether the option be exercised before deciding whether the property is comprised in the devise or in the bequest. The paragraph ends with these words:

"Somewhat different considerations apply to cases of specific gifts."

In this case what was it that the testatrix had when she died? As it seems to me, she had an equitable estate or interest in this property. True it is that that equitable estate or interest was liable to be upset as was also the legal interest of Sibly, the nominee, but she had a good equitable interest and that would pass to her devisee provided that the beneficiaries under the will of Mrs. Sherman did not take steps to set the transaction aside. The persons interested were not bound to set it aside and, indeed, they might confirm it, or they might, moreover, lose their rights by acquiescence. I see that, if there were a general devise here, the principle that one must wait and see whether they did exercise their right might apply, but I do not think it applies to a specific devise. I find some assistance in *Stump v. Gaby* (3), a decision of LORD ST. LEONARDS, L.C., dealing with a voidable conveyance, where it is stated in the sidenote (2 De G. M. & G. 623):

"Assuming that the conveyance was voidable, the interest which remained in A. after its execution was not a right of entry under the old law, but an equitable estate which was clearly devisable".

In my judgment, Mrs. Walters had an equitable estate which was "clearly devisable", and I think that when she devised "my property Hyland" she intended to devise whatever interest she had in that property to her specific devisee. She had no reason to suppose that he would not receive whatever she could give in the property. It is true that now her purchase is proved to be avoidable, the specific devisee will never have the property, but it seems to me that he should, nevertheless, receive the £400 which, so to speak, is compensation for the property. In my judgment, he should also receive the interest on that sum of money from the date of the death of the testatrix. The interest that accrued before that date falls into her personal estate. On the other hand, so far as an occupation rent is payable, a similar apportionment will have to be made and any occupation rent payable by the testatrix in her lifetime must come out of

her personal estate. The amount payable since her death must be paid by the specific devisee or set off against his claim for interest on the £400.

Declaration accordingly.

Solicitors: *Robbins, Olivey & Lake*, agents for *Grylls & Paige*, Redruth (for all parties except the second defendant, who did not appear).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

ARCHER v. CATTON & CO., LTD.

[LEEDS ASSIZES (Streatfeild, J.), March 9, 1954.]

Limitation of Action—Negligence—Injury caused by acts outside statutory period—Injury first discovered within statutory period—Limitation Act, 1939 (c. 21), s. 2 (1) (a).

In an action of negligence the cause of action accrues at the time of the negligence, because it is then that the damage is caused, even though its consequences may not be apparent until later.

Between 1923 and 1940 A. was employed by the defendants on work which resulted in the casting-off of a great deal of fine dust. In October, 1943, for the first time he found himself to be suffering from a condition of the chest which he alleged had been caused by his subjection to the dust up to 1940. On Sept. 27, 1949, he issued a writ against the defendants claiming damages for negligence and breach of statutory duty. In a preliminary issue on a plea by the defendants that the action was barred by s. 2 (1) (a) of the Limitation Act, 1939,

HELD: that the plaintiff's cause of action accrued during the period, ending in 1940, in which he was exposed to the dust, and, the writ not having been issued until more than six years after 1940, his claim must fail.

Howell v. Young (1826) (5 B. & C. 259), applied.

AS TO LIMITATION OF ACTION IN NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 20, p. 615, para. 773; and FOR CASES, see DIGEST, Vol. 32, pp. 342, 343, Nos. 249-256.

Case referred to:

(1) *Howell v. Young*, (1826), 5 B. & C. 259 (108 E.R. 97); 2 C. & P. 238 (172 E.R. 108); 4 L.J.O.S.K.B. 160; 32 Digest 342, 250.

PRELIMINARY ISSUE in an action by the plaintiff claiming damages for negligence and breach of statutory duty under s. 47 of the Factories Act, 1937. The defendants by their defence (in addition to denying negligence and breach of duty) pleaded that the action was barred as not being brought within six years from the date when the cause of action accrued.

J. Harvey Robson for the plaintiff.

R. Withers Payne for the defendants.

STREATFEILD, J.: The plaintiff pleads that he has suffered injury, namely, a condition of his lungs, due to the inhalation of dust while in the employment of the defendants. He alleges in his statement of claim that that was brought about by the negligence and breach of duty of the defendants, so far as the breach of duty is concerned reliance being placed on s. 47 of the Factories Act, 1937, which deals with measures to be taken to protect employees against the inhalation of dust. One of the pleas of the defence is that the action was not brought within six years from the date when the cause of action accrued. The defendants contend, therefore, that the cause of action is barred by s. 2 (1) (a) of the Limitation Act, 1939. I am now required to deal with that as a preliminary issue, not having heard any evidence on the merits of the actual cause of action, but having been invited by counsel on both sides to consider the issue on a statement very fully, fairly, and carefully made by counsel for the plaintiff

which is agreed by counsel for the defendants as an accurate statement of the facts for the purposes of the issue.

A The facts on which I am asked to pronounce on this point of law are these. Between 1923 and 1940 the plaintiff was employed by the defendants. Until 1937 in that period his work consisted of servicing Bessemer furnaces, which necessitated the breaking up of the fire brick linings to Bessemer converters in order that they might be renewed with new fire brick. That work was done in a confined space and resulted in the casting off of a great deal of fine dust. In 1937 a change was made, but only to the extent that, instead of being fire brick, for the next three years it was fire clay, the plaintiff's work being otherwise the same and a great deal of dust being given off in its removal. In 1940 the plaintiff was directed to different work altogether, work which either did not involve his being subjected to dust, or, if it did, only very slightly, so counsel B for the plaintiff concedes that nothing that took place after 1940 can in any way be said to have contributed to the condition from which this man afterwards was found to be suffering. In October, 1943, having been employed on that other work, the plaintiff then for the first time found himself to be suffering from a condition of his chest which is said to have been caused by his subjection for a long period of time to dust collections, and he had to give up his work by reason C of chest trouble. He returned in the summer of 1944. In 1945 he was off work again, and he then returned after a little time until January, 1946, when he was laid off work for the same reason, and he has been off work ever since. The writ in this action was not issued until Sept. 27, 1949. Counsel for the plaintiff contends that, if the plaintiff's cause of action can be said to have arisen in October, 1943, when for the first time he gave up work by reason of his chest D trouble, this action was brought just within the statutory limit of six years. On the other hand, he concedes that, if his cause of action arose in 1940, the writ issued in 1949 was out of time.

E On that question of law, reference has been made to DR. CHARLESWORTH'S LAW OF NEGLIGENCE, 2nd ed., p. 597, in which, after quoting s. 2 (1) (a) of the Limitation Act, 1939, and pointing out that the section applies to actions founded on simple contract or on tort, the learned author continues thus:

"In an action of negligence, the cause of action accrues at the time of the negligence, because it is then that the damage is caused, even though its consequences may not be apparent until later".

F He then quotes the case of *Howell v. Young* (1), where a solicitor was sued for negligence in representing that certain mortgages were sufficient security for a loan. More than six years after that alleged negligence damage was suffered and an action was begun to which the solicitor pleaded that it was statute-barred. The learned judge, HOLROYD, J., held that it made no difference that the damage was suffered more than six years afterwards and that the cause of action accrued when the solicitor negligently gave the advice that the mortgages were sufficient security for a loan. If the proposition laid down in that case and G enunciated by DR. CHARLESWORTH is correct, it seems to be quite clear that it is fatal to the plaintiff's claim in this case.

H Counsel for the plaintiff, however, has argued, and argued strenuously, that, a cause of action in negligence cannot be complete until there is, first of all, negligence and until the plaintiff either knows or should know that he has suffered injury in consequence of it. In other words, he is in this case contending that, although the act of negligence (or, one should say more accurately, continued negligence over a long period), if negligence it was, was complete by 1940, in fact it led to no ill consequences until October, 1943, when for the first time the plaintiff became aware of the damage which he had suffered and his cause of action became complete.

I have come to the conclusion, although with regret because it may well be that hardship has been suffered, that that is not a sound proposition, and that

Howell v. Young (1) is in principle indistinguishable and I am bound by that case and a line of cases which have stood the test of time for many years. In my judgment, the proposition is correctly stated in DR. CHARLESWORTH'S learned work to which reference has been made, and the true view in this case is that, during all the time up to 1940 in which the plaintiff was exposed to this dust, assuming for the moment that that amounted to negligence or breach of statutory duty, there was the accrual of the cause of action, and it makes no difference, as HOLROYD, J., found, that the plaintiff himself was not aware of the fact that it would lead to ill consequences. For these reasons, in my judgment, the preliminary point succeeds and this action is statute-barred, the writ not having been issued until more than six years after the accrual of the cause of action. The plaintiff's claim must fail on this preliminary point. A

Judgment for the defendants.

Solicitors: *Rowley, Ashworth & Co.*, Manchester (for the plaintiff); *Willey B Hargrave & Co.*, Leeds (for the defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

IVORY v. IVORY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Sachs, J.), February 8, 1954.] C

Justices—Husband and wife—Maintenance—Amount—Husband in receipt of grant from National Assistance Board.

In 1940 the husband deserted the wife and went to live with another woman by whom he had a child. On Nov. 9, 1950, justices ordered him to pay the wife £3 a week as maintenance. At that time he was earning £8 18s. a week. Subsequently, he became unemployed and received a grant of £4 16s. 6d. a week under the National Assistance Act, 1948. On Aug. 18, 1953, the justices reduced the amount of maintenance to £1 10s. a week, ordering the husband to pay 15s. a week while he was unemployed, the balance of 15s. a week to accrue as arrears. D

HELD: the justices were wrong in fixing a figure which was too high for the husband to pay and ordering part of that figure to accumulate as arrears; in the circumstances, the proper amount to be ordered was 6s. a week. E

FOR THE NATIONAL ASSISTANCE ACT, 1948, s. 5 (2), s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 16, pp. 936, 937.

APPEAL by the husband against an order of the Gosport justices, dated Aug. 18, 1953. F

On Nov. 9, 1950, the justices found that the husband had deserted the wife in 1940 and made an order in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, for the payment of maintenance at the rate of £3 a week. At that time the husband was earning £8 18s. a week, and the wife £2 16s. 2d. net a week. On Aug. 18, 1953, the justices heard an application by the husband to vary the amount of the order. At that date he was unemployed and in receipt of grants under the National Assistance Act, 1948, and the wife was earning £4 12s. 6d. gross. The arrears of payments by the husband then amounted to £58, after the remission by agreement of arrears amounting to £78 in consideration of the husband transferring the matrimonial home to the wife. The justices ordered that the husband should pay maintenance at the rate of £1 10s. a week, but that so long as he was out of employment he should pay only 15s. a week, the balance of 15s. a week to accumulate as arrears. The husband appealed, contending that in the circumstances the reduction of the amount was inadequate. G H

Ormerod for the husband.

McLellan for the wife.

LORD MERRIMAN, P., stated the facts and continued: The justices decided that the husband should pay actually 15s. a week, and that the balance of 15s. a week which, on their own finding, he is at present unable to pay, should accumulate week by week as arrears. I appreciate the view behind the order, that the husband has not shown any undue anxiety to support his wife, and that the justices were not prepared to consider the making of a purely nominal order merely because the wife was earning money and doing her best to keep herself, and, perhaps, to save a little. In my opinion, however, it is fundamentally wrong to fix a figure which is too high for the husband to pay and to order part of that figure to accumulate as arrears, for there is bound to come a moment when the husband will prefer to go to prison rather than pay. The proper thing is, if possible, to fix an amount which he will pay rather than go to prison. In my view, therefore, the justices have directed themselves on a wrong principle as to the amount to be awarded in the circumstances. Counsel united in inviting us to deal with the question of amount to avoid the expense of sending the case back to the justices, and we have accepted that burden.

The figures, then, which we have to consider, are, in general terms as follows. The husband's weekly income from the National Assistance Board is a total of £4 16s. 6d., but of that a sum which is estimated at £1 7s. 6d. is paid in respect of the woman with whom he has been living for some time and their child. That leaves him with £3 9s. out of which to satisfy what are called his "requirements". There are two periodical requirements. One is the payment of £1 10s. a week for the rent of the house where he is living. The other is the payment of 5s. in respect of a fine of £50 for a criminal offence—a "requirement" which is, of course, outside his obligations to his wife. The result is that, subtracting £1 15s. from £3 9s. he is left with £1 14s. for himself, or, bringing back again into the calculation the £1 7s. 6d. in respect of the paramour and the child, a sum of £3 1s. 6d., rent free, for food and clothing. That is not a large amount for the support of three persons. On the other hand, the wife, subtracting a sum for her necessary expenses, is left, in round figures, with £3, plus the house. The question is whether or not the amount of the order should be reduced to a nominal sum. We were at first faced with an argument by counsel for the husband that a duty is put on the National Assistance Board by the National Assistance Act, 1948, to assess the needs of the husband according to the terms of the Act, and, in particular, by s. 7 (1), which provides that where the applicant (i.e., the husband)

"... has to provide for requirements of some other person being a member of the same household, the board shall . . . give assistance by reference to the aggregate requirements and aggregate resources of the applicant and the said other person."

It is the paramour and the child who are members of "the same household", and the wife, though still his wife, is no longer a member of the husband's household. It was argued that the scheme of the Act prohibited ordering any support for the deserted wife out of the sum computed by the National Assistance Board for the aggregate requirements of the husband, the paramour and their child, for that which the husband receives from the board must be presumed to be neither more nor less than that which is exactly required for the subsistence of those persons to the exclusion of the wife. It would be strange if that were a necessary consequence. Incidentally, on the facts of the present case, it is an argument which appears to have a flaw, because one of the deductions out of this sum provided by the National Assistance Board is for the satisfaction of a fine in respect of some wrong-doing of the husband. I am bound to say that I was relieved to find that the argument was not pressed to its logical conclusion, and we were left, not with an absolute prohibition against making any order in favour of the wife, but with a discretion, to be exercised as best we might exercise

it, on the basis that the husband has been given a small sum for the maintenance of himself and his household.

I have come to the conclusion that it would be wrong to reduce the amount to a nominal figure. I think that we ought to reduce it to the sum of 6s. a week, this variation to be retroactive to the date of the hearing, Aug. 18, 1953. We are in no position to deal with arrears outstanding at that date, but we can, thus, get rid of the suggestion that those arrears should receive a weekly accretion of 15s.

SACHS, J.: Counsel for the husband made a brave attempt to argue that there was, in effect, always an absolute bar to the court's making an order for more than a nominal sum to be paid by way of maintenance when the husband's sole source of income was derived from funds provided under the National Assistance Act, 1948. He was, however, faced with the position that he could cite no provision in that Act which set up such a bar, or which would disable the court from making such an order, however small, as might be just in respect of the man's legal obligations. Nor was he able to point to any provision in the Act which laid on the husband any obligation not to pay from the funds so provided to him any part of what he received for such objects as beer and tobacco. Nor was he able to tell us how the "requirements" referred to in s. 5 (2) of the Act are computed. So, in the end he was constrained to concede that the fact that the husband's income derives solely from funds provided under the Act is simply one factor which must be taken into account when assessing what it is proper for him to pay. With that statement, which he made by way of concession, I respectfully agree. I agree with LORD MERRIMAN, P., and, in particular, with what his Lordship has said as to the mischief of making an order with the deliberate intention of ensuring that arrears accrue. Any such order can only be based on a wrong approach to the principles on which amounts should be awarded.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Addison, Sons & Madden*, Portsmouth (for the husband); *Sinclair, Roche & Temperley*, agents for *Churcher & Churcher*, Gosport (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

FROST v. JOHN SUMMERS & SONS, LTD.

[COURT OF APPEAL (Somervell, Birkett and Morris, L.J.J.), March 10, 11, 19, 1954.]

Factory—Dangerous machinery—Duty to fence—Grindstone—Grindstone fenced by “hood”—Part of grindstone exposed—Factories Act, 1937 (c. 67), s. 14 (1).

The plaintiff, a maintenance fitter employed by the defendants, injured his thumb while grinding the ends of a piece of metal known as a key on a power-driven grinding machine. The machine consisted of the grindstone, a spindle running through its centre which allowed the power to be applied to rotate the grindstone, an adaptable tool rest on which the metal to be ground was rested by the workman as he applied it to the grindstone, and a fixed guard or hood covering a portion of the grindstone. The uncovered portion of the grindstone between the “hood” and the “rest” was about seven inches long. In an action for damages for personal injuries based on negligence at common law and breach of s. 14 (1) of the Factories Act, 1937,

HELD (SOMERVELL, L.J., dissentiente): the grindstone was a dangerous part of a machine within s. 14 (1) of the Act and so must be securely fenced even though such fencing rendered it unusable; it was not securely fenced; and, accordingly, the plaintiff was entitled to recover damages for breach of statutory duty on the part of the defendants.

Davies v. Owen (Thomas) & Co. ([1919] 2 K.B. 39), applied.

FOR THE FACTORIES ACT, 1937, s. 14 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1009.

Cases referred to:

- (1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (2) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (3) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle v. Hindle*, 66 L.J.Q.B. 173; 24 Digest 909, 71.
- (4) *Lewis v. Denyé*, [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; 2nd Digest Supp.
- (5) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; sub nom. *Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 32 B.W.C.C. 253; 2nd Digest Supp.
- (6) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 908, 68.
- (7) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (8) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.
- (9) *Pugh v. Manchester Dry Docks Co., Ltd.*, ante, p. 600.
- (10) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.

APPEAL by the plaintiff from an order of JONES, J., at Chester Assizes, dated Oct. 21, 1953, whereby he dismissed a claim for damages for negligence and/or breach of s. 14 (1) of the Factories Act, 1937.

Marven Everett, Q.C., and *R. Geraint Rees* for the plaintiff.

Forrest, Q.C., and *N. G. L. Richards* for the defendants.

Cur. adv. vult.

Mar. 19. The following judgments were read.

SOMERVELL, L.J.: This is a claim for damages for personal injury based on an alleged breach by the defendants of s. 14 (1) of the Factories Act, 1937, which is as follows:

“Every dangerous part of any machinery, other than prime movers and

transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part".

The learned judge dismissed the claim.

The plaintiff is a fitter who has been employed for some years by the defendants. In the defendants' factory were two circular grindstones of which we have photographs, at one of which the accident happened. In front of each grindstone is a stand on which is a flat-bottomed basin. From the floor of the basin there rises a rest which overlaps the wheel. Above the rest the wheel is exposed for about six or seven inches so that it can be used for grinding. Above the exposed part there is a hood which is continued over the top and round the back of the stone. The stones were driven by power at about 1,430 revolutions a minute. The plaintiff was grinding the ends of a piece of metal about four inches long, known as a key. Counsel agreed that the plaintiff demonstrated he was holding the key near the top. He placed it, he said, on the tool rest, took the pressure with an upward movement, and added the pressure to grind.

"The instant I added the pressure, the key flicked forward to the stone with my thumb in between, towards the stone itself causing a crushing effect which caused me to snatch my thumb out".

This is very difficult to follow. Many allegations were made by the plaintiff. It was said the wheel was running out of the true, that there was an excessive and dangerous gap between the rest and the wheel, and that the lighting was insufficient. On all these points the plaintiff failed on the learned judge's findings of fact, and there is no appeal on these points. There remains the submission that there was a breach of s. 14 (1) which caused the accident.

I will read the learned judge's conclusions:

"If the machinery is dangerous, it has got to be fenced or guarded properly. I have no doubt that the machinery should be regarded as dangerous: in other words, that this was a dangerous part of the machine, and every dangerous part of any machinery, according to the section, should be securely fenced; therefore, this should have been securely fenced. The question is: Was it securely fenced? I think, judging by the evidence I have heard, I must come to the conclusion that it was securely fenced. Of course, it could be completely covered up so that no one could get anywhere near it, then it would be even more securely fenced, but then it would be no use as a machine. It has this guard at the top and it has the rest at the bottom, which is in the nature of a guard, leaving a comparatively small part of it exposed, and Mr. Martin [a consultant engineer, the plaintiff's expert witness] was of the opinion that it was not dangerous in that state. He said, as I have already observed, that he had no criticism to make of it and that it was in accordance with modern practice. I think he was quite satisfied that it was safe to use in that state. He did not suggest any further guarding or fencing was necessary. The plaintiff himself, a practical person, seems to have taken the same view. He said that the guard had nothing to do with his accident. I understood him to say that it was not the absence or deficiency in any guard that caused the accident. Therefore, in those circumstances, it seems to me that the correct conclusion is that the machinery, if not properly guarded would be dangerous, but that it was properly guarded by the guard at the top and by the rest at the bottom. In these circumstances I hold that there is no breach of s. 14".

It is clear that when the learned judge finds that the machinery should be regarded as dangerous he is speaking of the rotating wheel as a whole. "Fenced", as it is, by the "rest" and the hood, the remaining exposed part is not, he finds, "dangerous" within the section.

A The first question is whether this is consistent with the authorities as to the meaning of "dangerous" in this context. If it is not, then the result would, or might, be that the grindstone must be fenced so that it could not be used. It has been held by this court that s. 14 can lead to this result: *Miller v. William Boothman & Sons, Ltd.* (1). It seems surprising if the legislature has made it a criminal offence to use a grindstone. In *Walker v. Bletchley Flettons, Ltd.* (2) DU PARCQ, J., as he then was, had to consider the meaning of "dangerous" in a similar context in the Factories Act, 1901. He cited ([1937] 1 All E.R. 175) two observations by WILLS, J., in *Hindle v. Birtwistle* (3) B ([1897] 1 Q.B. 195), dealing with a similar provision in the Factories Act, 1878:

C "In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection".

The learned judge put a gloss on that which, with respect, I do not think adds anything to what WILLS, J., said, if the two citations are taken together. I would add a third from the same judgment (*ibid.*):

D "No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous".

E I, therefore, turn to the evidence. The plaintiff agreed that this was the ordinary type of grindstone, although he said that in his last factory the exposed gap was somewhat smaller. That would not have affected this accident. The plaintiff's case, as I have said, was that the gap [between the hood and the rest] was too wide. Mr. Alexander, a fitter employed by the defendants called by the plaintiff, thought the machine was quite safe if the rest was close up to the rim. Mr. Martin, a consultant engineer, the plaintiff's expert, had, as the learned judge said, no complaint of the machine if properly adjusted. It was a perfectly normal machine. There was no evidence or suggestion that this machine had caused accidents before. Of course, a wheel revolving at this rate is likely to cause damage if a finger or hand is placed on it. In the same way, a lorry on the road will cause injury if a man steps out suddenly in front of it. Many, perhaps most, machines at which men work, are capable of injuring a finger or a hand. F In the present case the plaintiff was grinding a smaller piece of metal than is usual. He could have used other appliances. He held it high up, and on the judge's findings it seems to me clear that he had a lapse or did something which I do not think was, on the evidence, reasonably to be anticipated. Prima facie G whether a part of machinery is dangerous was a question of fact for the learned trial judge and I agree with his conclusion, basing myself on the tests laid down by WILLS, J.

H The second point does not, therefore, arise. Although we are bound by *Miller's* case (1) I feel considerable difficulty about it, and, of course, the difficulty increases as the standard of what is dangerous becomes more—if I may so put it—automatic. Parliament cannot have intended to prohibit the use of rotating grindstones. If the purpose had been to prohibit by statute the use altogether of certain types of machine the words of s. 14 (1) are a very curious approach. They assume the machine is there in situ, but it is to be permanently caged. As, however, we are precluded from re-considering previous decisions of this court it is unnecessary to pursue the matter further. In *Lewis v. Deny * (4) the House of Lords expressly reserved the point and I hope it may have an opportunity of

deciding it. I would, therefore, dismiss the appeal. My brethren take a different view and the order will be in accordance with their decision.

BIRKETT, L.J., stated the facts and continued: The defendants denied all the allegations of negligence and breaches of statutory duty, and alleged that the accident was caused by the negligence of the plaintiff himself. After hearing the evidence **JONES, J.**, held that all the allegations of negligence failed, that there was no breach of statutory duty, and that the accident was caused by the negligence of the plaintiff himself. In this court the argument on behalf of the plaintiff has been concerned almost wholly with the submission that the defendants were in breach of s. 14 (1) of the Factories Act, 1937:

"Every dangerous part of any machinery . . . shall be securely fenced . . ."

JONES, J., found the grindstone to be "a dangerous part of the machine", but also that it was in fact securely fenced. The plaintiff said in the court below: "The guard had nothing to do with my accident, not the top guard", and attributed the accident to causes which the learned judge has rejected: but that does not preclude the submission that the wheel of the grindstone was not securely fenced and that that breach of duty was the cause of the accident.

The first question to be considered is: Was this grinding wheel, revolving at 1,430 revolutions a minute, a dangerous part of the machinery? In *Walker v. Bletchley Flettons, Ltd.* (2) **DU PARCQ, J.**, said ([1937] 1 All E.R. 175):

"In considering whether machinery is dangerous you must not assume that everybody will always be careful . . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur".

And in *Stimson v. Standard Telephones & Cables, Ltd.* (5) he said that the behaviour of which he had spoken in the earlier case was such behaviour as was reasonably foreseeable, and was not necessarily confined to such behaviour as is reasonable behaviour. I cannot doubt that, in applying these tests to the facts of this case, **JONES, J.**, was right in holding that this was "a dangerous part of the machinery".

The second question, and a much more difficult one, is: Was the dangerous part adequately fenced? From *Davies v. Thomas Owen & Co.* (6) it is clear that where the duty to fence exists the obligation is absolute, and **SALTER, J.**, said ([1919] 2 K.B. 41):

"It is an obligation not merely to fence, but to fence securely. The statute does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use".

In *Miller v. William Boothman & Sons, Ltd.* (1) **GODDARD, L.J.**, delivering the judgment of the Court of Appeal, said ([1944] 1 All E.R. 335):

"Turning again to the authorities, it follows from what we have said that, in our opinion, *Davies v. Owen* (6) was rightly decided, and that, as a general proposition, we agree with the passage in the judgment of **SALTER, J.**, to which we have already referred. It should, however, be qualified by saying that the statute prohibits the use of a dangerous machine which cannot be securely fenced, unless it is one which is subject to special regulations, and is used and constructed in accordance therewith".

There are no special regulations affecting the question of fencing in this case, although special regulations dealing with the grinding of metals have been made under s. 60 of the Factories Act, 1937. The duty to fence securely in this case is, therefore, absolute. It is clear, moreover, that the secure fencing referred to in s. 14 (1) of the Act is secure fencing against the danger of contact between the

part to be fenced and the person employed. In *Nicholls v. Austin (Leyton), Ltd.* (7) LORD SIMONDS said ([1946] 2 All E.R. 98) the fencing was "intended to keep the worker out" and in *Carroll v. Andrew Barclay & Sons, Ltd.* (8) LORD PORTER said ([1948] 2 All E.R. 390):

"Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine . . ."

A JONES, J., states his conclusions on this point:

"I think, judging by the evidence I have heard, I must come to the conclusion that it was securely fenced. Of course, it could be completely covered up so that no one could get anywhere near it, then it would be even more securely fenced, but then it would be no use as a machine. It has this guard at the top and it has the rest at the bottom, which is in the nature of a guard leaving a comparatively small part of it exposed, and Mr. Martin was of the opinion that it was not dangerous in that state. He said, as I have already observed, that he had no criticism to make of it and that it was in accordance with modern practice. I think he was quite satisfied that it was safe to use in that state. He did not suggest any further guarding or fencing was necessary. The plaintiff himself, a practical person, seems to have taken the same view. He said that the guard had nothing to do with his accident. I understood him to say that it was not the absence or deficiency in any guard that caused this accident. Therefore, in those circumstances, it seems to me that the correct conclusion is that this machinery, if not properly guarded, would be dangerous, but that it was properly guarded by the guard at the top and by the rest at the bottom. In those circumstances, I hold that there is no breach of s. 14".

D But this is tantamount to saying that it could not be more securely fenced without making the machine unusable and the decision in *Miller v. William Boothman & Sons, Ltd.* (1) makes it quite clear that this is not the proper construction of s. 14 (1). It would seem to be clear that, if the wheel was dangerous, and must, therefore, be securely fenced to prevent the workman coming into contact with it, and a seven inch gap is left unfenced, the statutory duty has not been fulfilled. I am far from accepting the view that this grindstone could not be securely fenced without making it unusable, but that is not a matter with which I am now concerned. The only questions are: Was the wheel dangerous, and, if so, was it securely fenced? I am driven to the conclusion that it was not securely fenced, and that the defendants were, therefore, in breach of their statutory duty under s. 14 (1) of the Act of 1937.

F I am not unmindful of the answers made by Mr. Martin, the consultant engineer, called on behalf of the plaintiff:

"Q.—You see nothing wrong in doing that work on that machine?

A.—No, provided the rest is properly adjusted and provided the work is properly done . . . I have no criticism to offer of the guard. It is in accordance with normal practice . . . Q.—You say that the machine is a perfectly normal machine? A.—Yes. Q.—You do not criticise the guard? A.—It is guarded as far as is practicable in order to allow the machine to be used at all. Q.—Therefore, it is a machine that any skilled fitter should be able to use without hesitancy, is it not? A.—If it is properly adjusted. Q.—If it is properly adjusted and he is careful? A.—Yes. Q.—The only complaint you have is that this rest was not near enough to the wheel—that is what you suggest? A.—Yes, that is the only complaint I have".

H It was on those answers that JONES, J., said: ". . . and Mr. Martin was of the opinion that it was not dangerous in that state", etc. But nothing that Mr. Martin said could exclude the manifest danger from the exposed wheel if the hand of the operator came in contact with it: and all that he was saying was that the wheel was fenced in so far as it was practicable to do so, and that with

care an operator could avoid coming in contact with the wheel. In my opinion, that was not the question before the learned judge. The question was whether the defendants had fulfilled their statutory duty to fence securely the dangerous part of this machine. In *Pugh v. Manchester Dry Docks Co., Ltd.* (9) DONOVAN, J., was faced with very much the same situation with which we are faced in this appeal, and in a considered judgment came to the conclusion that the defendants in that case were guilty of a breach of statutory duty. In my opinion, with respect, he came to the right conclusion on the authorities, adding (ante, p. 602) that A

“ . . . the deadlock can be resolved, in my opinion, only by the House of Lords or by Parliament.”

There remains the question of contributory negligence. JONES, J., held that the accident was solely due to the negligence of the plaintiff, that negligence consisting in the way the plaintiff held the piece of metal when applying it to the grindstone. The judge said: B

“ What I feel is strongly against him—although, of course, I am not really skilled in these matters—is the way in which he himself showed me he held that key when he was doing his work. I cannot believe that it was safe and careful on his part to hold that key right up at the top and then apply the top of it to this wheel, revolving at a great speed, with his fingers close to the wheel. If his foot had moved or he had lost his balance, his finger would have been caught immediately by this wheel. He was obviously careless in the way in which he handled the key and it is really unnecessary to go into the question of whether he might have done this job in some other way.” C

Incidentally, I think this passage indicated the dangerous state of the machinery in its unfenced condition, because “ if his foot had moved or he had lost his balance ” he might have been brought into contact with the wheel, however carefully he had been holding the metal. And a few words later in the judgment the learned judge says: D

“ If only he had kept his fingers away from the grindstone, I do not think any harm would have been done at all in this case.” E

But the statutory duty to fence securely was, of course, to prevent the contact altogether. The plaintiff was a maintenance fitter of twenty-five years' experience. The learned judge refers to him as “ being such a skilful person ” and also as “ a practical person ”, and, in my opinion, if the defendants had fulfilled their statutory duty and fenced the wheel securely the accident would not have happened at all, and it was the breach of statutory duty that caused the accident and the consequent injury to the plaintiff. The learned judge said it was unnecessary to go into the question whether the plaintiff might have done this job in some other way, and then added: F

“ If he could not do [this operation] without putting his fingers into a dangerous position, as he did, he ought not to have been at this grindstone at all: he ought then to have used the other method suggested to him of putting the key in a vice and using a file or possibly using the portable grindstone.” G

I do not think that the plaintiff was at fault in using this power-driven grindstone, and the question of alternative methods does not arise. He was not doing anything wrong or stupid or forbidden in using the grindstone, and, in my opinion, this appeal should be allowed and judgment entered for the plaintiff for the sum of £261 6s., the amount provisionally assessed by the learned judge. H

MORRIS, L.J.: The learned judge held that the allegations made by the plaintiff that there was no proper lighting and that there had been a negligent failure to maintain the grinding machine in satisfactory condition failed. It is in regard to his further finding that there was no breach of s. 14 (1) of the Factories

Act, 1937, that complaint is made. He held that it was a perfectly safe machine to use, having a guard above and the rest below, if a person used it in the proper way. Holding that the exposed part of the grinding wheel was a dangerous part, he said:

A "The question is: Was it securely fenced? I think, judging by the evidence I have heard, I must come to the conclusion that it was securely fenced. Of course, it could be completely covered up so that no one could get anywhere near it, then it would be even more securely fenced, but then it would be no use as a machine."

B Having referred to the fact that, with the guard at the top and the rest at the bottom, there was only "a comparatively small part of it exposed" and on a consideration of the evidence, the learned judge came to the conclusion that the machine was properly guarded. The fact remains, however, that while operating the grinding machine the plaintiff was injured, because his hand came into contact with the revolving grindstone. The mechanically produced revolutions were at a speed of 1,430 revolutions per minute. If the hand of an operator came into contact with this swiftly moving grindstone physical hurt would seem to be inevitable. I can entertain no doubt that in these circumstances the exposed grindstone, or any part of the exposed grindstone, was a "dangerous part".

C The question arises whether it was "securely fenced". Certain regulations relating to the grinding of metals were made by the Secretary of State in 1925 under s. 79 of the Factory and Workshop Act, 1901, and by the Minister of Labour and National Service in 1950 under s. 60 of the Factories Act, 1937, and by virtue of other Acts. None of these regulations refers to or deals with fencing, and it is not suggested that there has been any modification of the statutory requirement of secure fencing. It is said, however, that the regulations must have been issued on the basis that grinding machines can lawfully be used, and a safety pamphlet, officially issued, was referred to in which no complete guarding or fencing is portrayed. It was submitted that these circumstances pointed to the conclusion that the grinding machine under consideration in the present case must be, or can be, regarded as having been securely fenced. I do not find any sure foothold in this contention. At its highest it depends on what it is suggested that somebody may have thought. But there is no necessary implication of what anyone may have thought, and, in any event, the problem remains of applying a statutory provision which is in force and applicable to the facts as they exist.

F I can see no escape from the view that the exposed part of the swiftly moving grindstone (which I consider was a dangerous part) was not securely fenced. The statutory obligation is clear and definite. There is no qualification or modification to the effect that the part should, as far as reasonably practicable, be securely fenced. We were helpfully referred to a number of sections of the Act which, by contrast with s. 14, contain modifying and qualifying provisions: these include s. 19 (3), s. 22 (4), s. 25 (3), s. 26 (1), and s. 47.

G In *Nicholls v. Austin (Leyton), Ltd.* (7) LORD THANKERTON said ([1946] 2 All E.R. 95):

"... the obligation to fence imposed by [s. 14 (1)] is an obligation to provide a guard against contact with any dangerous part of a machine ..."

LORD SIMONDS said (*ibid.*, 98):

H "The fence is intended to keep the worker out ..."

The proviso to s. 14 (1) is important. It reads:

"Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirement of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

This seems to reinforce the view that secure fencing does not exist if an operator may come into contact with the dangerous part. In reference to the proviso LORD SIMONDS in the *Nicholls* case (7) above cited, said (*ibid.*):

"These last six words make it clear that the security at which the substantive part of the sub-section aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part."

In *Carroll v. Andrew Barclay & Sons, Ltd.* (8) LORD PORTER said ([1948] 2 All E.R. 390):

"Any risk arising from the working of a dangerous machine must be guarded against under s. 14 . . . Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

It is suggested that, if the grinding machine had been further fenced, it could not have been effectively used. Mr. Martin, a consultant engineer called for the plaintiff, said that he had no criticism to offer of the guard and that the machine was guarded as far as was practicable in order to allow the machine to be used at all. If this be so—it seems to me to be irrelevant. The question is not whether further fencing would have impeded use, but whether there was secure fencing. No dispensing power is provided for if there be cases where commercial practicability and compliance with the statute cannot co-exist: see *Davies v. Thomas Owen & Co.* (6), and *Miller v. William Boothman & Sons, Ltd.* (1). There was no occasion to test the view that no further fencing of the machine consistent with its user was practicable, but it seems surprising if the wit of practical scientists and engineers could not devise secure fencing which is not stultifying.

On the assumption that there was a breach of statutory duty on the part of the defendants, it was submitted that, nevertheless, the injuries to the plaintiff cannot be said to have been caused by the breach of duty since he could have used alternative methods of grinding or filing the key. It was said, therefore, that the injuries to the plaintiff were caused by his own deliberate act in using the grinding machine in the condition in which it was. I do not think that this submission is sound. The plaintiff was not acting irregularly from his employers' point of view in using the grinding machine: it was there for him to use and I have no doubt that the plaintiff considered that he was doing his work for his employers in the most appropriate way when he set out to use the grinding machine. He was not acting in a deliberately foolhardy way.

Lastly, it is said that the plaintiff was himself negligent and was, in part at least, the author of his own mishap. The line is always difficult to define at which maladroitness or ill-advised method should be characterised as negligent. Nor is the plea that a man was doing his best any sure protector from a finding of negligence. In the present case the plaintiff felt that he had to apply pressure and that his grip of the key had to be near to its end. As LORD WRIGHT said in his speech in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (10) ([1939] 3 All E.R. 740):

"The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty."

While some measure of criticism can forcibly be suggested, I have come to the conclusion that any deficiencies or failures on the plaintiff's part fell short of negligent conduct. I would, therefore, allow the appeal and I consider that the plaintiff should recover the damages which were assessed. *Appeal allowed.*

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters*, agents for *Laces & Co., Liverpool* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BRIESS AND OTHERS v. WOOLLEY AND OTHERS.

[HOUSE OF LORDS (Lord Oaksey, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), March 8, 9, 10, April 1, 1954.]

Company—Sale of shares—Negotiations by managing director—Shareholders informed of offer—Instruction to managing director to complete transaction—Liability of shareholders for fraudulent misrepresentation by managing director.

A *Agent—Fraudulent misrepresentation—Liability of principal—Misrepresentation by agent made before appointment and continuing thereafter—Ratification.*

Under the terms of a licence granted by the Ministry of Food under the Food Substitutes (Control) Order, 1941, para. 2, N.P., Ltd. were authorised to manufacture synthetic cream in accordance with a formula approved by the Ministry. It was a condition of the licence that no change should be made in the composition of the synthetic cream without the Ministry's written consent, but, from 1945 onwards, R., the managing director of N.P., Ltd., without the knowledge of his co-directors and fellow shareholders, by the introduction of water and disregarding the formula, increased the amount of synthetic cream manufactured and sold, thus producing substantial profits which could not have been made by lawful means. In 1948 N.P., Ltd. began to lose money, and R. approached the appellants, who were also engaged in the food trade, with a view to their acquiring the shares in N.P., Ltd. He told them that N.P., Ltd. had a licence and an allocation of raw materials, and showed them accounts which were accurate, but he concealed the fact that he had been acting illegally. The negotiations reached a point where the appellants had provisionally agreed to a price if all the shares in N.P., Ltd. were transferred to them and R. then put the matter before his co-directors. On Oct. 14, 1948, the shareholders of N.P., Ltd. in general meeting resolved that R. "should take the matter up further with [the appellants] with a view to completing the transaction on the above basis." The shares were subsequently sold to the appellants at the suggested price. The appellants later discovered the fraud, and commenced the present action against R. and the chairman of N.P., Ltd., claiming damages for fraudulent misrepresentations made by R. on behalf of himself and the other defendant. The latter had died, and the present respondents were his executors.

HELD: it could not be said that the shareholders ratified R.'s agency up to Oct. 14, 1948, as it was not proved that they had full knowledge of all the facts or that they intended to ratify whatever he had done: *Marsh v. Joseph* ([1897] 1 Ch. 213) applied; but, on the true interpretation of the minute of the general meeting, it was clear that R. was appointed on Oct. 14 agent on behalf of all the shareholders of the company to negotiate the sale of their shares, and in those circumstances the shareholders were responsible for any fraudulent representations he made in the course of those negotiations; even assuming that all the relevant representations were made by R. before Oct. 14, a principal could not disclaim responsibility for fraudulent misrepresentations made by his agent which, though made before the agency commenced, to the agent's knowledge continued to influence the other party after his appointment as agent and finally induced the other party to enter into the contract which the agent had been authorised to make, and did make, on behalf of his principal; it was the agent's duty, having made false representations, to correct them before the other party acted on them to his detriment, but R. continued to conceal the true facts, and so the representations were continuing representations; and, therefore, the appellants were entitled to recover.

Decision of the COURT OF APPEAL, sub nom. *Briess v. Rosher* ([1953] 1 All E.R. 717), reversed.

AS TO DIRECTORS ACTING AS AGENTS FOR THE COMPANY, see HALSBURY, 1949 Edn., Vol. 5, pp. 328, 474, paras. 547, 754. AS TO THE DATE AT WHICH REPRESENTATIONS MUST BE SHOWN TO HAVE BEEN FALSE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 28-30, paras. 43, 44; and FOR CASES, see DIGEST, Vol. 35, p. 19, No. 109.

Cases referred to:

- (1) *Marsh v. Joseph*, [1897] 1 Ch. 213; 66 L.J.Ch. 128; 75 L.T. 558; 35 Digest 161, 568. A
- (2) *Smith v. Kay*, (1859), 7 H.L. Cas. 750; 30 L.J.Ch. 45; 11 E.R. 299; 35 Digest 19, 109.
- (3) *Meluish v. Milton*, (1876), 3 Ch.D. 27; 45 L.J.Ch. 836; 35 L.T. 82; 16 Digest 177, 823.
- (4) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 1 Digest 595, 2284. B
- (5) *Houldsworth v. City of Glasgow Bank*, (1880), 5 App. Cas. 317; 42 L.T. 194; 9 Digest 248, 1553.
- (6) *Barwick v. English Joint Stock Bank*, (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 1 Digest 587, 2245.
- (7) *Weir v. Bell*, (1878), 3 Ex.D. 238; 47 L.J.Q.B. 704; sub nom. *Weir v. Barnett, Bell, etc.*, 38 L.T. 929; 35 Digest 29, 196. C
- (8) *Mair v. Rio Grande Rubber Estates, Ltd.*, [1913] A.C. 853; 1913 S.C. (H.L.) 74; 83 L.J.P.C. 35; 109 L.T. 610; 1 Digest 588, 2251.

APPEAL by shareholders from an order of the Court of Appeal, dated Feb. 17, 1953, and reported [1953] 1 All E.R. 717, reversing in part an order of BARRY, J., dated July 31, 1952. D

The facts appear in the opinion of LORD OAKSEY.

Gardiner, Q.C., and *N. Lawson* for the appellants.

Salmon, Q.C., and *Gage* for the respondents.

The House took time for consideration.

Apr. 1. The following opinions were read. E

LORD OAKSEY: My Lords, this is an appeal from a judgment of the Court of Appeal (LORD GODDARD, C.J., MORRIS and ROMER, L.J.J.) reversing the judgment of BARRY, J., in an action for fraud.

The appellants, who were plaintiffs in the action, are four Czechoslovakians and a company who were engaged in the year 1947 in the food trade. In that year Mr. Fischer, on their behalf, applied to the defendant, Rosher, who was the managing director of a company called Nutrifood Products, Ltd. (hereinafter called "the company"), with the object of acquiring the shares in the company, but Rosher at that time, since the company was then prospering, refused to enter into negotiations. In the year 1948 the company began to lose money and Rosher then approached Mr. Fischer with a view to his acquiring the shares of the company on his own behalf and on behalf of his associates, who are the plaintiffs. It is admitted by the respondents [the executors of Sir Charles McRae, the chairman of Nutrifood Products, Ltd., at all material times] that, throughout these negotiations, which culminated in the sale of all the shares in the company to the plaintiffs, the defendant, Rosher, never disclosed that the accounts of the company, though based on figures which were accurate in themselves, were to his knowledge the result of fraudulent and dishonest trading. The company was engaged in the manufacture and sale of synthetic cream under licence from the Ministry of Food, and, under this licence, the cream had to be prepared in accordance with a formula which laid down the percentage of margarine which must be used. The company, under Rosher's management at all material times, increased the amount of synthetic cream manufactured and sold by the introduction of water and by the disregard of the formula. F G H

Relying on the figures in the company's accounts, the plaintiffs and Rosher had reached a point in the negotiations when Rosher determined to bring the matter before his fellow directors and before a general meeting of the company. After this meeting on Oct. 14, 1948, a minute was drawn up in the following terms:

A "The chairman [Sir Charles McRea] reported that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials being increased. The proposition referred to had been received from Economic Utilities, Ltd. whereby that company would purchase from the shareholders of Nutrifood Products, Ltd. their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities, Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis.

(Sgd.) F. E. Rosher."

C On the true interpretation of this minute there has been much argument to which I will return later.

Thereafter Rosher continued the negotiations and saw the plaintiffs, Mr. Briess, Mr. Fischer, Mr. Jedlin and Mr. Pintus, and it was ultimately agreed, on or about Nov. 4, 1948, that the plaintiffs would purchase all the shares in the company for £12,000. Two meetings, undoubtedly, took place between the plaintiffs and Rosher towards the end of October, probably on Oct. 20 and 23, and at one of these meetings Mr. Briess asked Rosher explicitly whether the company had a licence and whether they had a fat allocation, and Rosher answered in the affirmative and explained that a minimum output of 250 gallons per week was essential to a profit whereas, according to BARRY, J.'s finding, the company could not produce more than 150 gallons if they had adhered to the Ministry's formula. When Rosher's fraud was discovered the plaintiffs applied, on Mar. 1, 1950, to Sir Charles McRea for redress, but liability was denied and this action was then begun, Sir Charles McRea having died in the meantime. At the trial, at the close of the case for the plaintiffs, counsel for the defendant executors elected to call no evidence and submitted that there was no case for them to answer. The learned trial judge overruled the submission, accepting the contentions made on behalf of the plaintiffs as to the basis of those defendants' liability, and holding: (i) that fraud had been committed by Rosher after Oct. 14, 1948, and thus during the period when he had been authorised to act as agent on behalf, *inter alios*, of the deceased; (ii) that the deceased, *inter alios*, had accepted Rosher's negotiations effected prior to Oct. 14, 1948, in such circumstances as to accept responsibility for Rosher's fraud so far as previously committed.

H The action then proceeded, and on July 31, 1952, BARRY, J., held that (i) Rosher had been guilty of fraud by misrepresentation and concealment whereby the plaintiffs had been induced to enter into the said agreement. (ii) that the defendant executors as representing the deceased were liable to the plaintiffs for the fraud of Rosher on the grounds contended by the plaintiffs. (iii) that by reason of the said fraud the plaintiffs had suffered loss and damage to the amount of £6,000 but that the defendants were entitled to a deduction of £600 from this sum on account of the fact that the plaintiffs, Cereal Manufacturing Co. (Chelsea), Ltd., who had contributed £4,800 of the purchase price of £12,000 paid to the shareholders of the company in respect of which the company had taken transfers of 1,905 preference shares of £1 each and 1,904 ordinary shares of 1s. each, had, in fact, sold such shares in August, 1949, prior to the

discovery of the fraud, for the sum of £3,000. BARRY, J., accordingly ordered that judgment be entered for the plaintiffs against Rosher and the defendant executors for the sum of £5,400 with costs other than those incurred by the joinder of the plaintiffs Cereal Manufacturing Co. (Chelsea), Ltd., and that the said sum of £5,400 be apportioned between the plaintiffs respectively, as to the plaintiff Briess £1,500, as to the plaintiff Pintus £900, as to the plaintiff Strauss £450, as to the plaintiff Fischer £750, and as to the plaintiffs Cereal Manufacturing Co. (Chelsea), Ltd. £1,800 (which last sum represented £2,400 less £600 deducted). Thereafter the learned trial judge heard and disposed of the third-party proceedings in which the defendant executors claimed contribution from other former individual shareholders. At the conclusion of such proceedings judgment was entered in favour of the defendant executors against such third parties for a sum of money and costs in the case of each third party proportionate to the value of his transferred shareholding in the company related to the price paid for the shares in that company by the plaintiffs on the ground that Rosher, having acted as agent for such third parties as well as for the said deceased, such third parties were liable to make contribution as aforesaid towards the liability of the defendant executors under the judgment in favour of the plaintiffs.

The defendant executors appealed to the Court of Appeal on the grounds that the trial judge was wrong in law in holding that the deceased, and through him his estate, was liable for the fraud of Rosher, and that there was no evidence on which the trial judge could so hold. Rosher did not appeal against the judgment and order. The plaintiffs cross-appealed against the judgment and order of the learned trial judge in so far as the sum of £600 had been deducted from the damages.

On Feb. 17, 1953, the Court of Appeal (LORD GODDARD, C.J., MORRIS and ROMER, L.JJ.) allowed the appeal of the defendant executors holding (i) that there was no continued or repeated fraud committed by Rosher in showing to the plaintiffs balance sheets of the company and allowing the plaintiffs to remain under the impression that the figures shown in such accounts related to trading which he, Rosher, had fraudulently represented the company to have been conducting lawfully and in a material which could be lawfully sold; (ii) that the doctrine of ratification had no application to the circumstances of the case on the ground that the shareholders (including the said deceased) knew, and could know, nothing of Rosher's fraud; (iii) that the authority given to Rosher at the meeting of Oct. 14, 1948, was merely to accept an offer in stated terms for the purchase of the shares in the company and was not an authority to Rosher on behalf of the shareholders to negotiate a sale.

At the hearing in your Lordships' House counsel for the respondents contended (i) that the shareholders did not ratify Rosher's agency at the meeting of Oct. 14, 1948; (ii) that the minute of that meeting showed on its true interpretation that Rosher was not given authority to make any representations on the shareholders' behalf; (iii) that, in fact, Rosher made no misrepresentation after Oct. 14, and that his previous misrepresentations did not continue or have any continued effect after Oct. 14, 1948, when he became the agent of the shareholders.

My Lords, I think that on the authorities, and particularly on the judgment of the Court of Appeal in *Marsh v. Joseph* (1), it cannot be said that the shareholders ratified Rosher's agency up to Oct. 14, 1948, as it was not proved that they had full knowledge of all the facts or that there is sufficient evidence to make it clear that they intended to ratify whatever he had done. But, on the other hand, I am of opinion that, on the true interpretation of the minute of the general meeting, it is clear that Rosher was appointed on Oct. 14, 1948, agent on behalf of all the shareholders of the company to negotiate the sale of their shares and that, in such circumstances, the shareholders are responsible for any fraudulent representations he made in the course of those negotiations.

A It was argued that there was no satisfactory evidence that he made any further misrepresentations after Oct. 14, 1948, but, even on that assumption, I am of opinion that, in negotiating from the outset on the basis that the company's accounts which he put forward represented the true position of the company, Rosher continued to make that fraudulent representation up to the time the contract was completed. It is not a case in which an innocent misrepresentation has been forgotten, or a truthful representation has been changed into an untruthful representation by a change of circumstances. From the first, and throughout the negotiations, Rosher knew perfectly well that the plaintiffs were negotiating in the belief that the accounts put forward by him represented an authorised and legitimate business and his fraud continued from minute to minute after Oct. 14, 1948, up to the time when he secured the completion of the contract: cf. SPENCER BOWER ON ACTIONABLE MISREPRESENTATION, 2nd ed., pp. 77, 78; *Smith v. Kay* (2) (7 H.L.Cas. 769); *Meluish v. Milton* (3) (3 Ch.D. 35).

B Apart, however, from this consideration, I am of opinion that, having regard to the attitude of counsel for the defendants at the trial and the evidence of Mr. Briess, there was sufficient evidence to show that Rosher actually made further express misrepresentations after Oct. 14, 1948—in particular, in his admitted representation that 250 gallons was a minimum for profitable working.

C For these reasons I am unable to agree with the judgment of the Court of Appeal, and I move, your Lordships, that the appeal be allowed and the judgment of BARRY, J., be varied by increasing the damages to £6,000 and the apportioned share thereof of the Cereal Manufacturing Co. (Chelsea), Ltd. to £2,400. The appellants will have the costs here and below.

D **LORD REID:** My Lords, the business of Nutrifood Products, Ltd. was the manufacture and sale of synthetic cream. To manufacture this substance they had to have a licence from the Ministry of Food and an allocation of raw materials. They obtained the licence on condition that they manufactured the cream according to a formula approved by the Ministry. The company's undertaking was small and the whole business was conducted by Rosher, the managing director. From the outset, Rosher disregarded the formula and added much more water to the cream than he was permitted to do. This was a criminal offence, but it produced substantial profits which could not have been made by lawful means. None of the other directors or shareholders was aware of this and it is not suggested that they were culpable in any way. Rosher concealed his offence from the Ministry by making false returns.

E F When it became difficult to carry on this system Rosher sought to sell the business. Without informing his co-directors he approached the appellants, who he knew were willing to buy the business. He told them truthfully that the company had a licence and an allocation of raw materials, and he showed them accounts which were accurate, but he concealed from them the fact that he had been acting illegally and that, if he had complied with the conditions of the licence, the total output of cream would have been so much smaller that the profits could not have been made. It is not disputed that the false picture which he thus presented to them was a fraudulent misrepresentation.

G H When negotiations had reached the stage of the appellants provisionally agreeing to a price if all the shares in the company were transferred to them, Rosher put the matter before the other directors and then before the shareholders at meetings at which the late Sir Charles McRea presided on Oct. 14, 1948. I shall have to consider later what occurred at those meetings. Then, on Nov. 2 the appellants, through Economic Utilities, Ltd., a company controlled by them, offered to buy all the shares for a total price of £12,000, and on Nov. 12 Rosher accepted that offer. All the shareholders signed transfers of their shares in favour of the appellants and the sale was duly completed, £12,000 being received by the shareholders, including Sir Charles McRea.

The appellants later discovered the fraud and after some correspondence,

on Apr. 15, 1950, they raised the present action against certain of the former shareholders, including Sir Charles McRea, for £12,000 damages. The only respondents now are the executors of Sir Charles McRea, who died after the raising of this action and who was the chairman and largest shareholder in the company, and if this appeal succeeds it is agreed that the appellants are entitled to judgment against the respondents for £6,000, being the difference between the price paid by the appellants, £12,000, and the true value of the shares which they received, which was £6,000. The ground of action is that, in completing the transaction, Rosher acted as the agent of Sir Charles McRea and the other shareholders, and that all the shareholders who authorised him to act as their agent are jointly liable for the damage caused to the appellants by his fraud. A

The first question to be decided is the extent of the authority conferred on Rosher by the shareholders. The only authority which they gave to him was given at the general meeting of the company held on Oct. 14, 1948. No doubt it was convenient to discuss and settle this matter at the general meeting, but the arrangements which the shareholders made with Rosher were not company business and, therefore, the minutes of the meeting were not, strictly speaking, the appropriate place to record these arrangements. Nevertheless, the minutes of this meeting are the only evidence in this case of what took place at the meeting, and it has been accepted throughout that the nature and extent of the authority which the shareholders then conferred on Rosher are to be determined by a construction of the minutes. The relevant part of the minutes is in these terms: B C

"The chairman reported that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials being increased. The proposition referred to had been received from Economic Utilities, Ltd., whereby that company would purchase from the shareholders of Nutrifood Products, Ltd., their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities, Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis." D E

The respondents say that the true meaning of this minute is that the shareholders only authorised Rosher to accept the sum of money which was being offered, and that they gave him no authority to do anything else and, in particular, no authority to make any representations on their behalf. This was the interpretation accepted by the Court of Appeal. LORD GODDARD, C.J., said ([1953] 1 All E.R. 721): F

"I base my judgment on the ground that this minute of Oct. 14 did not give [Rosher] authority, or purport to give him authority, to negotiate on behalf of the company. It gave him authority to accept what was being offered, a sum of money which he said he could get for the shares." G

My Lords, I am unable to accept that interpretation. The minute states that the directors had received a "proposition". I do not think that "proposition" here means a firm offer. The minute of the directors' meeting held earlier on the same day shows that this "proposition" was submitted to the directors by Rosher. It states that Rosher "outlined a proposition which had been made to him by Economic Utilities, Ltd." and that it was decided that this proposition should be placed before the shareholders for their consideration. Rosher had been negotiating with the appellants, but, in fact, he had not then received any firm offer either from them or from Economic Utilities, Ltd. His earlier conduct shows that he would not have been deterred from making any H

statement which suited him, because he knew it to be untrue, but it appears to me to be improbable that he would have told the shareholders that he had a firm offer, because if, by any chance, the negotiations had later broken down his false statement would have put him in a difficult position with the shareholders. If he did not say that a firm offer had been received, then the natural course for the shareholders to take was to authorise him to do all that was necessary to complete the transaction, and as I read the last sentence of the minute that is, in fact, what was done. Authority to

“take the matter up further with that company with a view to completing the transaction on [that] basis”

appears to me clearly to include authority to make such further statements and representations and to give such answers to any questions by the company and do such other things as he should think desirable or necessary to achieve a sale.

If that be so, and if thereafter Rosher made any false and fraudulent representation which brought about the sale, then it was not disputed that the appellants must succeed. But the evidence on this matter is not very satisfactory. There is evidence that Rosher made such representations to Mr. Briess, one of the appellants, after Oct. 14, but this does not appear to have been treated as a vital matter at the trial, and the findings of BARRY, J., on the subject are not very specific. I am, therefore, not prepared to decide the case on this ground, and I shall consider it on the footing that all the relevant misrepresentations were made by Rosher before Oct. 14.

The respondents argue that a principal can only be vicariously liable for acts done by his agent after he had become agent, and, therefore, the shareholders cannot be liable for damage caused by fraudulent misrepresentations made by Rosher at a time when he had no authority to act for them any more than they would be liable in respect of fraudulent misrepresentations made by some third person with whom they never had any connection at all. The general principle of vicarious liability for fraudulent misrepresentations is now well settled. I shall quote two short passages from the speech of LORD MACNAGHTEN in *Lloyd v. Grace, Smith & Co.* (4) ([1912] A.C. 735). LORD MACNAGHTEN quoted from LORD BLACKBURN's speech in *Houldsworth v. City of Glasgow Bank* (5) this passage, dealing with the case of *Barwick v. English Joint Stock Bank* (6):

“The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud.”

Then LORD MACNAGHTEN added: “That, my Lords, I think is the true principle.” LORD MACNAGHTEN then quoted, with approval, the following passage from the judgment of BRAMWELL, L.J., in *Weir v. Bell* (7) (*ibid.*, 737):

“every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.”

That passage from the judgment of BRAMWELL, L.J., was also quoted with approval by VISCOUNT HALDANE, L.C., in *Mair v. Rio Grande Rubber Estates, Ltd.* (8) and I might add one sentence from the speech of LORD MOULTON in that case ([1913] A.C. 872):

“Now, it is elementary law that no person can take advantage of the fraud of his agent.”

My Lords, I find it impossible to reconcile those general statements of the law with the contention that a principal can disclaim responsibility for fraudulent misrepresentations made by his agent which, though made before the agency commenced, to the agent's knowledge continued to influence the other party

after his appointment as agent and finally induced the other party to enter into the contract which the agent had been authorised to make, and did make, on behalf of his principal. The misrepresentations were continuing representations intended to induce the other party to make the contract, and when that party made the contract to his detriment, a cause of action arose, and, in my opinion, it arose against both the agent and the principal. The agent continued to be fraudulent after he was appointed. It was his duty, having made false representations, to correct them before the other party acted on them to his detriment, but he continued to conceal the true facts. Sir Charles McRea "undertook for the absence of fraud" in Roshier in the exercise of the authority given to him. But Roshier acted fraudulently while executing that authority and in making the contract, and on that ground I am of opinion that this appeal should be allowed.

I might add that counsel for the respondents stressed the hardships that would result in this, and other cases, if the law is so applied, but the hardships which would result if the law were otherwise would be no less. If this remedy were not available to the appellants, counsel was unable to suggest any other form of remedy which would be available to them, and if no remedy was available to the appellants in this case, then the hardship to them is obvious, but I do not think that cases of this kind can, or should, be decided by balancing actual or possible hardships.

LORD TUCKER: My Lords, it is not in dispute that the sale of the shares in Nutrifood Products, Ltd. was induced by the fraud of one Roshier who was a defendant in the action. The nature of the fraud was that he represented that the profits of that company had been made by lawful trading whereas, as he well knew as managing director of the company, the profits had been made as a result of the manufacture of greatly larger quantities of artificial cream than could have been manufactured if the formula approved by the Ministry of Food had been adhered to as required by the licence granted by the Ministry. He never made an express representation to this effect, but the learned trial judge, BARRY, J., found that he had, by the production of the company's balance sheets and his conduct throughout the negotiations, impliedly so represented.

The question for decision in this appeal is whether the personal representatives of Sir Charles McRea, deceased, whose shares were sold as a result of this fraudulent misrepresentation, are liable to pay damages. The answer depends on whether Roshier was, at any stage prior to Nov. 12, 1948, on which date the contract for the sale of all the shares in Nutrifood Products, Ltd. to Economic Utilities, Ltd., as agents for the appellants was concluded, the agent for the shareholders, including Sir Charles McRea, to negotiate the sale and make representations on their behalf.

Roshier had been tentatively approached with regard to a possible sale of the shares of Nutrifood Products, Ltd. by one of the appellants, Mr. Fischer, in 1947, but nothing resulted therefrom. In the summer of 1948 Roshier re-opened the question by inviting Fischer to lunch with him at his club. There were further interviews with some of the other appellants and, by Oct. 14, 1948, the negotiations had reached a stage at which Roshier was in a position to report to the shareholders and ascertain their intentions. Up to this point they had no knowledge of the discussions and it is not in dispute that, prior to Oct. 14, Roshier had no authority from Sir Charles McRea or any other shareholder to make any representation on their behalf. He had ascertained that the appellants were disposed to pay 35s. per share for the preference shares and 15s. for the ordinary shares, but the trial judge has found that he had not by this date obtained a firm offer at these prices, and there was no evidence that, at the annual general meeting of the company on Oct. 14, he ever stated that he had obtained a firm offer. As to what took place at this meeting the parties were content to rely at the trial on the minutes of the company and no witness, apart from Roshier,

was called by either side. It is true that Rosher, in answer to questions by counsel for Sir Charles McRea's representatives, stated that, by that time, the price had been agreed and the negotiations were concluded, but this was not strictly accurate since no firm offer was then in existence and, in fact, the offer by Economic Utilities, Ltd., six days after the meeting was "subject to contract".

A The nature of Rosher's authority can, therefore, only be ascertained from a perusal of the minutes. The relevant portions of the minute of the directors' meeting at 12 o'clock on Oct. 14 and of the company's annual general meeting at 2.30 p.m. on the same day are as follows:

Directors' Meeting

B "Mr. Rosher outlined a proposition which had been made to him by Economic Utilities, Ltd. whereby that company would purchase from the shareholders of Nutrifood Products, Ltd. their preference shares for 35s. per share and their ordinary shares for 15s. per share. This was discussed very fully and in view of the difficulties being encountered in consequence of the restricted supplies of raw materials it was decided that the above proposition should be placed before the shareholders at the annual general meeting for their consideration."

C *Annual General Meeting*

D "The chairman reported that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials being increased. The proposition referred to had been received from Economic Utilities, Ltd., whereby that company would purchase from the shareholders of Nutrifood Products, Ltd., their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities, Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis."

E BARRY, J., held that the authority thus conferred on Rosher was not limited to accepting an offer to purchase and arranging the necessary transfers, but that, there being then no binding offer in existence which Rosher could accept forthwith, he was given authority to take the matter up further with the prospective purchasers and to make any statements concerning the company's business which might be required in order to induce them to enter into a binding contract.

F The Court of Appeal, on the other hand, have construed the minute as conferring only the more limited authority, viz., to accept what was being offered, i.e., a sum of money. My Lords, I am unable to take such a limited view of the agent's authority. It would have been perfectly simple to say in terms that he was to "accept the offer which had been received." Instead, the expressions "a proposition with regard to the sale", "whereby that company would purchase", "Mr. Rosher, who had already been in negotiation", "should take the matter up further with that company", "with a view to completing the transaction on the above basis" are used. This language is consistent with the known facts that no firm offer capable of acceptance so as to constitute a binding contract existed, and that further negotiations were, in fact, required to bring this about. But, apart from these facts, the language of the minute is, I think, in such general terms as to preclude the more limited construction. My Lords, if, as I think, this is the proper construction of the minute, Rosher was, from that time until the completion of the contract on Nov. 12, the agent of Sir Charles McRea, inter alios, to complete the negotiations and make a contract. He knew more about the business of the company than anyone else, and would clearly have authority to answer all questions relevant

thereto and to make any statements in connection therewith necessary to bring about the desired result.

I do not think the learned judge's judgment can fairly be read as containing a specific finding that Rosher, at any time after Oct. 14, expressly made any misrepresentation, but in his preliminary judgment given at the close of the plaintiffs' case on a submission of "no case" by counsel for the present respondents he dealt with the respondents' liability on the basis that the previous misrepresentations of Rosher were to be regarded as continuing down to the moment when the appellants' agents acted on them. He said:

"I am quite satisfied that the representations made by Mr. Rosher concerning the affairs of Nutrifood Products, whether made before or after Oct. 14, were continuing representations and remained continuing representations until the plaintiffs or their agents, Economic Utilities, Ltd., acted upon them by entering into a binding contract to purchase these shares in the beginning of November. These representations, being continuing representations, the law regards them as being repeated from minute to minute during the whole period between the time the representations were made and the time when they were finally acted upon."

A little later he said:

"It was suggested at an early stage of the argument that the duty to make a disclosure as to the affairs of the company and to rectify misstatements which had been made about those affairs was a duty which fell only upon Mr. Rosher in his personal capacity, because it was his misrepresentations made in the early stage of the negotiations which caused that duty to arise . . . I cannot take the view that it was merely a personal responsibility falling upon Mr. Rosher whether before or after Oct. 14. After Oct. 14, as I have said, I am satisfied that Mr. Rosher was acting on behalf of the shareholders, and with their authority, and that if he allowed these representations . . . to continue right up to the date of the sale, he did so as from Oct. 14 as agent for the named defendants, among others, and they are, unfortunately for them, vicariously responsible for that tort."

My Lords, this is, in my opinion, a completely accurate statement of the law. It was contended by counsel for the respondents that, when once the representations were made, the wrongful act was complete although no action for damages would lie until the representee suffered damage. He argued that the representations were not continuing, but the consequences of the original representation continued, and, accordingly, provided the representor was not the agent of the respondents when the original representation was made, they could not be held responsible, because the consequences of that representation took effect at a time when the representor had become their agent.

No authority for this proposition was cited, and it is, in my view, founded on error. The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation—not having been corrected in the meantime—is acted on by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted on by the representee the tortious act is complete, provided that the representation is false at that date. If false when made but true when acted on there is no misrepresentation. In art. 73 of SPENCER BOWER ON ACTIONABLE MISREPRESENTATION, 2nd ed., it is stated (p. 77):

"It is commonly said that the representation must be shown to have been false when made. But this is not quite correct. The only real issue is—was it true or false when it was acted upon."

In HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 23, p. 29, para. 44, it is stated:

"Where there is an appreciable interval between the two dates above

mentioned [i.e., date when made and date when acted upon], and the representation relates to an existing state of things, the representor is deemed to be repeating his representation at every successive moment during the interval, unless he withdraws or modifies it by timely notice to the representee in the meantime."

A I do not think the accuracy of these statements can be challenged. It is true that there does not appear to be any express authority which can be quoted as an example of the application of this principle to a case of principal and agent where the agency commences after the making of a representation which is allowed by the agent to continue uncorrected with knowledge of its falsity until acted upon. I agree, however, with BARRY, J., that the duty of the agent, who has made the misrepresentation, to correct it cannot be regarded as only a personal obligation. If he has, in the meantime, been appointed agent with authority to make representations for the purpose of inducing a contract he, in his capacity as agent, is, by his conduct, repeating the representations previously made by him. This is more particularly the case where the misrepresentation results from silence with regard to matters which, if revealed, would have rendered false statements which, standing by themselves, were literally true. C The present is such a case. Having given information with regard to the profits of the company, Rosher's silence both before and after Oct. 14 as to the nature of those profits rendered that information false. His fraud was a continuing fraud which became tortious when acted on by the appellants' agents on Nov. 12, 1948.

D The learned judge awarded the appellants £5,400 damages. It was contended by counsel for the appellants and agreed by counsel for the respondents that, if the appellants were entitled to succeed, the damages should have been £6,000, of which sum the apportioned share of the Cereal Manufacturing Co. (Chelsea), Ltd. would be £2,400.

E For the reasons stated above I would allow the appeal and vary the judgment of BARRY, J., by increasing the damages to £6,000 and the apportioned share thereof of the Cereal Manufacturing Co. (Chelsea), Ltd. to £2,400.

My Lords, my noble and learned friend, **LORD ASQUITH OF BISHOPSTONE**, is unable to be present this afternoon. He has asked me to say that he has read the speech which I have just delivered, and that he agrees with it.

F **LORD COHEN:** My Lords, it is common ground between the parties that, prior to Oct. 14, 1948, Mr. Rosher had no authority to act in relation to the sale of the shares in Nutrifood Products, Ltd. (to which company I shall refer hereafter as "the company") on behalf of any of the shareholders of the company other than himself. It is also common ground that, at the annual general meeting of the company held on that day, the shareholders conferred on him some authority. The first question which your Lordships have to determine is as to the extent of that authority. No shareholder in the company other than G Rosher was called as a witness at the trial. The parties treated the minutes of that meeting, which were signed by Rosher, as being a correct record of the proceedings thereat.

H In the Court of Appeal the Lord Chief Justice, with whom MORRIS, L.J., and ROMER, L.J., agreed, construed that minute not as recording any authority to negotiate a sale on behalf of the shareholders, but as recording only authority to accept an offer which had already been made. Had I been able to construe the minute in this sense I should, I think, have agreed with the decision of the Court of Appeal, but I am unable so to construe it. The language of the concluding sentence of the minute—

"it was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities, Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis"—seems to me inconsistent with so limited an authority as that for which the

respondents contend. Had that been the intention, it would have sufficed to record that it was agreed that Rosher should accept the offer on behalf of all the shareholders.

It is plain that, prior to the meeting, Rosher had, in fact, received no definite offer from the proposed purchasers, and there seems no reason why he should have lied to the shareholders on this point. The use of the word "proposition" with regard to the sale of the whole of the company's shares suggests that he told the shareholders that the matter was still in the stage of negotiation, and the concluding sentence which I have already quoted confirms that view. If that be so, I think the form of the minute necessarily involves that Rosher was authorised by the shareholders to give on their behalf such information as to the business of the company as the proposed purchasers might require before they would turn their proposition into a definite offer. On this basis counsel for the appellants argued that the shareholders were liable for Rosher's admittedly fraudulent misrepresentations on the ground (a) that they were repeated after Oct. 14, 1948, and before the contract became binding on Nov. 12, 1948, or, alternatively, (b) that the misrepresentations, though made before Oct. 14, 1948, were continuing representations which neither Rosher nor his principals corrected before Nov. 12.

The first of these grounds raises a pure question of fact, and counsel for the respondents did not dispute that, if the learned trial judge had found on evidence that fraudulent misrepresentations had been made between Oct. 14, 1948, and Nov. 12, 1948, the appellants would be entitled to succeed. Unfortunately, there is no clear finding on this point. The learned judge had first to consider it when ruling on a submission by Mr. Conolly Gage that there was no evidence that the late Sir Charles McRea was responsible in tort for the alleged misrepresentations. In the course of his observations on this submission the learned judge said:

"It is not clear, as Mr. Gardiner has conceded, whether or not any specific statements were made about the company's business after that date, or whether the relevant balance sheets and accounts of the company were shown to the plaintiffs, or any of them, before or after that date."

Had the matter rested there, the appellants would have failed to discharge the onus which rested on them of proving a fraudulent misrepresentation after Oct. 14, 1948.

The learned judge had, however, to consider the matter again when giving judgment at the conclusion of the hearing. In the course of his observations he said:

"Mr. Briess was, of course, also interested in these matters, and he tells me (and I accept his evidence as to this—indeed, there is no real dispute about it) that he was concerned about whether this company had a licence to produce this cream from the Ministry of Food. He knew that a licence was necessary and he was concerned to know whether or not the company had the necessary allocation of materials, and he raised both those points with Mr. Rosher and Mr. Rosher confirmed that the company had a licence and that it had the necessary allocation of materials. Throughout the profit figures that were shown on the company's accounts for the three years I have mentioned were treated as being the profits earned by the company in respect of their trading activities during those three annual periods. Shortly before the final bargain was made, Mr. Briess and Mr. Fischer (and, I think, also Mr. Pintus) all went out to visit the Nutrifood factory at Acton. There they saw Mr. Rosher and saw the manufacturing process going on. They did not go into any details on that occasion, but Mr. Rosher met these three gentlemen (some of them for the first time) and that interview is said to have taken place somewhere about Oct. 20, 1948."

This reference to Oct. 20, 1948, is, I think, a mistake for Oct. 23, 1948. This

extract leaves it in doubt when the questions were asked by Mr. Briess, but there is some evidence to support the view that no interview between Rosher and Mr. Briess had taken place before Oct. 20, 1948. Later in his judgment, while dealing with the question whether there was any false representation, the learned judge refers to a statement which Rosher says he made to Mr. Briess at an interview in Mr. Briess's office in October, shortly before Mr. Briess's visit to the company's factory. That statement was to the effect that a minimum output of 250 gallons per week was essential before the business could show any margin of profit. From some of the evidence it seems probable that this interview at Mr. Briess's office took place on Oct. 20, 1948. The learned judge points out that a production of 250 gallons per week must, to Rosher's knowledge, have been utterly impossible except by watering down of the mixture to such an extent that the fat content was half or less than half of the minimum required by the Ministry. He concludes his observations on that part of the case by saying:

"With all that knowledge, it seems to me, to represent that the company was operating under a licence granted by the Ministry (a licence in the terms I have indicated) was a false representation. I am forced to the conclusion, in all the circumstances of this case, that that false representation was made knowingly, with a view to inducing these gentlemen (the plaintiffs in this case) and the company now associated with them as co-plaintiffs, to purchase the shares in this company."

He then proceeds to consider the question of the liability of the other shareholders for Rosher's fraudulent misrepresentations. After referring to his decision on the submission and saying that he need not repeat what he said then, he continued:

"... I cannot see that Mr. Rosher's evidence has carried the matter any further than the point to which it had been carried at the close of the plaintiffs' case. I am bound to say, for the reasons which I indicated in ruling upon Mr. Gage's submission, that I have come to the conclusion that his clients, the representatives of the late Sir Charles McRea—although no one has suggested that Sir Charles McRea was personally implicated in any way in these representations which I have found to be fraudulent—are none the less liable to the plaintiffs for the damages which flowed from those fraudulent representations on the ground that the representations, or some of them at some period, were made by Mr. Rosher acting as Sir Charles McRea's agent and on his behalf . . ."

This seems to suggest that part of the misrepresentations complained of were, in fact, made after Oct. 14, 1948, but, having in mind that the onus is on the appellants, I should hesitate, in the absence of a clear finding, to decide this case in their favour on this ground. I turn, therefore, to the question of continuing misrepresentation.

Counsel for the appellants relied on a statement of the principle of continuing misrepresentation to be found in SPENCER BOWER ON ACTIONABLE MISREPRESENTATION, 2nd ed., p. 3, which reads as follows:

"In any case where there is an interval between the representation and the alteration of position induced thereby, the representor is at liberty to withdraw or modify the representation at any time during such interval. Unless so withdrawn or modified, and, if modified, subject only to the modification, the representation is deemed to be repeated at each successive moment during the whole of such interval, and is hereinafter called 'a continuing representation'."

This statement is based on some observations of LORD CRANWORTH in *Smith v. Kay* (2), where he said, of a representation in issue in that case (7 H.L. Cas. 769):

"It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on."

The headnote in the case seems to suggest that LORD WENSLEYDALE doubted the correctness of this statement, but I am unable to find any such doubt expressed in his speech. I respectfully agree with the observation of LORD CRANWORTH and adopt the statement of principle I have cited from the work of Mr. SPENCER BOWER. Mr. SPENCER BOWER was at that stage, however, dealing with the position as between the maker of the representation and the person to whom it was made. He was not considering the question of the responsibility of a principal for the fraudulent misrepresentation of his agent. I turn, therefore, to the question whether, on the assumption that the statements from which the fraudulent misrepresentation arises were not repeated after Oct. 14, the respondents are liable for the fraudulent misrepresentation of their agent, or, to be more accurate, for his fraudulent failure to correct the false impression he had made, it being admitted that they were themselves innocent of any fraud.

My Lords, in my opinion, on the facts of this case this question must be answered in the affirmative. Roshier, when he became the agent of the respondents, was under the duty as between himself and the appellants to correct the false impression that his misrepresentations had made. He had become the agent of the respondents to complete the negotiations for the sale of their shares, as well as his own shares, to the appellants. His authority extended to giving the appellants information as to the business of the company. It cannot be denied that, if he had made a new fraudulent statement as to that business, the respondents would have been liable to the appellants in damages for that fraud. It seems to me necessarily to follow that they must be liable for his fraudulent failure to withdraw or modify the false statement he had already made.

In view of the conclusion I have reached on this point, it is unnecessary for me to express any opinion whether counsel for the appellants was right in his alternative submission that, by appointing Mr. Roshier their agent on Oct. 14 with the authority I have indicated, the shareholders accepted responsibility for the representations he had made before that date.

My Lords, I do not think that the decision of your Lordships in this case will have the widespread consequences which ROMER, L.J., feared, for the difference between your Lordships and the Court of Appeal turns not on any question of law, but on the view your Lordships have formed as to the extent of the authority conferred on Mr. Roshier at the meeting on Oct. 14.

For the reasons I have given I would allow the appeal with costs here and below. In view of the admission by counsel for the respondents that he cannot support the deduction of £600 which BARRY, J., allowed because of the re-sale by the Cereal Manufacturing Co. (Chelsea), Ltd. of the shares acquired by it, I agree that judgment should be entered for the appellants for £6,000 apportioned as stated in the order of BARRY, J., dated July 31, 1952, save that the amount apportioned to the Cereal Manufacturing Co. (Chelsea), Ltd. should be increased to £2,400.

Appeal allowed.

Solicitors: *Buckeridge & Braune* (for the appellants); *Woolley, Tyler & Bury* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SMEATON v. ILFORD CORPORATION.

[CHANCERY DIVISION (Upjohn, J.), February 9, 10, 11, 12, 15, 16, 17, March 9, 1954.]

Nuisance—Sewer—Overflow—Flooding of neighbouring premises—Liability of sanitary authority—Public Health Act, 1936 (c. 49), s. 31, s. 34 (1).

A The defendants, as sanitary authority, had built and maintained a soil sewer which ran under the street in which the plaintiff had, since 1940, owned and occupied a leasehold dwelling-house. The sewer, which was eighteen inches in diameter, carried the soil and foul water from its catchment area into a larger sewer. The whole sewage system of the defendants' area had become overloaded since the construction of the soil sewer in 1898, and a new system was required. The sewers were kept properly cleansed by the defendants, but in time of heavy rain, if the larger sewer were heavily taxed by the volume of sewage, back pressure was created in the smaller soil sewer so that from time to time the manhole cover opposite the plaintiff's dwelling-house was displaced and his property was flooded with sewage. The plaintiff claimed an injunction and damages for nuisance and trespass, but he did not allege negligence on the part of the defendants.

C HELD: (i) the flooding was caused by the overloading of the sewers, which arose, not from any act of the defendants, but because, under the Public Health Act, 1936, s. 34 (1), they were bound to permit occupiers to discharge their sewage into the sewers, and, therefore, the defendants had not created or continued the nuisance within s. 31, and were not liable.

D (ii) the defendants could not claim exemption from the application of the principle of *Rylands v. Fletcher* (1868) (L.R. 3 H.L. 330) on the ground that the use of land for sewage collection was for the general benefit of the community or that such collection was a natural user of land, but the proper construction to be given to s. 31 of the Act of 1936 was that, in the absence of negligence, it excluded liability for the escape of sewage and so also excluded the application of the principle.

E Dictum of DENNING, L.J., in *Pride of Derby & Derbyshire Angling Assn., Ltd. v. British Celanese, Ltd.* ([1953] 1 All E.R. 202), not applied.

Robinson v. Workington Corpn. ([1897] 1 Q.B. 619), followed.

Dictum of LINDLEY, L.J., in *Green v. Chelsea Waterworks Co.* (1894) (70 L.T. 548), criticised.

F *Hammond v. St. Pancras Vestry* (1874) (L.R. 9 C.P. 316) and *Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.* ([1894] 1 Ch. 431), applied.

FOR THE PUBLIC HEALTH ACT, 1936, s. 31 and s. 34, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 335, 336.

Cases referred to:

- G (1) *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* H.L. sub nom. *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest, Replacement, 282, 334.
- (2) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 36 Digest, Replacement, 297, 419.
- H (3) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp.
- (4) *Pride of Derby & Derbyshire Angling Assn., Ltd. v. British Celanese, Ltd.*, [1952] 1 All E.R. 1326; *generally affd.* C.A., [1953] 1 All E.R. 179; [1953] Ch. 149; 117 J.P. 52.
- (5) *Humphries v. Cousins*, (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; *on appeal* C.A., 46 L.J.Q.B. 442; 36 Digest, Replacement, 288, 361.

- (6) *Hobart v. Southend-on-Sea Corpn.*, (1906), 75 L.J.K.B. 305; 94 L.T. 337; 70 J.P. 192; 41 Digest 35, 257.
- (7) *Tenant v. Goldwin (or Golding)*, (1704), 1 Salk. 21, 360 (91 E.R. 20, 314); Holt K.B. 500 (90 E.R. 1175); 2 Lord Raym. 1089 (92 E.R. 222); 6 Mod. Rep. 311 (87 E.R. 1051); 36 Digest, Replacement, 287, 356.
- (8) *Foster v. Warblington Urban Council*, [1906] 1 K.B. 648; 75 L.J.K.B. 514; 94 L.T. 876; 70 J.P. 233; 41 Digest 31, 229.
- (9) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 36 Digest, Replacement, 288, 359. A
- (10) *Haigh v. Deudraeth Rural District Council*, [1945] 2 All E.R. 661; 174 L.T. 243; 110 J.P. 97; 36 Digest, Replacement, 289, 362.
- (11) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest, Replacement, 293, 396.
- (12) *Read v. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest, Replacement, 292, 379. B
- (13) *Hammond v. St. Pancras Vestry*, (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 38 Digest 25, 135.
- (14) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 36 Digest, Replacement, 284, 338. C
- (15) *Nichols v. Marsland*, (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; *affd.* C.A., (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 36 Digest, Replacement, 297, 421.
- (16) *Ross v. Fedden*, (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest, Replacement, 293, 393.
- (17) *Green v. Chelsea Waterworks Co.*, (1894), 70 L.T. 547; 38 Digest 23, 125. D
- (18) *Glossop v. Heston & Isleworth Local Board*, (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 38 Digest 42, 249.
- (19) *A.-G. v. Dorking Guardians*, (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 38 Digest 54, 310.
- (20) *Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.*, [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791; 38 Digest 26, 140. E
- (21) *Robinson v. Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 38 Digest 55, 318.
- (22) *Harrington (Earl) v. Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 44 Digest 58, 418.
- (23) *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260; 93 L.J.K.B. 461; 130 L.T. 476; 88 J.P. 77; 38 Digest 48, 280. F
- (24) *Dunn v. Birmingham Canal Co.*, (1872), L.R. 8 Q.B. 42; 42 L.J.Q.B. 34; 27 L.T. 683; 36 Digest, Replacement, 75, 404.
- (25) *Metropolitan Asylum District Managers v. Hill*, (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 36 Digest, Replacement, 346, 868. G

ACTION for an injunction perpetually restraining the defendants, Ilford Corporation, from causing or permitting (whether by their servants or agents or workmen or otherwise) any liquid or solid sewage matter to escape from their sewer on to the plaintiff's premises so as to occasion either a nuisance or a trespass or both to the plaintiff, and for damages for nuisance and trespass.

Sir Lynn Ungood-Thomas, Q.C., and *Newsom* for the plaintiff. H
Milner Holland, Q.C., and *Hesketh* for the defendants.

Cur. adv. vult.

Mar. 9. UPJOHN, J., read the following judgment. The plaintiff in this action is the owner and occupier of a leasehold dwelling-house and premises known as No. 66, Vicarage Lane, in the borough of Ilford. The defendants are the sanitary authority for the borough of Ilford, and the plaintiff complains that

A the defendants are causing or permitting sewage to erupt from time to time from a manhole in Vicarage Lane nearly opposite the plaintiff's premises which seriously affects him in his occupation of his house and garden. Unlike most pollution actions, the facts are not really in dispute. The locus in quo is conveniently described by reference to a plan of the borough of Ilford which has been referred to as "annexure D". That plan shows, not far from Seven Kings Station, Vicarage Lane running approximately east and west and there is delineated by a red enclosing line the catchment area for a soil and foul water sewer which passes under and along Vicarage Lane. Within and towards the north of the catchment area, and coloured green, are two areas both owned by the defendants, the more northerly being the Oaks Lane Estate and the more southerly being the Suffolk Road Estate. The area coloured pink within the catchment area denotes houses with partially separate drainage; that is where B part of the rainwater drains off into the foul water sewer, and not into a surface water drain. The exact line of the sewer in question and the position of the manholes during its course are shown in red. The Vicarage Lane sewer is some eighteen inches in diameter and carries the soil and foul water from the whole of the catchment area I have mentioned and discharges it into a larger twenty-four inch sewer in Ley Street, which is shown on annexure D to the west of the C catchment area.

The soil sewer in question was constructed by the predecessors of the defendants, the urban district council of Ilford, some time before 1898. The urban district council have since been incorporated into a borough by a charter, the terms of which obliged the borough to assume all the liabilities of the council. The action D has, therefore, proceeded before me on the footing that the defendants are to be treated as the builders of the sewer and they are, of course, vested in them as the sanitary authority: see the Public Health Act, 1936, s. 20. In 1905 the railway line running north and south to the west of the catchment area was constructed, and the railway company then constructed a syphon for the sewer under the railway. The number of houses in the catchment area and served by the soil E sewer is now over 3,800. Of these, some 318 were built by the defendants on the Oaks Lane Estate, for occupation by tenants, between 1946 and 1949. Those houses became fully occupied by tenants by about the middle of 1949.

On the Suffolk Road Estate the defendant corporation have recently erected sixty flats for occupation by tenants, but at the date of the issue of the writ they had not been completed and were not occupied. I am informed, though it F was not proved in evidence before me, that even today no connection to any soil sewer has been made for these flats.

That, then, is a general description of the locus in quo. Now, it is not disputed that at times of heavy rain there is a serious eruption from the soil sewer in Vicarage Lane of untreated human excreta and other deleterious and malodorous matter. The sewage surges from the sewer up the manhole nearest to the plaintiff's premises, blows off the manhole cover and floods into the road. The G plaintiff's premises, together with the other premises on the south side of Vicarage Lane, are slightly lower than the lane, so the sewage floods over the road towards the south. It runs into the plaintiff's front garden and, until he stopped the damp-course ventilators up, into his house. The sewage then runs by the side of his house on to his back garden and finally runs off into the allotment gardens H to the south of his property.

The plaintiff kept a record of the number of times this happened in 1953. It happened once in April, four times in July, twice in September, three times in October and once in November. For the previous year the plaintiff also kept a record. Unfortunately, it has been lost, but he could remember at least four occasions when it happened. When it happens, it necessitates the most unpleasant operations on the part of the plaintiff, who has to take two or three hours clearing up the very unpleasant mess that it leaves in his front garden, and it

then leaves a residue of nasty black slime over it. This led the plaintiff to go to the expense of concreting the whole of his front garden, the better to enable him to clear away the black slime. Before the ventilators were blocked up, it caused injury to his floor, causing it to rot, and the renewal or repair of the floor, together with the provision of the concrete, has cost him £88. The plaintiff has also been put to expense in that he has built a brick wall adjoining the pavement to prevent flooding directly from the road, but he now receives the sewage from and through the garden of the adjoining property, No. 68, Vicarage Lane. The plaintiff is a man of modest means, and he has told me he could not afford to build a wall down the side of his property. The plaintiff lives in his house with his wife and four children, and, on one occasion, the flooding happened at a peak period in the morning and made it quite impossible for his two younger children to leave the house and go to college and school respectively. This flooding has been known to exist by the defendants for twenty years at least, but the plaintiff, who has been in occupation of his present premises since 1940, told me that it got worse some two years ago than it had ever been before. I am satisfied, and find as a fact, that this eruption or flooding from the manhole in time of heavy rain causes the plaintiff and his family grave inconvenience, and it constitutes a serious deprivation of the ordinary and reasonable enjoyment of his property and its amenities which he is entitled to expect.

The facts as to flooding are not disputed by the defendants. They frankly say that, with the growth of the borough, the whole of their sewage system has become overloaded and that the borough badly needs a new sewage system. Steps towards provision of a new sewage system were taken before the war, but were abandoned during the war, and a revised scheme has since been prepared. The defendants have obtained an Act known as the Ilford Corporation Drainage Act, 1950 (14 Geo. 6 c. lxi), which empowers them to build a new system at a cost of over £1,400,000. Unfortunately, they cannot at the present time obtain the necessary consent to the raising of the money. That is by way of history. It is not suggested that those facts can affect the legal liability of the defendants.

Mr. Cotterell, a well-known civil engineer of great experience in drainage matters, gave evidence for the plaintiff which I can summarise quite shortly. In times of heavy rain the total amount of sewage, including the storm water from the houses which have a partially separate system of drainage, flowing down the soil sewer he has worked out as being something rather less than four hundred and fifty cubic feet per minute at peak periods. Of this total, Mr. Cotterell estimates about 9·4 cubic feet per minute would be attributable to the Oaks Lane Estate—that is, two per cent. of the whole—and 0·4 per cent. to the Suffolk Road Estate when connected. His calculations show that if one assumes that the Ley Street sewer is running at anything up to full bore but no more, then the Vicarage Lane sewer could carry the quantity I have mentioned without flooding. There would be a great deal of “surcharge”, i.e., the capacity of the Vicarage Lane sewer would be strained to the utmost and sewage would be rising in the manhole nearest to the plaintiff’s property, but it would not quite have exerted sufficient power to lift the manhole cover and erupt into the road and thence into the plaintiff’s garden. Those calculations were made on the assumption, which was not challenged by the plaintiff, that the sewers were kept properly cleansed by the defendant corporation. If, however, the Ley Street sewer is itself in a state of “surcharge”, so that sewage is rising up the Ley Street sewer manholes, the effect will be to create a back pressure so that less sewage can come down the Vicarage Lane sewer. Consequently, the pressure there is sufficient to blow off the manhole cover and it will cause flooding opposite the plaintiff’s property. The effect of that, it seems to me, is that the cause of the flooding is not the inadequacy of the Vicarage Lane sewer but the fact that the capacity of the Ley Street sewer is itself overtaxed. I think the matter may be tested in this way. Short of making some tank for temporary storage, it would

be of no use at all enlarging the Vicarage Lane sewer unless the Ley Street sewer is first enlarged. That seems to me a conclusion which must necessarily follow from the evidence given by Mr. Cotterell.

A On those facts, the plaintiff puts his claim in two alternative ways. He says, first, that the principle of *Rylands v. Fletcher* (1) is applicable to the case and that the defendants are absolutely responsible for any escape from the manhole which damages the plaintiff's property. Secondly, he says that the defendants have wrongfully caused or wrongfully failed to prevent a nuisance to him as occupier of his premises by causing or permitting the sewage matter to erupt from the manhole on to his premises. Negligence is not alleged.

B It will be convenient for the purposes of this judgment to define the word "discharge" as meaning a discharge caused or permitted by the local authority through defined orifices or channels, built for the purpose of carrying away sewage, for the construction or maintenance of which they are responsible, on to the land of adjoining or neighbouring owners or into natural watercourses to the prejudice of lower riparian owners, and by the word "escape" to mean an involuntary escape from the sewage system of the local authority, e.g., through the bursting of a sewer or, as in this case, by escape from manholes owing to the incapacity of the sewer to carry away the sewage in times of heavy rain. The text-book writers are at variance on the question whether the principle of *Rylands v. Fletcher* (1) is truly a particular example of the general law relating to nuisance or ought to be treated as something sui generis. I do not propose to enter that controversial field, but, solely for the purpose of defining the language I use in this judgment, I propose to use the phrases "liability in nuisance" or "nuisance", on the one hand, and "absolute liability", on the other, as contrasting terms. Thus, if a man is absolutely liable on the principle of *Rylands v. Fletcher* (1), he is liable not only for discharges but escapes. On the other hand, a person is liable in nuisance to an adjoining or neighbouring occupier if he himself causes a nuisance, e.g., if he discharges sewage over the land of the occupant to his damage or if he knows of an existing nuisance emanating from his own land but "continues" it by failing to take reasonable steps to prevent it: see *Barker v. Herbert* (2), a case of nuisance adjoining a highway which was treated, however, as of general application in *Sedleigh-Denfield v. O'Callaghan* (3). In my judgment, in order to establish liability for continuing a nuisance by failing to prevent it, one must necessarily prove that the person so failing must be in a position to take effective steps to that end. The point did not arise directly for decision in those cases, but I respectfully think that LORD ATKIN was speaking with exact accuracy when he said in the last-mentioned case ([1940] 3 All E.R. 361):

"In my opinion, the defendants clearly continued the nuisance, for they come clearly within the terms I have mentioned above. They knew the danger, they were able to prevent it, and they omitted to prevent it."

G A person may also be liable in nuisance if he "adopts" a nuisance by making any use of the erection, building, bank or artificial contrivance which constitutes the nuisance: see per LORD MAUGHAM (*ibid.*, 358).

H I propose to deal first of all with liability in nuisance. The plaintiff, in his re-amended statement of claim, relied on a number of matters to support his claim in nuisance, but, at the close of his case, he very properly abandoned some of them, and the only remaining claims are now set out in para. 6, para. 8, para. 9, para. 13 and para. 14 of his statement of claim, and I will deal with them in order, reading the relevant paragraphs as I permitted them to be informally further amended at the close of the plaintiff's case.

Paragraph 6 alleges that the said soil sewer was constructed by the defendants. That is admitted, but it is no longer alleged that it was constructed in a defective manner or that it was originally inadequate for the needs of the neighbourhood. No doubt, the defendants' whole sewage system has now become totally inadequate

to deal with the increased volume of sewage which it now has to carry, but that cannot give rise to a claim for nuisance; the only remedy of the injured party is to complain to the Minister: see *Pride of Derby & Derbyshire Angling Assn., Ltd. v. British Celanese, Ltd.* (4), per DENNING, L.J. ([1953] 1 All E.R. 203), where he refers to the earlier cases.

Paragraph 8 is in these terms:

"The defendants have erected over 300 houses on their Oaks Lane Estate. The sewage from all such houses is discharged by the defendants into the said soil sewer."

That, again, is admitted and it follows that the defendants are responsible for causing something up to two per cent. of the sewage from the whole catchment area to pass into the sewer. However, there was no evidence before me that the connection made to the Vicarage Lane sewer in 1949, when the flats were already fully occupied, sensibly increased the flooding. The only increase of which I have heard has been in the last two years. Mr. Cotterell in his evidence never stated that the discharge from this estate was a cause of the flooding. This is not at all the case of a local authority connecting up a large new building estate to an existing sewer which is entirely inadequate to deal with the increased quantity of sewage. The plaintiff submits that the defendants are causing, or at any rate contributing to the cause of, the flooding by putting an additional two per cent. of the sewage into the sewer which the defendants well knew had an insufficient outlet at the Ley Street end. That is an attractive argument, but, on the whole, I do not think it is correct. The flooding is caused, or partly caused, by the sewage from the Oaks Lane Estate in this sense, that there would be no flooding if there was no sewage or only a small quantity of sewage coming in the sewer at all. But the evidence of Mr. Cotterell, which I have already summarised, establishes that the real cause of the flooding is not the inability of the Vicarage Lane sewer to take all the sewage poured into it, although it is only just sufficient in times of heavy rain, but the inability of the Ley Street sewer to carry it away, and, in my judgment, the plaintiff's claim under this head fails. The plaintiff in his statement of claim does not complain of the insufficiency of the Ley Street sewer. Even if I were to come to a different conclusion, it is admitted that under this head of complaint an injunction would have to be limited to restricting a discharge from the Oaks Lane Estate, and, in the particular circumstances of this case, I should hesitate long before granting any such injunction, which would not appear to benefit the plaintiff in any way.

The next complaint is contained in para. 9. That relates to the Suffolk Road Estate and the same considerations apply as to the Oaks Lane Estate, but with these differences: First, the discharge of sewage contemplated from that estate is only 0.4 per cent. of the total intake, and, secondly, the sewer from that estate has not yet been connected. I say no more about that claim.

The next complaint is in para. 13 in these terms:

"The defendants have for many years continued to maintain the said soil sewer constructed as hereinbefore mentioned, well knowing that the same caused flooding in Vicarage Lane and the premises adjacent thereto".

That, again, is admitted.

No doubt, the defendants are bound to provide and maintain the sewers (see the Public Health Act, 1936, s. 14), but they are not thereby causing or adopting the nuisance. It is not the sewers that constitute the nuisance; it is the fact that they are overloaded. That overloading, however, arises not from any act of the defendants but because, under the Public Health Act, 1936, s. 34, subject to compliance with certain regulations, they are bound to permit occupiers of premises to make connections to the sewer and to discharge their sewage therein, and that, excluding the Oaks Lane Estate, accounts for ninety-eight per cent. of the sewage in the sewer. Nor, in my judgment, can the defendant corporation

be said to continue the nuisance, for they have no power to prevent the ingress of sewage into the sewer.

The last ground of complaint is in para. 14 in these terms:

"By reason of the matters hereinbefore stated, the defendants discharge the excess sewage in times of rain from the said manhole in Vicarage Lane on to an area of allotment gardens belonging to the defendants, and lying south of the plaintiff's premises through the plaintiff's premises in preference to discharging the same by a route to the west of No. 62, Vicarage Lane where the defendants' said allotments abut immediately on Vicarage Lane".

Briefly, the plaintiff contends that his cause of action is flooding of his property and not flooding generally and that, as the sewer ultimately floods to the allotment gardens anyway, the defendant corporation ought to take the sewage there by direct means. No one disputes the right of the plaintiff to erect a wall round his property to prevent flooding on his own land, although it may cause additional injury to adjoining owners, but, if the defendants take active steps by building walls or channels or pipes so as to canalise the sewage directly on to the allotments, it seems to me plain that they would then themselves be causing a nuisance to the occupants of those allotments and liable in an action for nuisance by such occupants. It would no longer be a case of escape, but would be one of discharge. This court could not properly make an order which would, as it seems to me, inevitably cause an actionable wrong to the adjoining occupiers.

In my judgment, the plaintiff, therefore, fails to establish that the defendants have caused, continued or adopted a nuisance, and this part of his action fails.

I must now turn to the very difficult question whether the rule in *Rylands v. Fletcher* (1) applies to the flooding from the Vicarage Lane sewer. If the principle of *Rylands v. Fletcher* (1) is applicable, the defendants are plainly liable for the escape from their sewer, and it is not suggested that they can avoid liability on the ground of vis major. The locus classicus for the principle is to be found in the judgment of BLACKBURN, J., in *Fletcher v. Rylands* (1), in the following passage which was quoted with approval when the case reached the House of Lords (L.R. 1 Exch. 279):

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench".

In *Rylands v. Fletcher* (1) the court was in fact dealing with an escape of water, but the same principle was applied as between adjoining owners in relation to sewage in *Humphries v. Cousins* (5).

So far as the researches of counsel go, this principle was first applied in sewage disposal cases against local authorities in 1906 by BUCKLEY, J., in *Hobart v. Southend-on-Sea Corpn.* (6), where he said (75 L.J.K.B. 308):

"The plaintiff is entitled to the enjoyment of a several fishery; he has a right to enjoy the land for the purpose of laying oysters there. That right of his in the land is interfered with by nuisance caused by the discharge by the defendants from their pipes of offensive matter in such a way as that it reaches the plaintiff's layings. Upon the principle of *Fletcher v. Rylands* (1) and the decisions upon which that case is founded, the defendants must keep their noxious matter from trespassing upon their neighbour's land. *Tenant v. Goldwin* (7) is an express authority upon this point".

That decision was referred to with approval by VAUGHAN WILLIAMS, L.J., in the Court of Appeal in the same year in *Foster v. Warblington Urban Council* (8) ([1906] 1 K.B. 670). The same principle was stated by PARKER, J., in *Jones v. Llanrwst Urban Council* (9) in an oft-quoted passage ([1911] 1 Ch. 405). That case was expressly followed by VAISEY, J., in *Haigh v. Deudraeth Rural District Council* (10), and by HARMAN, J., in the *Pride of Derby* case (4) ([1952] 1 All E.R. 1326). Counsel for the plaintiff forcibly argues that I should consider these authorities, extending over a period of nearly forty years, to be binding on me. It is to be observed, however, that all those cases were cases of discharge and the plaintiff would have succeeded in an action for nuisance without invoking the principle of absolute liability, though, no doubt, they must all be treated as direct decisions on the applicability of the rule in *Rylands v. Fletcher* (1).

When the *Pride of Derby* case (4) went to the Court of Appeal, the members of the court clearly decided the liability of the defendants on the ground of nuisance and left open the question of absolute liability. SIR RAYMOND EVERSHED, M.R., said ([1953] 1 All E.R. 195):

"It was suggested that local authorities have a special immunity from the so-called rule in *Rylands v. Fletcher* (1). I am not, as at present advised, satisfied that that is so. PARKER, J., clearly applied the rule in *Jones v. Llanrwst Urban Council* (9). So far as relevant to the facts as they are in the present case, I think that the result is the same whether that which is complained of would render the doer of the act liable on the grounds of nuisance or on the grounds of the rule in *Rylands v. Fletcher* (1), if applicable. In either case the question depends on whether the Public Health Act or the special Act, as the case may be, provides, on the principles stated, a defence to the claim which otherwise would lie".

DENNING, L.J., went rather further and said (*ibid.*, 202):

"In this case, negligence is not alleged. The only cause of action available to the plaintiffs is an action for nuisance. I pause here to say that I doubt whether the doctrine of *Rylands v. Fletcher* (1) applies in all its strictness to cases where a local authority, acting under statutory authority, builds sewers which afterwards overflow, or sewage disposal works which later pour out a polluting effluent, for the simple reason that the use of land for drainage purposes by the local authority is 'such a use as is proper for the general benefit of the community', and is on that ground exempt from the rule in *Rylands v. Fletcher* (1); see *Rickards v. Lothian* (11), per LORD MOULTON ([1913] A.C. 280), approved by the House of Lords in *Read v. J. Lyons & Co., Ltd.* (12), per VISCOUNT SIMON ([1946] 2 All E.R. 475) and per LORD UTHWATT (*ibid.*, 484); and also on the ground of statutory authority: see *Hammond v. St. Pancras Vestry* (13) per BRETT, J. (L.R. 9 C.P. 322)."

That passage in the lord justice's judgment is really the foundation of the attack by the defendants on the principle of absolute liability.

A Counsel for the defendants argued that the principle of absolute liability did not apply for four reasons: (i) The defendants do not collect the sewage on to their own land. (ii) The defendants do not collect it for "their own purposes", but, in contrast, "for the benefit of the community", and the principle is applicable only to the former case. (iii) The construction and use of a sewer for the benefit of the inhabitants is not an unnatural use of land such as to bring the principle into play; and (iv) The principle does not apply to persons who are acting under statutory duty.

B On the first point, no doubt, the defendants are under a duty to provide sewers and a sewage disposal system. The sewers vest in them, and they are bound to permit owners and occupiers of premises to discharge sewage into their sewers. I have already referred to the relevant sections of the Public Health Act, 1936, which re-enacted sections to the same effect in the Public Health Act, 1875. It is said that, in those circumstances, it is not correct to speak of the defendants as collecting sewage on their own land. I reject that contention. The defendants do collect, although they may be under a duty to do so, and they collect it into a sewer vested in them.

C On the second point, counsel for the defendants properly drew my attention to the use of the words "for their own purposes" in *Rylands v. Fletcher* (1) and in some subsequent cases, and he contrasts that with uses "beneficial to the community". Apart from authority, I see much difficulty in drawing a line between the two types of user unless, which is not suggested, the latter class be confined to charitable operations as understood in these courts. I agree with the submission of counsel for the plaintiff that "what is beneficial to the community" cannot depend on the personality of the owner of the land who brings the substance on to it, but must depend entirely on the act under discussion. To collect and dispose of sewage is clearly beneficial to the community; so is the provision of water, and that must be so whether the undertaker providing the water does so as a local authority or for his own purposes in the sense of making private profit.

E The provision of industrial water (i.e., water under pressure for operating hydraulic lifts and other operations) seems also beneficial to the community, but undertakers have been held to be absolutely liable: *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (14), a case to which I shall return later. The provision of transport is plainly beneficial to the community, whether carried on for profit or by a local authority, yet can it be that a transport authority is not, but a profit-making company is, absolutely liable for permitting an escape of oil and filth from their depot? The provision of theatres and cinemas may be regarded as beneficial to the community, but equally the proprietors may be using the land for their own purpose in that they attract the public to make a profit. The same was true of coal mining operations, at any rate before nationalisation, and of many ordinary trading operations, and no satisfactory

F definition contrasting and defining the two conceptions was suggested to me.

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In support of the proposition I was referred to certain authorities. The first was *Nichols v. Marsland* (15) in the Court of Exchequer. There BRAMWELL, B. (L.R. 10 Exch. 260), referred to a "reasonable use of property in a way beneficial to the community", but it is clear he was contrasting such user with the man who kept a tiger for his own amusement, the animal's chain being sundered by lightning. As I read his remarks, he was not saying that the principle of absolute liability applied to the latter, but not to the former, case. He was saying that in the former case the owner, who was prima facie absolutely liable, would be excused from that liability if the escape occurred through the act of a third party, or vis major, whereas the keeper of a tiger might be liable even where the chain was sundered by an act of God. It seems to me clear that BRAMWELL, B., spoke of "reasonable use of property in a way beneficial to the community" as including ordinary trading operations, for he included in such user a man who

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built "for his own purposes" a chimney fifty feet high (*ibid.*, 259). That authority seems to me to be against, rather than in favour of, the proposition of the defendants. When the case went to the Court of Exchequer Chamber, it turned entirely on a question of *vis major*.

The next authority relied on was *Rickards v. Lothian* (11), a decision of the Privy Council, the judgment being delivered by LORD MOULTON. In that case a lavatory basin on the top floor of a building overflowed and damaged the occupiers of a lower floor, the overflow being caused by the malicious act of a third party. The Privy Council decided that, assuming the principle of absolute liability to apply, the owner of the upper storey was excused, as the escape was the malicious act of a third party. But LORD MOULTON continued ([1913] A.C. 280):

"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

That case, in my judgment, sought to establish the proposition that to bring water on to land for ordinary domestic purposes did not bring into play the principle of *Rylands v. Fletcher* (1). That had already been decided in *Ross v. Fedden* (16), a decision in the Court of Queen's Bench on appeal from a county court, of a court of which BLACKBURN, J., was a member, though for myself I do not find it easy to discover the exact principle on which it was decided. In *Humphries v. Cousins* (5) the court distinguished that case on the not very satisfactory ground that *Rylands v. Fletcher* (1) applied to adjoining owners but not to subjacent owners in the same house.

Counsel for the defendants also relied on *Green v. Chelsea Waterworks Co.* (17), to which I shall refer later. The distinction in that case, however, was not between user for a person's own purposes and purposes beneficial to the community, but between his own purposes and statutory purposes.

With all respect to the observations of DENNING, L.J., in the *Pride of Derby* case (4), to which I have already referred, in my judgment, the authorities do not establish the proposition that a local authority is exempt from the principle of absolute liability on the ground that use of land for sewage collection purposes is such a use as is proper for the general benefit of the community. I differ from him with the less hesitation as junior counsel before me, both of whom were engaged in the *Pride of Derby* case (4), tell me that *Rickards v. Lothian* (11) was not cited to him in argument, nor was the principle now under review discussed, while I have had the advantage of a very full debate on the matter. I will only add that the approval given to *Rickards v. Lothian* (11) by VISCOUNT SIMON and LORD UTHWATT in *Read v. J. Lyons & Co., Ltd.* (12) was only in general terms, the actual decision in that case not being on this point at all.

The next proposition sought to be established, viz., that this is a natural user of the land, or, perhaps more accurately, not such an unnatural user as to bring the principle of absolute liability into play, in a sense stems from the last proposition, and counsel for the defendants relied on *Rickards v. Lothian* (11) and *Ross v. Fedden* (16), to which I have already referred, and to some extent on some observations of the late VISCOUNT SIMON in *Read v. J. Lyons & Co., Ltd.* (12) ([1946] 2 All E.R. 475). Those observations do, at all events, show that what is or is not a natural user of land for the purposes of the rule awaits authoritative determination.

I confess that, apart from authority, I should have thought that to bring water for domestic purposes into a dwelling-house and to erect and use a privy thereon were characteristically the same type of user of land. I should have held that a man who permitted an escape, either of water from his pipes or sewage from his privy, would be under the same type of liability, i.e., he would either be subject to the rule of absolute liability on the ground that he has brought

water and sewage not naturally there on his land, or be exempt for the reason that user in each case is a normal and natural user of the land. Yet, as I have shown, BLACKBURN, J., himself has stated (L.R. 1 Exch. 279) that to allow an escape of filth from his privy brings the principle of absolute liability into play, while to permit an escape from a domestic water supply does not. It may be that the distinction between the two classes is to be found in *Humphries v. Cousins* (5) or turns on the fact that, while sewage is inherently noxious, water is not, though the latter, when it escapes, may do just as great or greater damage than the former. Whatever may be the law, however, as regards use of land for ordinary domestic purposes, in my judgment, different considerations arise when a local authority collects, even though under a duty to do so, large quantities of sewage which they are bound to dispose of. To collect into a sewer a large volume of sewage, inherently noxious and dangerous and bound to cause great damage if not properly contained, cannot be described, in my judgment, as a natural user of land. Accordingly, in my judgment, a local authority cannot claim exemption from the rule on this point. If I held otherwise, I should be disregarding the long line of authority typified by the *Llanrust* case (9), and I do not think it is open to me so to hold, even if I was disposed to do so.

The fourth point of counsel for the defendants is that a local authority carrying out statutory duties is not liable on the principle of *Rylands v. Fletcher* (1) at all. Before referring to the two cases on which he particularly relies, it will be convenient to refer to a long line of cases which he says, and says rightly, also supports his submission. They start with *Glossop v. Heston & Isleworth Local Board* (18), which was followed in *A.-G. v. Dorking Guardians* (19), *Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.* (20), *Robinson v. Workington Corpn.* (21), *Harrington (Earl) v. Derby Corpn.* (22) and *Hesketh v. Birmingham Corpn.* (23). I do not propose to review those cases in any detail, but in each case (except, possibly, *Lord Harrington's* case (22), which was a very special case) the local authority were held not liable for permitting a discharge through sewers which they inherited from an earlier local authority (*Glossop* (18) and *Dorking* (19)) or for an escape from sewers or watercourses which they had themselves constructed (*Stretton's Derby Brewery* (20), *Robinson* (21) and *Hesketh* (23)). The importance of these cases is that in not one of them was it suggested that the principle of *Rylands v. Fletcher* (1) had any application. In no case was *Rylands v. Fletcher* (1) mentioned, according to the reports, except in the *Stretton's Derby Brewery* case (20). In that case the plaintiffs did not rely on *Rylands v. Fletcher* (1), but counsel for the defendants arguendo said ([1894] 1 Ch. 437):

"The defendants are not within the doctrine of *Rylands v. Fletcher* (1), for they are not bound to warrant that their sewer will retain what is sent into it".

According to the report, the remark appears to have passed without challenge. It is said that if the rule in *Rylands v. Fletcher* (1) applied, then in each case the decision would have been the other way. I am not satisfied that that is right, at any rate in relation to the three escape cases, but at all events the criticism can be made that no one appeared to think the rule had any relevance, and in the three escape cases there was no discussion in any judgment whether the relevant statutory provisions abrogated or limited the rule.

It was further submitted, and, in my judgment, rightly, that *Robinson's* case (21) was on its facts indistinguishable from the present, and I must refer to it. It was an action to recover damages for injuries sustained through the insufficiency of sewers vested in and constructed by (see *Pride of Derby, Ltd. v. British Celanese, Ltd.* (4) [1953] 1 All E.R. 195), the borough of Workington. The sewer was adequate at the time it was built, but became inadequate when a number of new houses were built and drained into the sewer. The result was that the sewage overflowed and backed into the plaintiff's houses causing the injury complained of. The Court of Appeal held that the action failed and that the plaintiff's only

right was to complain to the Local Government Board under the Public Health Act, 1875, s. 299.

LORD ESHER, M.R., said ([1897] 1 Q.B. 621):

"It is obvious that the drains were efficiently built, and were not out of repair. There is no evidence to support the action on this ground, and the real complaint is that the defendants had not caused to be made such sewers as were necessary for effectually draining their district. Whether, as has been suggested, this obligation relates to sewers for draining the whole district, I do not say; but assuming that the case can be brought within s. 15 of the [Public Health Act, 1875], and that the defendants are in default, that is an act of non-feasance on their part, and not an act of misfeasance. If it were not for the statute, there would be no duty on the defendants to do anything in the matter, and a default on their part is dealt with by a remedy provided by the same statute. I have no hesitation in saying that that is the only remedy which is available. It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. The remedy in this case is under s. 299, which points directly to s. 15, and shows what is to be done for default of the duty imposed by that section. That is not the remedy sought for in this action, which is brought to recover damages".

The other members of the court delivered judgments to the same effect.

The distinction between non-feasance and misfeasance as forming a basis for the explanation of these cases, however, appealed neither to SIR RAYMOND EVERSHERD, M.R., nor to DENNING, L.J., in the *Pride of Derby* case (4). The *Glossop* (18) line of cases certainly seems to have proceeded on the basis that there was no absolute liability on a local authority to prevent an escape of sewage and, further, they were not even liable for a discharge through inherited sewers unless they were negligent. Liability in such cases, it seems, was determined on the footing that there was no liability unless it was imposed by statute on the local authority on whom the statutory duty to construct or maintain the sewers was imposed. LORD ESHER's views in the passage I have quoted could not be clearer. I find it impossible to reconcile the principles on which these cases proceeded with the principle laid down in the *Llanrwst* (9) line of cases, and I do not propose to add to the many pages of the law reports which have been devoted to attempts to explain them. It may be that, having regard to the manner in which the plaintiff's claim in each of the *Glossop* (18) line of cases was framed, viz., on the basis of a breach of statutory duty, the point was never seriously considered. It may be noted in passing that BUCKLEY, J., who decided the *Harrington* case (22) in 1904, himself introduced the principle of absolute liability two years later in the *Southend* case (6).

This brings me to the two cases on which counsel for the defendants particularly relies in support of his proposition. The first is *Hammond v. St. Pancras Vestry* (13). In that case a sewer vested in the local authority became choked up without negligence on the part of the authority and "escaped" on the plaintiff's land. The plaintiff brought an action against the vestry, charging them with breach of their duty under the Metropolis Local Management Act, 1855, s. 72, to keep their sewers cleansed. *Rylands v. Fletcher* (1) was not relied on. BRETT, J., said (L.R. 9 C.P. 322):

"It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the

party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed ”.

The next case, *Green v. Chelsea Waterworks Co.* (17), as its name implies, was concerned, not with a sewer, but with water supplied by an undertaker having statutory powers. The headnote is this (70 L.T. 547):

“ A main belonging to a waterworks company burst, and the water flooded the plaintiffs’ premises, causing considerable damage. Held, that the company, being authorised by Act of Parliament to lay the main, and having been guilty of no negligence, were not liable in damages to the plaintiffs.”

LINDLEY, L.J. (with whom the other lords justices concurred), said (*ibid.*, 548):

“ It was argued that the company were liable by reason of the doctrine in *Rylands v. Fletcher* (1), and it was said that this was like the case of a landowner who stores water on his land so as to become a source of danger to his neighbours, and that consequently the defendants were bound to show that they were relieved by the Acts of Parliament under which the company was constituted from the duty of keeping the water in their pipes. The fault of that argument is in the major proposition. *Rylands v. Fletcher* (1) was not a case of a company authorised to lay down water pipes by Act of Parliament. It was a case of a private individual storing water on his own land for his own purposes ”.

Then, after quoting from *Rylands v. Fletcher* (1), the lord justice continued (*ibid.*, 549):

“ It is possible that that principle might have been applied to companies having statutory authority to make railways or carry water, but the court has declined to extend it to such cases. The same argument was used without success in the case of *Dunn v. Birmingham Canal Co.* (24), where, without any negligence on the part of the company, water from the canal had flooded the plaintiff’s mine. It was there held that the defendants were not liable expressly on the ground that the doctrine of *Rylands v. Fletcher* (1) was inapplicable to a company which was doing what it was authorised to do by Act of Parliament. That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision. Here the defendant company were only doing what they were authorised to do by their Act, and as they were not guilty of negligence they are not liable for damage ”.

That case, as appears from the judgment of MATHEW, J., in the court below, proceeded on the footing that, as the company were under a statutory duty to maintain a continuous supply of water, it was an inevitable consequence that there would be occasional bursts in the pipe and consequential damage.

That case was distinguished by LORD SUMNER, sitting in the Court of Appeal, in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (14), a case I have already mentioned, where he held that the defendant company, who had statutory powers to supply water under pressure for industrial purposes, was liable on the principle of *Rylands v. Fletcher* (1). LORD SUMNER said ([1914] 3 K.B. 781):

“ Another argument is based upon the language of the defendants’ Acts of Parliament. The Act of 1871 incorporated the undertakers and recited

that they proposed to carry on an undertaking that was beneficial to the public. They are not incorporated as waterworks supply companies with an obligation to supply water to the public, but they are given powers of taking water and of laying mains without being under obligation to keep their mains charged with water at high pressure, or at all. This serves at once to distinguish the class of cases of which *Green v. Chelsea Waterworks Co.* (17) was an illustration, where the principle is that if the legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon negligence in his way of doing it, and not upon the act itself. In the Act of 1871 there was no clause in *pari materia* with cl. 17 of the [London Hydraulic Powers Act, 1884] which is: 'Nothing in this Act shall exempt the company from any indictment, suit, action, or other proceeding at law or in equity in respect of any nuisance caused by them'."

In the circumstances, it seems to me that the judgment of LINDLEY, L.J., in the *Chelsea Waterworks* case (17) stated the law in terms that were too wide. It was really a case where the inevitable result of carrying out the statutory duty would result in damage from time to time and so by necessary implication the statute excused the company from liability where there was no negligence on the principle exemplified in *Metropolitan Asylum District Managers v. Hill* (25).

I turn, then, to the relevant statutory provisions applicable to this case. It has not been, and obviously could not be, suggested that the statutory duty to construct and maintain sewers leads inevitably to flooding through overloading the sewer which began some thirty-five years later. The whole question turns on the Public Health Act, 1936, s. 31, which is in these terms:

"A local authority shall so discharge their functions under the foregoing provisions of this Part of this Act as not to create a nuisance"

That section necessarily implies, in my judgment, that, provided the defendants do not "create a nuisance" in carrying out their duties, they are to be absolved from liability. What, then, does the section mean by "not to create a nuisance"? So far as this court is concerned, it must be taken as settled that the proper construction to be given to the section is to exclude liability for escapes in the absence of negligence and, therefore, to negative the rule in *Rylands v. Fletcher* (1): see *Hammond v. St. Pancras Vestry* (13), to which I have already referred, and *Stretton's Derby Brewery Co.'s* case (20), where ROMER, J., had to consider the Public Health Act, 1875, s. 19. Section 19 was in these terms:

"Every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied"

ROMER, J., said ([1894] 1 Ch. 442):

"Now s. 19, on which the plaintiffs rely, is in point of wording unlimited as to the liability it casts upon the defendants. But it has long since been held—and I take it to be now settled—that by reasonable construction of an Act such as this the liability in circumstances like the present, though in form not limited, is in fact limited to cases where the public authority has been guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence"

It seems, too, that in the *Pride of Derby* case (4), each member of the court construed the word "nuisance" in the Derby Corporation Act, 1901, s. 109, in the sense that I have used "liability in nuisance" in this judgment, though they were not directly concerned with escape and the point I have to consider was not directly before them. The Public Health Act, 1936, s. 31, seems to me clearly to absolve the defendants from liability for the escape of sewage complained of. It is, therefore, unnecessary to express a concluded view on the question whether a local authority exercising statutory duties is altogether

outside the rule in *Rylands v. Fletcher* (1), as suggested by DENNING, L.J., or whether, on the other hand, it is prima facie liable on the principle of *Rylands v. Fletcher* (1), subject only to express or implied statutory modification as tentatively suggested by SIR RAYMOND EVERSHED, M.R., in the respective passages I have already quoted from their judgments in the *Pride of Derby* case (4). The distinction may be important in some cases, though in most it will not be, for the question will turn on the construction of the relevant statute.

A In this rough sea of contradictory authority, an appeal, however tentative, to general principle is not out of place. The House of Lords has approved LORD BLACKBURN'S statement that an individual has an absolute responsibility for an escape of filth from his land, and I can see no justification for applying a different law to a local authority merely because it is a local authority, or that it is carrying out something beneficial to the community, or even that it is doing so pursuant to a statutory duty. However, if in imposing a statutory duty on a local authority, the legislature thinks fit to relieve that authority, by express provision or necessary implication, from the liability to which it would be otherwise subject, that is quite a different matter, and it may well be right to construe the relevant statutory provision in a manner generous to the authority on whom the statutory duty is imposed. However, be that right or wrong, as I have found that, on the true construction of s. 31, the defendants are not liable for escape and the plaintiff has failed to establish liability in nuisance, the action necessarily fails, and I dismiss it with costs.

Judgment for the defendants.

Solicitors: *Wylie Patterson & Herring* (for the plaintiff); *K. F. B. Nicholls*, town clerk, Ilford (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MARSHALL v. GOTHAM CO., LTD.

E [HOUSE OF LORDS (Lord Oaksey, Lord Reid, Lord Tucker, Lord Cohen and Lord Keith of Avonholm), March 1, 2, 3, 4, April 1, 1954.]

Mine—Gypsum mine—Security of roof—Duty of mine owner—“So far as may be reasonably practicable”—Metalliferous Mines Regulation Act, 1872 (c. 77), s. 23—Metalliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630), reg. 7 (3).

F By the Metalliferous Mines Regulation Act, 1872, s. 23, it is provided: “The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . .”, and by the Metalliferous Mines General Regulations, 1938, which are in substitution for the general rules contained in s. 23 of the Act of 1872, it is provided, by reg. 7 (3): “The roof . . . of every . . . working place shall be made secure, and no person, unless engaged in repairing or investigating the safety of the workings shall . . . work in any . . . working place which is not so made secure.”

H On Dec. 14, 1950, while working in a gypsum mine owned by the respondents, a miner was killed by a fall of marl from the roof of the working place. The fall was due to a condition known as “slickenside”, a rare geological fault which was unusual anywhere and had not occurred in the respondents' mine for at least twenty years before the accident in question. Before the accident the respondents followed the usual procedure for making the roofs secure, viz., inspecting them for visible flaws, sounding them by tapping with hammers and bringing down any loosely attached rock so detected. Slickenside was not detectable by this method and there was no known method of detecting it. No artificial support was provided for the roofs as it was not the general practice in gypsum mines to do so. On the

morning of the accident the roof of the working place where it occurred was inspected and sounded, and was, apparently, secure. In an action by the appellant, the miner's widow, alleging breach of statutory duty under s. 23 of the Act of 1872, and reg. 7 (3) of the regulations of 1938,

Held: regulation 7 (3) of the Metalliferous Mines General Regulations, 1938, read in conjunction with s. 23 of the Metalliferous Mines Regulation Act, 1872, required that the roof of every working place should be made secure so far as was reasonably practicable in all the circumstances of the case; the respondents had done all that was "reasonably practicable" to make the roof secure; and, therefore, the appellant was not entitled to recover.

Decision of the COURT OF APPEAL ([1952] 2 All E.R. 1044), affirmed.

AS TO CIVIL LIABILITY OF OWNER OF MINE FOR BREACH OF STATUTORY DUTY, see HALSBURY, Hailsham Edn., Vol. 22, p. 824, para. 1689; and FOR CASES, see DIGEST Supps., Mines.

Cases referred to:

- (1) *Coltness Iron Co., Ltd. v. Sharp*, [1937] 3 All E.R. 593; [1938] A.C. 90; 1937 S.C. (H.L.) 68; 106 L.J.P.C. 142; 157 L.T. 394; Digest Supp.
- (2) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 1912 S.C. (H.L.) 33; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.
- (3) *Edwards v. National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.
- (4) *Callaghan v. Fred. Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525; [1944] K.B. 560; 113 L.J.K.B. 381; 170 L.T. 368; 2nd Digest Supp.
- (5) *McCarthy v. Coldair, Ltd.*, [1951] 2 T.L.R. 1226; 2nd Digest Supp.

APPEAL by the widow of a man killed in an accident in a gypsum mine against an order of the Court of Appeal, dated Nov. 21, 1952, and reported [1952] 2 All E.R. 1044, reversing an order of JONES, J., at Leicester Assizes, dated May 28, 1952. JONES, J., found that there was no negligence at common law on the part of the mineowners, but that they were in breach of their statutory duty under the Metalliferous Mines Regulation Act, 1872, s. 23, and the Metalliferous Mines General Regulations, 1938, reg. 7 (3), on the ground that they had not done all that was reasonably practicable to make the roof of the working place secure. The Court of Appeal held that the statutory duty imposed on the mineowners was not an absolute and unqualified duty to make the roof secure, but a duty to make it secure so far as it was "reasonably practicable"; on the facts, they had done all that was reasonably practicable to make the roof secure; and, therefore, although it was not, in fact, secure, they were not in breach of their statutory duty.

Paget, Q.C., and *D. S. Hunter* for the appellant.

Marshall, Q.C., and *A. E. James* for the respondents.

The House took time for consideration.

Apr. 1. The following opinions were read.

LORD OAKSEY: My Lords, I have come to the conclusion, after some hesitation and with much sympathy for the appellant, that the judgment of the Court of Appeal is right. The question to be decided is whether the death of the appellant's husband was caused by the failure of the respondents to take reasonably practicable steps to secure the roof of the gypsum mine in which he was working.

The deceased man was working in the respondents' gypsum mine when the roof fell on him and killed him. The fall of the roof was due to slickenside. Slickenside is a rare geological fault which is due to air getting into the roof and causing a fall. It cannot be detected by any ordinary method of inspection or sounding, and it had never been found in the respondents' mine for twenty years before the accident in question. The ordinary practice is to sound the

roof by tapping with a hammer, or other utensil, and, if it sounds what is called "drummy", to bring it down, but where slickenside occurs the roof does not sound "drummy" and there was no known way of detecting it. In consequence, the respondents, following the ordinary practice, had sounded the roof with hammers at the place of the accident, and, finding it was not drummy, had allowed the deceased and his mate, who was called as a witness, to proceed with their work. After the accident the respondents found that the slickenside was present from, or more or less from, the point at which the accident had happened for some considerable distance, and, in consequence, where they thought the roof appeared dangerous, they refrained from working underneath it; where they thought it doubtful they propped it up with hydraulic props, and if they found it to be "drummy" they brought it down as before. In these circumstances the appellant contended, and JONES, J., held, that the respondents, in not taking the precautions which they took after the accident, had failed to take reasonably practicable steps to keep the roof secure before the accident, and that this failure was the cause of the deceased's death.

I agree with the Court of Appeal that it was not reasonably practicable to take such steps when slickenside had never occurred in the mine for the last twenty years. The position before the accident and the position after the accident are two quite different things. The question is not simply whether it was practicable as a matter of engineering, but whether it was reasonably practicable when no such thing as slickenside had occurred in the mine for at any rate twenty years, or even been heard of by many experienced miners although it is a known geological fault. I agree with the speech of LORD ATKIN in *Coltress Iron Co., Ltd. v. Sharp* (1), where he said ([1937] 3 All E.R. 593):

"In the facts of this case, where the dangerous machinery was exposed for only a few minutes, as the only means of effecting necessary repairs in a part of the mine where it was unlikely that any workman, other than the engineer engaged in the work of repair, would be exposed to risk of contact with the machine, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of s. 55 [of the Coal Mines Act, 1911]. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the defence is proved."

That is to say, what is "reasonably practicable" depends on a consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved. It is conceded, in the present case, that it was not reasonably practicable to make the roof secure by timbering, and to have attempted to make it secure by hydraulic props in some places and by leaving it unmined in others when no slickenside had ever occurred for a period of twenty years was not, in my judgment, reasonably practicable.

I agree with what JENKINS, L.J., said ([1952] 2 All E.R. 1051):

"To my mind, that which is 'reasonably practicable' in this context is no more nor less than what is capable of being done to make roofs and sides secure within the limits of what it is reasonable to do, and it cannot be reasonable to do for this purpose anything more than that which it appears necessary and sufficient to do according to the best assessment of what is necessary and sufficient that can be made at the relevant time, that is, in the present instance a point of time immediately prior to the accident."

Some argument was addressed to your Lordships' House as to the onus of proof, but, as all the evidence is before your Lordships and the respondents accepted the position that the onus was on them to show that reasonably practicable steps had been taken, I do not think it is necessary to decide this question. At the same time, I must say that, in my opinion, it is clear that the obligation on the respondents was not an absolute obligation to make the roof secure, but

was a qualified obligation to make it secure so far as was reasonably practicable. Nor do I find it necessary to decide whether, if the respondents had been in breach of their obligation, it would have been right to hold that the deceased's death was caused by their breach. For these reasons, I would dismiss the appeal.

LORD REID: My Lords, the appellant's husband was killed by a fall of the roof at the place where he was working in the respondents' gypsum mine, and this action was brought to recover damages from the respondents. The only ground of liability now maintained is that the death of the deceased was caused by a breach of a statutory duty of the respondents. A

The Metalliferous Mines General Regulations, 1938, made by the Board of Trade under powers contained in the Coal Mines Act, 1911, and the Mining Industry Act, 1920, provide that the regulations set out in that order shall be in substitution for the provisions contained in the general rules in s. 23 of the Metalliferous Mines Regulation Act, 1872. Section 23 provides: B

"The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . .",

and it is common ground that that part of s. 23 continues to apply so as to qualify all the regulations contained in the 1938 regulations. Regulation 7 (3) in those regulations provides: C

"The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure";

and reading this with the initial part of s. 23 of the Act of 1872 it must mean that, so far as may be reasonably practicable, the rule shall be observed that the roof and sides of every travelling road, outlet and working place shall be made secure, etc. The fact that the roof fell shows that it had not been made secure, and the question in this case, therefore, is whether, on the facts proved, the qualification "so far as may be reasonably practicable" applies. D

The strata in this mine are more or less horizontal. First, there is a stratum of gypsum some six or eight feet thick, then above that a thin stratum of marl less than two feet thick, then above that a thin and harder stratum of gypsum about two feet thick known as ball rock, and above that a thicker stratum of marl some four feet thick. The method of mining is first to extract as much as possible of the lower stratum of gypsum. From a main road faces are driven into the gypsum at right angles to the direction of the road. Then, as each face recedes, holes are driven at intervals parallel to the main road. This leaves untouched a regular series of pillars of gypsum which support the roof. At that stage the roof is the thin stratum of marl. At a later stage the ball rock is brought down by drilling holes in it and firing shots: that leaves the upper and thicker stratum of marl as the roof. The marl roof is never supported by timbering or otherwise. It is regularly tapped with a hammer to see whether it is safe. If tapping gives a "dummy" or "drummy" sound that shows that that piece of marl is loose and it is brought down. But when the roof rings true when tapped it is regarded as secure. The holes and faces are each about twenty feet wide, so a junction where a face and a hole meet is about twenty feet square or rather larger than that. E
F
G

The accident occurred at the junction between No. 6 face and No. 9 hole. The thick stratum of gypsum had been removed, and the men were engaged in bringing down the ball rock. The ball rock had already been removed from this junction, and the roof of the junction had been tested by tapping and it seemed to be secure. The man working with the deceased was standing on trestles boring a shot hole in the ball rock at the mouth of No. 9 hole, and the deceased was standing below him steadying the trestles. Then, without any warning, a large piece of the roof just behind them fell and the edge of it struck H

the deceased and killed him. The piece which fell was about thirty feet by fifteen feet in area and was of a mushroom shape, being about eight inches thick in the middle. The upper surface of this piece and the lower surface of the marl above were smooth and oily there being no continuity between them. But, as they had been tightly pressed together, there was some cohesion, and the piece of marl which fell did not become loose or fall as soon as the stratum below it had been withdrawn. This condition is known to mining engineers as "slickenside".

A The evidence is that it is impossible to detect discontinuity of this kind before the piece actually falls because, owing to there being no gap between it and the other part of the marl above it, the discontinuity is not disclosed by tapping the roof, and there appears to be no known way of discovering its existence. It seems that the part below the discontinuity only falls when air begins to percolate into it, and the evidence does not show how long the interval may be between the removal of the supporting stratum below and the fall of the slickenside. It appears that slickenside is not confined to any particular type of stratum. It occurs in comparatively small areas, and there is no means of discovering when a slickenside area is being approached. The condition is very rare, and in this mine it had certainly not occurred in the twenty years before the accident, though there is some evidence that it had been found about a mile away some twenty years earlier.

B The only way to make a roof secure against a slickenside fall appears to be to shore it up, and, as the presence of slickenside cannot be detected in advance, full protection against this danger would require that every roof under which men have to pass or to work should be shored up or timbered. There is evidence that this is never done in gypsum mines and that, in this mine, the cost of doing it would be so great as to make the carrying on of the mine impossible. Ultimately, it was not maintained by counsel for the appellant that timbering was reasonably practicable, and I think that it is proved that it was not reasonably practicable to comply fully with the requirement of reg. 7 (3) so as to make the roof secure against this particular danger. But it came out in evidence that, after the accident, while mining was going on the slickenside area, which was found to stretch some distance beyond the place where the accident happened, additional precautions were taken. The system used in this area was to insert a hydraulic prop near each working place unless it was thought that the roof might be thin in any place, and then the ball rock was not worked at all there, but the men passed on and began to bring it down again some distance further on, thus leaving a bridge of ball rock and marl at the place which was thought to be of doubtful safety. It appears that a prop will give good security if the roof at that point is thick, but that, if it is thin, the prop is of little value because, once the thin roof becomes loose, it will break in pieces and fall all round the prop. The mine manager said in evidence that, if slickenside had been suspected at the place where the accident happened, the men would have been withdrawn, but it does not appear from the evidence how, during the adoption of these additional precautions, it was determined whether or not the roof was safe enough to go on working with a prop near the working place. JONES, J., said, with regard to this evidence of the manager:

"His answer was that as it turned out this was a place where men should not have worked, but that may be being wise after the event."

H I think that, on a fair reading of the evidence, a skilled man, considering the matter before the accident occurred, would have known that slickenside is always a possibility, but would have been entitled to assume, in the light of the twenty years' freedom from it, that it was extremely improbable that there would be a slickenside at that point, and, indeed, there was no more risk of slickenside at the point where the accident occurred than there had been at any point in the mine during the preceding twenty years when it had never been found. It follows that, if there was any obligation to take further precautions

at the point where the accident happened, there must have been that obligation to take precautions throughout the mine for the preceding twenty years, and the question is whether such precautions would have been reasonably practicable.

It is not said that the use of props would have cost so much as to make working the mine uneconomic, but, obviously, using them regularly would have entailed a good deal of extra trouble and loss of time, and witnesses for the respondents said that indiscriminate use of props will give a false sense of security, and on that ground they ought not to be used generally. There would be a false sense of security because, as I have said, the prop is not an effective protection where the roof is thin, and, indeed, it appears to be common ground in this case that, even if there had been a prop near the place of this accident, the deceased might still have been killed, because, when the slickenside gave way, the prop would not have held up the roof, much of the piece which fell would have broken away, and the deceased might well have been hit and killed by the fall. JONES, J., said, with regard to this:

"The view I have formed, although it is not altogether supported by all the evidence that has been given, is that if such a [hydraulic] prop had been used at the time, although it is by no means sure that the death of this man would have been prevented, there is quite a possibility that it would have been prevented through the fall of the roof having been broken in some way or dissipated so that the amount that fell on the deceased man would have been smaller than was in fact the amount that actually fell on him."

I turn to consider what is meant by precautions being "reasonably practicable". It was maintained for the appellant that this means no more than "practicable" and that it is enough to show that it was physically practicable to use the precautions and irrelevant to consider whether, in the circumstances, it would have been reasonable to do so. This argument was said to be supported by the decision of this House in *Butler (or Black) v. Fife Coal Co., Ltd.* (2). I do not so read that case. It may be that "practicable" and "reasonably practicable" were sometimes used in that case interchangeably. But the circumstances were such that it made no difference which expression was used. The point was whether those in authority should have been instructed about carbon monoxide gas, and, if it was practicable to foresee that this gas might have been found in the workings, it was certainly reasonably practicable to take precautions against it by instructing those in authority how to test for it and deal with it. But, in my judgment, there may well be precautions which it is "practicable" but not "reasonably practicable" to take, and I think that that follows from the decision of the Court of Appeal in *Edwards v. National Coal Board* (3). I agree with what was said in that case by ASQUITH, L.J., and I do not find it helpful to consider whether this statutory duty is in every case the same as an employer's common law duty. I think it enough to say that, if a precaution is practicable, it must be taken unless, in the whole circumstances, that would be unreasonable. And as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable. I have avoided comparison with similar provisions in the Coal Mines Act and elsewhere. Different phraseology has been adopted in different cases, and, while the general effect may be the same, I do not think it helpful in border-line cases to argue from one statutory provision to another which is differently expressed.

Slickenside was a known danger, but there was no more reason to anticipate it, or provide against it, at the place of the accident than elsewhere in the mine, and a finding that precautions ought to have been adopted at the place of the accident would imply that they ought also to have been adopted generally. I am of opinion that this was not reasonably practicable and I base my opinion on these factors. The danger was a very rare one. The trouble and expense involved in the use of the precautions, while not prohibitive, would have been considerable. The precautions would not have afforded anything like complete

protection against the danger, and their adoption would have had the disadvantage of giving a false sense of security. I am, therefore, of opinion that this appeal should be dismissed.

LORD TUCKER: My Lords, the Metalliferous Mines General Regulations, 1938, are now substituted for the general rules contained in s. 23 of the Metalliferous Mines Regulation Act, 1872. The result is that they are all subject to the prefatory words:

“The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies.”

The regulation in question in this appeal is reg. 7 (3), which reads as follows :

“The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure.”

The appellant's husband was a miner working in the respondents' gypsum mine and he was killed by a fall of the roof in a working place in that mine.

The roof had not been made secure. The defence was that it was not reasonably practicable to have made it secure. The fall of roof was due to the presence of “slickenside”, a rare geological phenomenon, but one the existence of which is well known to mining engineers. It is a particularly dangerous condition when it does occur, since there is no known method of discovering its existence before it is revealed by the fall which takes place. It is not detectable by the normal process of hammering, which is the method used for ascertaining the existence of a faulty roof from the “drummy” sound which results in such a case.

It was conceded by counsel for the defendants at the trial—and, I think, rightly conceded—that, on proof of the fall of roof, the onus was on him to show that it was not reasonably practicable to have avoided it. I have reached this conclusion from the language of the regulation, taken in conjunction with the prefatory words. I do not consider that the fact that

“the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their work-people”

(to quote the dicta in the judgments of the Court of Appeal in *Callaghan v. Fred. Kidd & Son (Engineers), Ltd.* (4) ([1944] 1 All E.R. 527), and in *McCarthy v. Coldair, Ltd.* (5) ([1951] 2 T.L.R. 1228), delivered respectively by SCOTT, L.J., and DENNING, L.J.) is, in itself, a sufficient justification for shifting an onus which normally lies on a plaintiff. Such reasoning would be equally applicable to many cases of common law negligence, e.g., the failure to take all reasonable steps to provide a reasonably safe system of work. Regulation 7 (3) lays down the duty, i.e., to make the roof secure. I agree that the word “secure” does not involve security from the effects of earthquake or an atom bomb, but I think it must include security from all the known geological hazards inherent in mining operations. The prefatory words, however, enable the mineowner to escape liability if he proves that it was not reasonably practicable “to observe” the requirements of reg. 7 (3). I think the word “observe” shows that the obligation is to be measured by the words of the regulation, but that observance of the obligation may be excused in certain circumstances. Furthermore, “observed so far as may be reasonably practicable” indicates, I think, that, if a hundred per cent. security is not reasonably practicable but a lower percentage is, the mineowner is required to take those reasonably practicable steps which will afford a degree of security which may be something less than a hundred per cent.

I do not think this view of the respondents' obligations under reg. 7 (3) conflicts

with the decision of this House in *Coltness Iron Co., Ltd. v. Sharp* (1), where the obligation under s. 55 of the Coal Mines Act, 1911, that

"Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced"

was under consideration, and it was held that the suggested precautionary measure of excluding access to the machine would not have been a compliance with the statutory duty because, as LORD MACMILLAN pointed out ([1937] A 3 All E.R. 597):

"It is one thing to fence off access to a machine and another thing to fence securely a dangerous part of the machine."

Did the respondents then succeed in discharging this onus? The trial judge, JONES, J., accepted their evidence that timbering was not reasonably practicable on the ground of expense. This finding was upheld in the Court of Appeal and counsel for the appellant did not seek to disturb it. He based himself entirely on certain evidence given by the respondents as to the precautions which have been taken at this mine since this accident in working the area where slickenside has been found to be present. The method adopted has been to use hydraulic props in the working places where slickenside was known to be present. The difficulty with regard to this is that the evidence disclosed that the use of any sort of prop under a roof which is faulty will tend to push up the faulty roof in the immediate vicinity of the prop, causing the surrounding roof to fall. This being the case, the hydraulic prop is only used at places where the roof looks good and there is a fair thickness. If the roof looks good, but there is not much thickness, it is left in position and forms a kind of bridge. But, if the roof is found by the hammer test to be "drummy", it is brought down. This threefold method has been used in this mine where the slickenside is known to exist, and the respondents' under-manager stated that they had thereby reduced the danger of accident from slickenside, although neither he nor any other witness said there was any method of ascertaining whether slickenside was, in fact, present at any particular place. On this the learned judge said:

"The view I have formed, although it is not altogether supported by all the evidence that has been given, is that if such a [hydraulic] prop had been used at the time, although it is by no means sure that the death of this man would have been prevented, there is quite a possibility that it would have been prevented through the fall of roof having been broken in some way or dissipated so that the amount that fell on the deceased man would have been smaller than was in fact the amount that actually fell on him."

My Lords, I do not consider that this finding is conclusive against the respondents. If the learned judge, having heard all the evidence and being in a much better position to appreciate its effect than I am from a perusal of what LORD SIMON once referred to as the "still life" of the shorthand note, had found that the hydraulic prop method, if in use at the time of the accident, would have given security, or even a high degree of security, I do not think the fact that slickenside had not been found or suspected in this mine for at least twenty-five years would have sufficed to relieve the respondents from liability. But in weighing the suggested precautionary measures against the risk it is, I think, very material to consider the degree of security which those measures can be expected to afford, and when one finds that the risk of slickenside is very remote and that the suggested measures are of an elaborate nature and would only result in a "possibility" that the accident would have been prevented or its consequences mitigated, I do not consider that a finding against the respondents is justified.

My Lords, for these reasons I have come to the conclusion that the Court of Appeal were right in disturbing the judgment of the trial judge, but there are some passages in the judgments in that court, particularly in the judgments of

JENKINS, L.J., and HODSON, L.J., which seem to me to impose on the respondents a duty no different from that existing at common law, whereas, in my opinion, the result of reg. 7 (3), coupled with the prefatory words with regard to its observance, is to put the respondents in a position in which their liability cannot be ascertained merely by applying the test of common law negligence. I would dismiss the appeal.

A LORD COHEN: My Lords, I have had the advantage of reading the opinion of my noble and learned friend, LORD TUCKER, in which I concur.

B LORD KEITH OF AVONHOLM: My Lords, after some difficulty I find myself able to agree with your Lordships that this appeal fails. It is obvious that the roof of the working place at which the deceased man was working was not secure, and prima facie, therefore, the mine owners were in breach of reg. 7 (3) of the Metalliferous Mines General Regulations, 1938. The regulation, however, is qualified by the provision that it shall be observed "so far as may be reasonably practicable". It is for the mineowners to show that they have so observed the regulation. The position of a mineowner under the corresponding language of the earlier Coal Mines Regulation Acts which is indistinguishable from the language in the Metalliferous Mines Regulation Act, 1872, has been considered on several occasions in this House. In the case of *Butler (or Black) v. Fife Coal Co., Ltd.* (2), it is put by LORD KINNEAR as follows ([1912] A.C. 164):

"If the rules are broken and mischief follows, there is prima facie evidence of failure of duty, and although the employer may have a complete defence if he has done his best, the burden of proving it lies upon him."

D It was, no doubt, a physical or engineering possibility for the mineowners in the present case to have carried out the precautions that were carried out after the accident. These might not have ensured absolute security. But I agree with my noble and learned friend, LORD TUCKER, that, if absolute security is not reasonably practicable, that does not excuse the mineowner from taking those reasonably practicable steps that will give a lesser degree of security. But it is not the precautions in themselves that have to be reasonably practicable. E It is the observance of the precautions that is required so far as may be reasonably practicable. That calls, I think, for a consideration of the whole circumstances at the time of the accident—an assessment of the situation, as it has been put, at the material time. The regular means of securing the roof in this mine was by a system of tapping and bringing down loose portions of roof where insecurity was indicated by the sound given off by the tapping. This had been the only system employed, so far as the evidence reveals, in the history of the mine and, on experience, seems to have been found safe and satisfactory. It was carried out at the deceased man's working place just before the accident and revealed no imperfection in the roof. In these circumstances it can, I think, be said that the mineowners have established that it was not reasonably practicable that they should add to their precautions a system of using hydraulic props and leaving bridges in the roof to meet a risk which there was no reason to anticipate. F G

I would only add that, in my opinion, the question whether a mineowner has discharged a statutory obligation laid on him must depend on the particular circumstances of each case. There is, in my opinion, no general rule or test that can safely be relied on for measuring the discharge of such a duty. In particular, H I could not, as at present advised, accept it that the measure of an employer's liability can satisfactorily be determined by having regard solely to the proportion which the risk to be apprehended bears to the sacrifice in money, time or trouble involved in meeting the risk. *Appeal dismissed.*

Solicitors: *Amery-Parkes & Co.*, agents for *Hawley & Rodgers*, Loughborough (for the appellant); *Smith & Hudson*, agents for *Eking, Manning, Morris & Foster*, Nottingham (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CHANCERY DIVISION
PRACTICE DIRECTION.

Practice—Chancery proceedings—Witness action—Witness list—Date of appearance in list—Date of hearing—Alteration of date—Notification of settlement of action.

The following Practice Direction will take effect with regard to witness actions and proceedings set down for hearing on and after Tuesday, Apr. 27, 1954, in substitution for the Practice Direction dated Mar. 20, 1952, printed in [1952] W.N. 170. It has been framed with a view to ensuring so far as possible that an action comes on for hearing on a definite day related to the date on which it was set down for trial. A

1. There will be one witness list only of cases awaiting trial. B

2. Within ten days of setting down an action the solicitors for each party separately represented must lodge with the cause clerk at Room 136 a certificate (signed by counsel if the pleading was settled by counsel) stating the length of time the trial is expected to occupy. This certificate may be sent by post if desired, and a single certificate, signed by all the counsel concerned, should be lodged whenever this course is practicable. C

3. An action will appear in the list twenty-three days after being set down. The date on which it will come on to be heard will be fixed by the court of its own motion, and this date, and the length of time allotted to the case, will be indicated in the list. The date fixed will not be earlier than twenty-one days after the first appearance of the case in the list.

4. The periods of ten days (para. 2) and twenty-three days (para. 3) will be calculated by reference to the sittings of the courts as prescribed by R.S.C., Ord. 63, r. 1, periods during which the courts are not sitting being excluded. D

5. If circumstances affecting the probable length of a case appearing in the list arise, notice of the fact, and, where appropriate, a revised estimate of the length of the hearing, must be given promptly to the cause clerk who will note it and transmit it to the clerk of the judge in charge of the list. E

6. All applications with regard to cases appearing in the witness list are to be made to the judge notified in the daily cause list as the judge in charge of the list. If, on the settlement of any such case, no order is required, immediate notification of the settlement, signed by the solicitors for all parties, must be left with the cause clerk for transmission to the clerk of the judge in charge of the list, when the case will be struck out of the list. F

7. A party intending to apply for an alteration of the date fixed for the trial of a case shall give not less than forty-eight hours' notice in writing (a) to the other parties to the case (other than parties in default against whom he is entitled to move for judgment) and (b) to the clerk of the judge in charge of the list.

8. It is to be clearly understood that the dates fixed by the court for the hearing of cases will not be altered except for good cause such, for example, as the illness, or absence abroad, of a party or an essential witness. G

9. A proceeding commenced otherwise than by writ which is directed to be heard with witnesses will appear in the list not earlier than seven days after the date on which the order for hearing with witnesses was made or (in the case of a summons adjourned into court) the date on which the papers are received by the cause clerk, and will be allotted as early a date for hearing as is practicable. From the date of its appearance in the list, paras. 5, 6, 7 and 8 of these directions will apply to such case. H

By direction of the judges of the Chancery Division.

W. S. JONES,

Chief Registrar
Chancery Division.

2nd April, 1954.

Re AZOFF-DON COMMERCIAL BANK.

[CHANCERY DIVISION (Wynn-Parry, J.), February 23, 24, 25, 26, March 10, 1954.]

Company—Winding-up—Unregistered company—Russian company dissolved by Russian law—Assets, but no place of business, in England—Right of Crown to assets as bona vacantia—Petition by foreign creditors in respect of debts payable in foreign currency—Companies Act, 1948 (c. 38), s. 354, s. 399 (5) (a), s. 400.

A

A Russian company, which carried on business as bankers, entered into financial and mercantile transactions in England and other countries and had substantial assets in England, but it was not registered under the Companies Acts and had no place of business here. By the end of 1922 the company had been dissolved by the Soviet government. It still had assets in

B

England, shares of an English bank being registered in its name. Five Norwegian banks, who were creditors of the company for nearly six million Norwegian kroner (approximately £297,545), presented a petition for the company to be wound-up under the Companies Act, 1948, s. 399 (5) (a). The Crown opposed the petition on the grounds (i) that, on the dissolution

C

of the company in Russia, its English assets vested in the Crown as bona vacantia and the court had no jurisdiction to make a winding-up order without the consent of the Crown; (ii) that, in the case of a foreign company which had been dissolved by the law of the country of its incorporation, the court had jurisdiction to make a winding-up order only if the company had carried on business in this country, and it had not been shown that the company did so; and (iii) that, even if there were jurisdiction to make the

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order, it should not be made at the suit of foreign creditors in respect of debts payable abroad in foreign currency, and that the Crown should be allowed to get in the English assets so as to be able to make ex gratia payments to English creditors in respect of rouble debts which were irrecoverable.

E

HELD: (i) the Companies Act, 1948, had cut down the extent of the Crown's prerogative by necessary implication as well as expressly by the joint effect of s. 353 and s. 354, which were in Part V of the Act under the heading "Winding-up", and every other applicable section of that Part had the same operation if such a result was necessary to its effective working; on the presentation of a petition under s. 399, s. 404 operated to make the provisions of Part V of the Act applicable in the case of an unregistered

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company, and, if the assets vested in the Crown as bona vacantia and the court had no jurisdiction to make a winding-up order unless the Crown allowed it to do so, the main objects of Part V, viz., the realisation of the assets and their distribution among the creditors, could not be achieved; therefore, the Crown's right to the assets of a dissolved company as bona vacantia was exhaustively stated in s. 354 of the Act, and, on the dissolution

G

of the company under the law of the country of its incorporation, the highest title which the Crown could claim to the company's property in this country was a defeasible title liable to be defeated by a winding-up order which could be made without the consent of the Crown, and even against its wish where the conditions prescribed by the Act, as interpreted by the authorities, existed.

H

A.-G. v. De Keyser's Royal Hotel ([1920] A.C. 508), *Rudow v. Great Britain Mutual Life Assurance Society* (1881) (17 Ch.D. 600), *Food Controller v. Cork* ([1923] A.C. 647), *Re Wells* ([1933] Ch. 29), and *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.* ([1936] 1 All E.R. 505), applied.

(ii) to justify the exercise by the court of its discretionary jurisdiction under s. 399 (5) (a) of the Act of 1948, it was enough to show the existence of assets in England and the presence here of persons claiming as creditors

of the company, and it was not necessary to show, under s. 400, that the company had a branch or office in England or that it had carried on its business operations in this country from some established or specific place of business; and, therefore, as the necessary conditions were fulfilled, the court was justified in exercising its jurisdiction to make the winding-up order.

Banque des Marchands de Moscou (Koupetschesky) v. Kindersley ([1950] 2 All E.R. 549), followed.

(iii) the object of a winding-up order being to ensure distribution of the assets among the whole body of creditors, it would be unfair to refuse to make the order on the ground that it would benefit foreign creditors and to leave it to the Crown to make *ex gratia* payments in respect of rouble debts to English creditors as to whose existence there was no evidence.

Re Kloebe (1884) (28 Ch.D. 175), applied.

AS TO WINDING-UP OF FOREIGN COMPANY, see HALSBURY, Simonds Edn., Vol. 6, pp. 843-845, paras. 1729-1732.

FOR THE COMPANIES ACT, 1948, s. 354, s. 399, s. 400, and s. 404, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 728, 754-756, and 758.

Cases referred to:

- (1) *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 11 Digest 546, 499.
- (2) *Rudow v. Great Britain Mutual Life Assurance Society*, (1881), 17 Ch.D. 600; 50 L.J.Ch. 504; 44 L.T. 688; 10 Digest 1097, 7687.
- (3) *Re Webb (H. J.) & Co. (Smithfield, London), Ltd.*, [1922] 2 Ch. 369; 127 L.T. 373; *affd.* H.L., sub nom. *Food Controller v. Cork*, [1923] A.C. 647; 92 L.J.Ch. 587; 130 L.T. 1; 10 Digest 999, 6936.
- (4) *Re Wells*, [1933] Ch. 29; 101 L.J.Ch. 346; 148 L.T. 5; Digest Supp.
- (5) *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.
- (6) *Re Pinto Silver Mining Co.*, (1878), 8 Ch.D. 273; 47 L.J.Ch. 591; 38 L.T. 336; 10 Digest 817, 5323.
- (7) *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley*, [1950] 2 All E.R. 105; *affd.* C.A., [1950] 2 All E.R. 549; [1951] Ch. 112; 2nd Digest Supp.
- (8) *Re Tovarishestvo Manufactur Liudvig-Rabenek*, [1944] 2 All E.R. 556; [1944] Ch. 404; 113 L.J.Ch. 250; 171 L.T. 66; 2nd Digest Supp.
- (9) *Re Russian & English Bank*, [1932] 1 Ch. 663; 101 L.J.Ch. 226; 147 L.T. 57; Digest Supp.
- (10) *Re Kloebe*, (1884), 28 Ch.D. 175; 54 L.J.Ch. 297; 52 L.T. 19; 24 Digest 813, 8449.

PETITION for an order for the winding-up of the Azoff-Don Commercial Bank on the ground that it was an unregistered company which had been dissolved within the meaning of the Companies Act, 1948, s. 399 (5) (a).

The company was a joint stock company with limited liability which was created and established in Russia in 1871 by Imperial charter and was dissolved by 1922 under the laws of the Union of Soviet Socialist Republics. The petition was presented on Nov. 17, 1953, by five Norwegian banks who were creditors of the company for 5,944,393 Norwegian kroner. They alleged that the company still had substantial assets in England. The Crown opposed the petition on the ground that the court had no jurisdiction to make a winding-up order (a) as the English assets vested in the Crown when the company was dissolved in Russia, and (b) as the company had not carried on business in England. The Crown further contended that, if there was jurisdiction to make the order, it should not be made at the suit of foreign creditors in respect of debts payable abroad in foreign currency.

London, Q.C., and K. B. Suenson-Taylor for the petitioning creditors.

Lionel Edwards, Q.C., and J. P. F. E. Warner for E. Kaplan, opposing the petition.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), and Denys B. Buckley for the Crown.

Cur. adv. vult.

A Mar. 10. WYNN-PARRY, J., read the following judgment. This is a petition for the compulsory winding-up of Azoff-Don Commercial Bank, to which I shall refer as "the company". The company was established in 1871 under the laws of the Empire of Russia by royal charter as a joint stock company with limited liability. I am satisfied from the evidence of Mr. Dobrin that by the end of 1922, at the latest, the company had been dissolved under the laws of the Union of Soviet Socialist Republics.

B The company carried on business as bankers and generally transacted all kinds of financial and mercantile business including the investment of moneys. The company's head office and principal place of business was at Petrograd, and it had various branch offices in Russia. According to the evidence filed in respect of the petition, the company never had an office or place of business in
C England, nor were particulars of the company registered under the Companies Act, 1907, s. 35, or the Companies (Consolidation) Act, 1908, s. 274, or under any of the substituted statutory provisions.

So far as material paras. 5, 6 and 7 of the petition read as follows:

D "5. The company also carried on business and entered into mercantile transactions and arrangements with persons and corporations outside Russia and in particular provided for or arranged the provision of mercantile credits and banking facilities in England, Norway, Denmark, Belgium and elsewhere. 6. In the course of its business the company acquired and at all material times had and still has substantial assets in England. In particular the company was for many years a customer of [Hambros Bank, Ltd.]. The company had current or other accounts in pounds sterling with
E Hambros, into which the company paid or transferred or caused to be paid or transferred considerable sums of money in pounds sterling. Your petitioners believe that as a result Hambros held in December, 1917, and still hold substantial sums, the amount of which your petitioners have been unable to ascertain, on behalf of and for the account of the company, being the credit balance in favour of the company of its said accounts. 7. The
F company acquired prior to December, 1917, a number of shares in the capital of Hambros. There is now standing registered in the name of the company in the register of members of Hambros 9,916 shares of £10 each in the capital of Hambros all of which said shares are paid up to the extent of £2 10s. each and of which 8,500 had been allotted to the company by Hambros for cash
G prior to December, 1917."

H The petitioners are five Norwegian banks who, in the circumstances set out in the petition, are creditors of the company for 5,944,393 Norwegian kroner, the sterling equivalent of which is said to be £297,545. The petition asks for the order to be made under s. 399 (5) (a) of the Companies Act, 1948. The petition is opposed by the Crown and by a Mr. Kaplan, who first gave notice to support the petition. I will deal first with the position of Mr. Kaplan. In my view, he has no locus standi to be heard. He claims that as a result of an agreement between him and the liquidator in bankruptcy proceedings taken against the company in France, which agreement has been sanctioned by the competent French court, the liquidator has assigned to him all the assets of the company held by Hambros Bank, Ltd., including, as I understand his claim, the shares of Hambros Bank registered in the name of the company. In his notice of opposition Mr. Kaplan stated that he was a creditor for £2,300. He filed no evidence to

support the statement, and counsel who appeared for him was constrained to admit that he could not assert Mr. Kaplan's position as a creditor. Counsel contended that Mr. Kaplan was a contributory and could be heard as such. I refused to allow counsel to develop this submission. His object in making it was, as he frankly admitted, merely to establish a right to be heard. But, if he established that right, he then intended to assert that Mr. Kaplan was entitled in the circumstances above-mentioned to the whole of the known assets in England. Such a claim, however, apart from the difficulties (almost insuperable) of attempting to adjudicate on it in these proceedings, was clearly wholly inconsistent with his claim to be interested in these assets as a contributory. It is a claim outside any liquidation and will, therefore, be unaffected if I should make a winding-up order.

The Crown opposes the petition on three grounds, which can be shortly stated. First, it is said that, on the company becoming dissolved in Russia by the year 1922 at the latest, the assets became vested in the Crown as bona vacantia; that, therefore, the court has no jurisdiction to wind-up the company unless the Crown consents; the Crown does not consent; and, therefore, the court cannot make a winding-up order. Secondly, the Crown contends that to ground jurisdiction in the court to wind-up a foreign company which has been dissolved by the law of the country of its incorporation it is necessary to show that the company has carried on business in this country; the presence of assets, however valuable, is not sufficient; the company never carried on business in this country; and, therefore, I cannot make the winding-up order. Thirdly, the Crown contends that, even if there is jurisdiction to do so, I should not make a winding-up order at the suit of foreign creditors in respect of debts payable in Norway in Norwegian kroner, but that I should leave the Crown to get in the English assets with a view to the Crown being in a position to make *ex gratia* payments among English creditors in respect of rouble debts, which, of course, will be irrecoverable. I may observe that there is no evidence of the existence of any English creditors.

I will deal with those contentions in the order in which I have stated them. The first relevant question appears to me to be: To what extent has the Crown's prerogative been cut down by the Companies Act, 1948? It is clear that a statutory provision can cut down the prerogative of the Crown either expressly or by necessary implication: see *A.-G. v. De Keyser's Royal Hotel* (1). In the course of his speech LORD ATKINSON said ([1920] A.C. 539):

"It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same—namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it

imposed, however unrestricted the Royal Prerogative may theretofore have been."

LORD SUMNER said (*ibid.*, 561):

A "The legislature, by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a *modus operandi* for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object."

B

LORD PARMOOR said (*ibid.*, 576):

C "The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in BACON'S ABRIDGEMENT, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong . . . I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced."

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E It is against the background provided by those passages that the Companies Act, 1948, has to be construed. The Crown's right to property as *bona vacantia* is expressly mentioned in s. 354. That is the only section where it is mentioned. *Prima facie*, therefore, on the reasoning of the House of Lords in *A.-G. v. De Keyser's Royal Hotel* (1), that right of the Crown is exhaustively stated in that section. In my opinion, examination of other sections of the Act confirms this view. In the first place, there is no mention in either s. 399 or s. 400 of any such limitation on the jurisdiction of the court as that contended for. Secondly, on the presentation of a petition under either of those sections, s. 404 operates and makes applicable the provisions of Part V of the Act with certain immaterial exceptions: see *Rudow v. Great Britain Mutual Life Assurance Society* (2). It follows that to the winding-up of such a company as this s. 319 of the Companies Act, 1948, would apply, but it has been held that the effect of s. 209 of the Companies (Consolidation) Act, 1908, the section corresponding to s. 319 of the Companies Act, 1948, is to cut down or limit the prerogative of the Crown: see *Re H. J. Webb & Co. (Smithfield, London), Ltd.*, affirmed sub nom. *Food Controller v. Cork* (3). It is sufficient, I think, to refer to two short passages, the first from the speech of LORD SHAW OF DUNFERMLINE and the second from that of LORD WRENBURY. LORD SHAW said ([1923] A.C. 665):

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H "The Crown, as a creditor, is by its assent to this legislation plainly restricted in priority to the limited specification of Crown debts given. It follows that, beyond that point, the Crown assents to an equal division. Any super-eminent right, whether under the name of prerogative or otherwise, has disappeared. The Crown stands plainly bound to that result."

LORD WRENBURY said (*ibid.*, 669):

"The second observation is that s. 209 [of the Act of 1908] as affecting the rights of the Crown in respect of Crown debts is binding on the Crown. By assenting to an Act which affected the rights of the Crown it is obvious that the Crown waived its prerogative to the extent necessary to give effect

to the Act so long as the Act was in operation. The third observation is that s. 209 binds the Crown, s. 186 [of the Act of 1908], which deals with the same subject-matter—namely the application of the assets in satisfying the liabilities—also binds the Crown.”

It is thus clear that by the Companies Act, 1948, the extent of the Crown's prerogative is cut down by necessary implication as well as expressly by the joint effect of s. 353 and s. 354. Once it is shown, as, in my view, I have shown, that a section in Part V of the Act cuts down the Crown's prerogative by necessary implication, it follows that every other applicable section of that Part has the same operation if that result is necessary to its effective working. The main object of winding-up a company is to procure the realisation of its assets and their distribution among its creditors, including the Crown. On this basis, is it straining the language of the Act to place on its provisions a construction which, as regards such a company as this, will result in that object being achieved? In my view, authority is in favour of this construction. In the course of his judgment in *Re Wells* (4) LAWRENCE, L.J., said ([1933] Ch. 50):

“The right of the Crown to succeed to the personal estate vested in a company at the time of its dissolution does not in my opinion differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next of kin. In both cases the title of the Crown arises because the property has no other owner: such property must not, of course, be confused with property the owner of which is unknown. The old text-book writers on the law of corporations, such as KYD (1794), vol. 2, p. 516, and GRANT (1850), p. 304, expressed the opinion that the Crown is entitled to the personal estate of a dissolved corporation and, so far as I know, the correctness of that opinion has never been doubted. The only difference between the case of an intestate and of a dissolved company is purely one of form. In the case of an intestate, his personal estate immediately on his death formerly vested in the Ordinary, and now vests in the Probate judge pending the grant of letters of administration. As the right of administration follows the right of property, letters of administration in the case of an intestate dying without next of kin are granted to the nominee of the Crown, but subject to the usual condition of paying the administration expenses and debts of the intestate. In the case of a dissolved company, the personal estate passes directly to the Crown, and there is no necessity to provide for the payment of any administration expenses or debts, as the legislature has provided that these must be discharged before the company is dissolved.”

The position of such a company as this was exhaustively considered by the House of Lords in *Russian & English Bank & Florence Montefiore Guedalla v. Baring Bros. & Co., Ltd.* (5). The conflict between the views of the members of the House who heard the appeal consisted in this, that the minority, LORD RUSSELL OF KILLOWEN and LORD MAUGHAM, considered that it was the affairs of the dissolved company which were to be wound-up, while the majority, LORD BLANESBURGH, LORD ATKIN and LORD MACMILLAN, considered that it was the company which was to be wound-up, the company being deemed for the limited purposes of the liquidation not to have ceased to exist. I quote from the speeches of the majority. LORD BLANESBURGH said ([1936] 1 All E.R. 514):

“Take a company described in s. 338 (2) [of the Companies Act, 1929]. That company, although in terms stated to be non-existent in the country of its incorporation, is not only a company which may be wound up, but on an order for winding it up made, it is by s. 342 [of the Act of 1929] to be deemed to be a company under the Act, not, be it observed, a ‘dissolved’ company under the Act: there is, as COTTON, L.J., observed [in *Re Porto Silver Mining Co.* (6)], no such thing. Following SIR GEORGE JESSEL’S

terminology [in *Rudow v. Great Britain Mutual Life Assurance Society* (2)], it is to be deemed to be a registered company: adapting the phraseology of the Act already alluded to and equivalent in effect, it is to be treated as if it were a company which had not been dissolved. And it is not denied that it was within the competence of the legislature so to enact: the only question is whether it has in substance done so. My Lords, I cannot doubt that it has.

A The Act in regard to these companies is dealing with organisations which, as such, are beyond the control of Parliament. It is not for the legislature of this country either to kill or to make them alive. In this vital respect they stand in a totally different position from the companies under the Act whose dissolution the Act has brought about and whose dissolution it has also declared void. All that with reference to the dissolution of a foreign corporation the legislature can say is that it shall be ignored in a winding-up of the company under the Act. And it is ignored because any dissolution without a winding-up previously completed and with creditors unpaid is an offence, an injustice, to these creditors if it be permitted to defeat their claims against the company. Therefore such a dissolution is to be ignored. And reading s. 338 (2) and s. 342 together, I cannot doubt that in express

C terms the legislature has done so in that case—creating a situation the full benefit of which can be extended to the liquidation of the bank as a dissolved foreign corporation: thus rescuing from sterility a winding-up by statute directly authorised.”

LORD ATKIN said (*ibid.*, 517):

D “ The liquidator deals with the company’s property in right of the company or usually in the name of the company, possessing the powers of the directors and the special statutory powers given to him by the Act. On the assumption adopted by the judgments under appeal not only is there no property of the company in existence with the result that none of the statutory powers of the liquidator in respect of property come into existence, but there is the further difficulty that all that which had been the movable property

E of the company has become vested in the Crown as *bona vacantia*. For some reason which I cannot appreciate some of the learned judges in the courts below seem to have thought that this obvious difficulty might be cured by obtaining a vesting order under s. 190. But when that section is looked at, the power of the court is found to be to ‘ direct that all or any part of the property of whatsoever description belonging to the company . . . shall vest in the liquidator by his official name.’ The initial futility remains.

F 1. There is no property belonging to the company. 2. What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator. The result is that if the company for the purposes of winding-up is to be treated as dissolved, there never can be any assets over which the liquidator

G can exercise any powers of any kind. On the assumption I prefer to adopt, the Crown acquired a defeasible title defeated upon the making of a winding-up order.”

Finally, LORD MACMILLAN said (*ibid.*, 525):

H “ Be that as it may, it is manifest that the legislature has not been deterred by the fact that a company has ceased to exist from authorising it to be wound-up. Now the purpose of pronouncing a winding-up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased to exist can have any assets. But when the legislature authorised the making of a winding-up order in the case of a dissolved company, it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the legislature has authorised the

collection of the assets of a dissolved company, but has withheld the power of recovering these assets would be to attribute a singular ineptitude to Parliament."

The burden of those passages is, I think, that it must never be forgotten that the statutory provision of the application of the winding-up provisions of the Companies Act to a foreign corporation which has been dissolved under the law of the country of its incorporation is made with a view to something effective being achieved, namely, the collection of its assets and their distribution among the creditors, and it is, no doubt, for this reason that it appears to be accepted, as I shall show later in this judgment, that the court will not exercise its jurisdiction to wind-up such a company if it has no assets within the jurisdiction. If the contention of the Crown were correct, it must follow that a most far-reaching limitation must be placed on the plain language of s. 399 and s. 400 of the Companies Act, 1948, for the justification of which the whole Act can be searched in vain. The result must be that the two sections are to be regarded as a dead letter except on such occasions as the Crown allows them to have any force, a curious form of legislation. The truth is that if the Crown's contention is correct the Act does not work, whereas if that contention is rejected it does work: a complete system of administration is applied to the company's affairs and at the end of the administration any surplus goes to the Crown as bona vacantia under s. 354, where, and where only, the Crown's right to property as bona vacantia is mentioned. In my judgment, therefore, the highest title which the Crown can claim to the property of the company in this country is a defeasible title liable, as LORD ATKIN said, to be defeated by the winding-up order. It is a title which is liable to be defeated without its consent and even against its wish in every case where the conditions prescribed by the Act, as interpreted by the relevant authorities, exist.

I turn now to the second ground on which the Crown opposes the petition, namely, that in the case of a foreign dissolved corporation it is a condition for grounding jurisdiction in the court to wind it up that it should be shown that the corporation had at some time before its dissolution carried on business in this country, and that it has not been shown that this company did so. I think that this point is covered by the decision of the Court of Appeal in *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* (7). Three points were decided. The first dealt with the ground on which HARMAN, J., had dismissed the summons. This point has no materiality for my present purpose. The second point decided was that, if proof of conduct of business entered into by the bank was necessary to the existence of jurisdiction in the English courts to wind-up the bank under the Companies Act, 1929, s. 338 (1) (d) (i) [which corresponds to s. 399 (5) (a) of the Act of 1948], that condition was on the evidence satisfied. The third point decided was that, in the case of a foreign corporation (such as the bank) which had been dissolved and extinguished in the country in which it was established, it was not necessary, as a statutory condition of jurisdiction in the English courts to wind them up, to prove that they had, before their dissolution, established at some place in England a branch or other business place, and that that business had ceased: it was sufficient that there were assets of the bank in this country, and persons here claiming as creditors of the bank or said to be indebted to it, as being indicia of a business in some sense formerly conducted here. Having dealt with the first point, SIR RAYMOND EVERSHED, M.R., whose judgment was the judgment of the court, said ([1950] 2 All E.R. 556):

"I agree, however, with HARMAN, J., that in the case of a foreign corporation (such as the plaintiff bank) which has, ex hypothesi, been dissolved and extinguished in the country where it was established, it is not necessary, as a statutory condition of jurisdiction in the English courts to wind it up,

to prove that it had, prior to its dissolution, established at some place in England a branch or other business and that such business has ceased.”

The Master of the Rolls then proceeds to consider the scope of and jurisdiction conferred by s. 338 (1) (d) (i) of the Companies Act, 1929, without regard to the effect of s. 338 (2) [which corresponds to s. 400 of the Act of 1948]. He says (*ibid.*):

- A “Section 338 (1) of the Act of 1929 provided: ‘(d) The circumstances in which an unregistered company may be wound-up are as follows:—(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs . . .’ This form of words is substantially identical with that which has consistently appeared in all the relevant legislation since the Act of 1848 (11 & 12 Vict., c. 45).
- B As a matter of language it is plain that the three conditions named are independent and not cumulative. Assuming, therefore, in the case of a foreign corporation, which has by its local law been extinguished, that it is covered by the words ‘is dissolved’—which words must, as it is conceded, be taken to mean ‘has been dissolved’—it would appear from the language used that no other condition has to be fulfilled in order to confer on the
- C English court jurisdiction to wind it up. As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary.”
- D Pausing there, it is, I think, clear that it is the considered view of the Court of Appeal that for the purpose of grounding jurisdiction in the court under s. 338 (1) (d) (i) of the Companies Act, 1929, it is not necessary to show that the dissolved corporation has carried on a business in this country. SIR RAYMOND
- E EVERSHED, M.R., then proceeds to discuss the circumstances in which the court will exercise its discretionary jurisdiction. He continues (*ibid.*):

- “Prima facie, if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts. In the present case, there are substantial assets standing in the name of the plaintiff bank or its liquidator, and there are persons within the jurisdiction having claims to participate in the distribution of those assets. At the same time, by reason of the total extinction in Russia of the plaintiff bank and the absence of any machinery under Russian law for the due distribution of the assets among the persons regarded as properly having claims on them, the result is that, unless the machinery of winding-up under the Companies Act is available, no means of any kind exist for the administration of the English assets. The existence of assets here, the presence here of persons claiming as creditors of the plaintiff bank or said to be indebted to it, seem to constitute at least the *indicia* of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, on the general principle above referred to, would make the case appropriate for the exercise by our court of its winding-up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic unless it is also necessary to show that such business was carried on directly and from some established, or specified, place or places in this country.”
- F That passage indicates that in order to justify the exercise by the court of its discretionary jurisdiction it is enough to show the existence of assets here and
- G H

That passage indicates that in order to justify the exercise by the court of its discretionary jurisdiction it is enough to show the existence of assets here and

the presence here of persons claiming as creditors of the bank or said to be indebted to them, those circumstances being treated as constituting "at least the indicia of a business in some sense formerly conducted here", subject to the proviso:

"unless it is also necessary to show that such business was carried on directly and from some established . . . place or places in this country."

His Lordship then proceeded to deal with the relevant authorities and his conclusion is that it is not necessary so to show. Having, therefore, established the scope and extent of the jurisdiction under s. 338 (1) (d) (i) of the Companies Act, 1929, and the requirements for the exercise of that discretionary jurisdiction, SIR RAYMOND EVERSLED, M.R., proceeds to consider whether or not sub-s. (2) of the section has the effect of placing any limit on the jurisdiction under sub-s. (1). After an exhaustive consideration of the matter he states his conclusion as follows (*ibid.*, 560):

"In the light of the judicial pronouncements to which I have referred in the House of Lords [in the *Baring Bros.* case (5)], and also by COHEN, J. [in *Re Tovarishstvo Manufactur Liudvig-Rabenek* (8)], and BENNETT, J. [in *Re Russian & English Bank* (9)], Parliament re-enacted in ss. 399 and 400 of the Companies Act, 1948, the exact language of sub-ss. (1) and (2) of s. 338 of the Act of 1929. It follows, in my judgment, that sub-s. (2) of s. 338 must be regarded as expository only, and as not having been intended to give jurisdiction to wind up dissolved foreign corporations (such as the plaintiff bank) subject to special limiting conditions not applicable to the more general jurisdiction conferred by sub-s. (1); and that by the opening words in sub-s. (2), 'where a company incorporated outside Great Britain which has been carrying on a business in Great Britain', and so on is intended (subject to the suggestion of JENKINS, L.J.) no more than a reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction. In my judgment, therefore, the language of sub-s. (2) does not qualify the conclusion which I have reached on sub-s. (1)."

Finally, the Master of the Rolls states (*ibid.*) what I take to be his general conclusions on this point:

"I think that in circumstances such as exist in the present case it is unnecessary as a foundation for a winding-up order to prove that the plaintiff bank had any branch or office in England or carried on its business operations in England from some established or specific or identifiable place of business, and that EVE, J., had jurisdiction to make the order which he did make in May, 1932, apart from the matter on which he expressly relied."

In my view, therefore, that case is authority for the proposition that I have jurisdiction to make a winding-up order, and that, further, I should be justified in exercising that jurisdiction if I can find on the evidence some commercial subject-matter on which a winding-up order can operate. In view of the evidence at paras. 5, 6 and 7 of the petition, to which I have referred, I am satisfied that that condition is fulfilled.

As regards the third point taken by the Crown which was described as relating to the merits, I can see no merit in the suggestion that I should refuse to make a winding-up order which will benefit the petitioners as foreign creditors, but that I should leave it to the Crown to make *ex gratia* payments to English creditors for rouble debts—as to the existence of which creditors there is, as I have said, no evidence—to the exclusion, no doubt, of the petitioners as mere foreign creditors notwithstanding that their debts are clearly established: a somewhat surprising proposition. The object of a winding-up order is to ensure distribution of the assets among the whole body of creditors. No other basis of

distribution would be fair. As PEARSON, J., said in *Re Kloebe* (10) (28 Ch.D. 180):

" . . . but whatever the law in France or India may be, the law of England has always been that you must enforce claims in this country according to the practice and rules of our courts, and according to them a creditor, whether from the furthest north or the furthest south, is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country, and which I must say, for the sake of honesty, I hope will always be the law of this country."

I, therefore, make the usual compulsory order.

Order accordingly.

Solicitors: *McKenna & Co.* (for the petitioning creditors); *Barfield & Barfield* (for E. Kaplan); *Treasury Solicitor.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BUSHFORD v. FALCO.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), March 11, 19, 1954.]

Rent Restriction—Statutory tenant—Forfeiture of tenancy—"Non-occupying tenant"—Animus revertendi—Premises left owing to disrepair.

In 1937 premises consisting of a shop and dwelling accommodation above it were let to the tenant. In 1943 the premises were damaged by enemy action, and the parties agreed that the rent should be reduced while the top floor remained uninhabitable. Thereafter the condition of the premises gradually deteriorated, but the tenant and his family continued to live on the first floor until 1949 when he left the first floor owing to its condition, without, however, informing the landlord, and went to live elsewhere. He continued to carry on business in the shop and to pay the full rent as agreed in 1943. On a claim by the landlord for possession of the whole premises,

HELD: after a long absence from the premises the onus was on the tenant to show that he had an animus revertendi; the fact that his departure from the premises was attributable to their condition was not in itself sufficient to enable him to discharge that onus, nor was his evidence that it would be more convenient for him to return and live above the shop; and, therefore, he must be taken to have abandoned occupation, and the landlord was entitled to an order for possession.

Brown v. Brash & Ambrose ([1948] 1 All E.R. 922), applied.

FOR CASES AS TO NON-OCCUPYING TENANT UNDER THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACTS, 1920 to 1939, see DIGEST, Replacement Vol. 31, pp. 658-661, Nos. 7604-7623.

Case referred to:

(1) *Brown v. Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 31 Digest, Replacement, 660, 7619.

APPEAL by the landlord against an order of His Honour JUDGE PUGH at Bloomsbury County Court, dated Dec. 14, 1953.

By a written agreement dated Feb. 27, 1937, premises consisting of dwelling accommodation above, and a shop on, the ground floor, were let by the landlord to the tenant for three years at a rent of £205 per annum. Early in the war the premises were damaged by enemy action, the top floor of the premises was rendered uninhabitable, and a new letting supervened, the terms of which were contained in a letter dated June 24, 1943, written on behalf of the landlord to the tenant, in these terms:

"With reference to our recent interview with [the tenant's wife] and our

subsequent conversation with your solicitor . . . we confirm that your landlord . . . is prepared to accept the sum of £75 per annum for the rent of the above premises, exclusive of rates and subject to your not making use of the rooms on the top floor, the rent to be payable by monthly instalments of £6 5s. on the first day of every month. When these rooms have been renovated and made fit for occupation and use, the rent will be increased to £104 per annum (exclusive)."

Under this agreement there was no obligation on either side to do repairs. The tenant and his wife proceeded to live on the first floor of the premises. That floor was already in a dilapidated condition and it progressively deteriorated until some date in or about 1949 when the tenant and his wife left the premises without communicating with the landlord. The landlord served on the tenant a notice dated Sept. 23, 1952, to quit the premises on or before Mar. 31, 1953. The tenant failed to do so, and the landlord began proceedings for possession of the "business or shop premises". By his defence the tenant pleaded that the premises consisted of a shop with living accommodation and were a dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, that in 1949 the living accommodation became uninhabitable by reason of disrepair, and that the tenant ceased to reside therein until the war damage should be made good. The county court judge, holding that the tenant was forced to leave by the condition of the premises and that he retained protection under the Acts, dismissed the action, and the landlord appealed.

Heathcote-Williams, Q.C., and *Elson Rees* for the landlord.
John Montgomerie for the tenant.

Cur. adv. vult.

Mar. 19. **SIR RAYMOND EVERSHED, M.R.**, stated the facts and continued: As I read his judgment, the learned county court judge thought that because the tenant had left the premises "involuntarily", that circumstance was, in effect, conclusive in his favour. According to the brief note of his judgment:

"[The tenant] did not go out voluntarily either in fact or in law—he was forced out by circumstances, i.e., by the condition of [the living accommodation]. I must hold that the tenant retains protection, otherwise landlords could let premises fall into a bad state of repair and thereby deprive tenants of the protection of the Acts."

Taking that view, the judge did not find as a fact that since his removal from the living accommodation, the tenant intended to return, that is to say, that he had an *animus revertendi* or *animus possidendi*.

With all respect to the learned judge, I think his view was an over-simplification of the matter. No doubt, if a tenant is forced to leave his home by some sudden calamity, he will, *prima facie*, be regarded as doing so as a temporary expedient, meaning and intending to return as soon as possible. This will be, for example, the natural conclusion if he is compelled to leave because he is sent to prison for three months or because his house is invaded by the waters of a flood. If, however, the tenant's absence from the original home be long, the onus, according to the classic judgment of *Asquith, L.J.*, in *Brown v. Brash & Ambrose* (1), is on him to show that he had an *animus revertendi* although the circumstances may make the onus easy for him to discharge. In the present case the departure of the tenant was not occasioned by any sudden catastrophe. The living accommodation was in a dilapidated condition from 1943 (when the tenancy must be taken to have begun) till 1949 (when the tenant left). I assume that it progressively deteriorated until the time came when the tenant and his wife, having found alternative accommodation, concluded that continued residence there was no longer to be borne. At least there is no evidence to rebut what would appear, inevitably, to have been the natural course of events, and for that the tenant must be taken to be to blame for not only did he not give any such evidence

at the trial, but (as the judge emphasised) he and his wife left without any communication, by way of protest or affirmation of intention to return, to the landlord. If, then, the word "involuntary" is appropriately used at all, it must be, at least, subject to qualification.

In my judgment, therefore, the fact that the tenant's departure from the living accommodation, was attributable to its condition is not of itself sufficient to support a conclusion in the tenant's favour. As I have said, the judge did not find a continuing intention to resume occupation when the living accommodation had been rendered fit. It is, therefore, necessary to look at the evidence so far as it is recorded in the judge's notes, and, though it may well be, in such cases as the present, that the court should not be slow to find the onus discharged, I am unable to find or infer that the tenant discharged it. It is true that length of absence, of itself, will not by any means be fatal to the tenant. It is true, also, that in the present case the tenant continued to pay, and the landlord to receive, the full rent—though it is plain that the tenant's main concern was and is with the business which he has for very many years carried on in the shop on the ground floor, but the oral evidence on behalf of the tenant was as follows. The tenant in cross-examination said:

"We took over accommodation few yards round the corner. When shop [in Mornington Crescent] was offered to me I was content to go on living where I was. I was quite comfortable where I was living."

In re-examination, he said:

"I am living round the corner. Very convenient. I have two lodgers. It would be more convenient if I lived over the shop."

The tenant's wife said:

"We offered him [the landlord] a little bit more if he would do up the place. He said that was not enough."

In cross-examination, she said:

"We wanted to stay on until new premises built. We have been in present place five or six years with family. It is comfortable. Rather be on top of shop. Easier for me. He [the landlord] promised to put a shop window at house in Mornington Crescent. I did not want to go on living there [the premises the subject of the claim in the present proceedings] in the unfit state it is at present. I should like shop and premises to be re-modelled and then go back and live over the shop."

In re-examination, she said:

"If the premises had not deteriorated I would not have left."

In my judgment, the inevitable inference from these answers is that the tenant is contented and established where he is now living and has no more than the idea or belief in his mind that if and when, if ever, the living accommodation above the shop were sufficiently repaired or renovated he would find it more convenient for his business to live there than where he now is. In my judgment, this is plainly not enough. If it were otherwise, then, so far as I can see, a state of permanent stalemate (as DENNING, L.J., observed) would in this case be achieved. The landlord is under no obligation and does not intend to repair.

The tenant, likewise under no obligation, appears to have no expectation that the landlord will repair and has shown no sense of urgency or grievance. I attach, as did the judge, considerable significance to the fact that the tenant departed without any communication then or thereafter (until the present proceedings were imminent) with the landlord—a circumstance all the more remarkable having regard to the natural inference of the terms of the letter of June 24, 1943.

In my judgment, therefore, the appeal must succeed and the landlord should have obtained an order for possession on the ground that the tenant had not

explained what must, on the facts, be otherwise taken as an abandonment of occupation.

I have some sympathy with the tenant who will lose the place in which he has for so long carried on his business. I desire to add—having regard to the fears expressed by the judge—that my conclusion on the special facts of this case should in no circumstances be regarded as an authoritative encouragement to landlords to achieve an escape from the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, by the simple expedient of inactivity in the matter of repairs. As I have said, where a tenant is for practical purposes forced to leave his home by reason of lack of repairs, he should have little difficulty, if such be the fact, in proving that his departure is regarded by him as an unwelcome and temporary removal. To that end he will normally so inform his landlord in no uncertain terms on the occasion of his going. In such a case, even if the landlord is under no contractual obligation to repair and cannot be compelled by statute to do so, he should be left with the realisation that he cannot hope to make his passivity the means of getting an order for possession.

DENNING, L.J.: It would be strange if the tenant were held to be protected under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, because it would mean that the dwelling-house would be rendered forever sterile. The tenant cannot live in it because it is not fit for human habitation. The landlord cannot pull it down and re-build because he cannot get possession. Only the local authority could end the stalemate by exercising their powers under the Housing Act, 1936. They could either direct the landlord to make the place fit under s. 9 (1), or they could make a closing order under s. 12 (1), but there is no sign of their doing either. In my opinion, however, there is no such stalemate, because in the special circumstances of this case the tenant is not protected. He left the dwelling-house without a word to the landlord. He never protested to anyone about its unfitness. He has been absent so long that he can no longer be credited with an intention to make it his home. He is, therefore, not protected by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. It would have been very different if he had complained of its unfitness and shown some desire to go back once it was made fit. I agree that the appeal should be allowed.

ROMER, L.J.: I agree.

Appeal allowed.

Solicitors: *Scadding & Bodkin* (for the landlord); *W. R. Bennett & Co.* (for the tenant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LAMBERT v. VE-RI-BEST MANUFACTURING CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 11, 1954.]

Landlord and Tenant—New lease—Provision for determination by landlord—Compensation—Tribunal's power to fix compensation on determination—Landlord and Tenant Act, 1927 (c. 36), s. 5 (2).

- A Under a building agreement with their superior landlords, the landlords of a licensed restaurant were under an obligation to demolish the building and re-develop the block of which it was part on obtaining possession of the buildings involved and in any case within thirty-five years. On the expiration of an eight years' lease of the restaurant the tenant applied to the county court for the grant of a new lease under s. 5 (2) of the Landlord and Tenant Act, 1927, on the ground that the sum she would be awarded under s. 4 (1) of the Act would not compensate her for her loss of goodwill if she removed to other premises. In granting a new lease for five years the court at the instance of the landlords imposed a condition that the term might be determined by the landlords by giving twelve months' notice if they required the restaurant for development, but it added as a proviso to the right to obtain possession
- C "upon payment of such compensation as the court may determine to be the value of the unexpired residue of the term hereby granted".

HELD: the court was entitled as a term of the grant of the new lease to require the landlords to pay such compensation as the court might determine at some future date in the event of notice to determine the lease being given by the landlords before the expiration of the lease.

- D AS TO A TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-301, paras. 340-345; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 631-633, Nos. 7405-7417.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 5 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 892.

- E APPEAL by the landlords against an order of His Honour JUDGE DALE, dated May 13, 1953, granting the tenant a new lease of a holding for a term of five years under s. 5 (2) of the Landlord and Tenant Act, 1927, subject to the right of the landlords to give the tenant twelve months' notice to quit in the event of the holding being required for a re-building scheme, on payment of compensation to the tenant for the then unexpired residue of her term to be determined by the court. The landlords contended that there was no power to include a clause
- F providing for the fixing of compensation by the court at some future time.

Duveen, Q.C., and A. L. Figgis for the landlords.

D. Ackner for the tenant.

- G SINGLETON, L.J.: This appeal from an order of His Honour JUDGE DALE arises out of an application for a new lease made under s. 5 (1) of the Landlord and Tenant Act, 1927. The applicant, Mrs. Lambert, the tenant, had become entitled to the residue of a term granted by a lease of 105, New Oxford Street, dated Mar. 18, 1946, by the Commissioners of Crown Lands to Bing Pang and Yin Pang. The term was for eight years from Mar. 25, 1945, and the lease would thus normally have expired on Mar. 25, 1953. On Mar. 16, 1951, the Commissioners of Crown Lands granted the landlords a ninety-nine years' building
- H lease of a large block of property, bounded by New Oxford Street, St. Giles High Street and Lawrence Place, and embracing 105, New Oxford Street. By cl. 7 of the schedule to that lease:

"Within two years of obtaining possession of all of the old buildings and in any event not later than Mar. 25, 1986, the lessees shall proceed with the demolition of the old buildings in accordance with the provisions of cl. 4 (3) of the building agreement and remove and clear away all such buildings and

the material thereof and shall clear out and solidly fill in with concrete all cesspools and drains in or upon the said premises."

Thus, the landlords are under an obligation to undertake demolition and re-building of this large block of property by Mar. 25, 1936.

The tenant was of opinion that she had rights under the Landlord and Tenant Act, 1927. She had a restaurant at 105, New Oxford Street, and on June 15, 1951, notice on her behalf was given pursuant to the Act in these terms:

A

"(1) That I allege that the sum which could be awarded to me under s. 4 of the Landlord and Tenant Act, 1927, for compensation for the loss of goodwill attaching to the said leasehold premises, No. 105, New Oxford Street, aforesaid, of which I am the tenant and at which I carry on the trade or business of a licensed restaurant, would not compensate me for the loss of goodwill which I shall suffer if I remove to and carry on my trade or business in other premises, and further (2) that in lieu of such compensation I require a new lease of the said premises to be granted to me."

B

Section 4 (1) of the Act of 1927 provides that:

"The tenant of a holding to which this Part of this Act applies shall [in certain events] be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto."

C

The tenant's notice purported to show that she would have been entitled to compensation under that section, and that the compensation which she could have obtained would not have been sufficient to do justice between the parties, having regard to what had been done to improve the goodwill attaching to the premises, and so she claimed that she was entitled to a new lease under s. 5 (1) of the Act of 1927. Section 5 (1) provides:

D

"Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

E

F

The tenant's notice of June 15, 1951, under that power was served on the Commissioners of Crown Lands, and on the landlords. By s. 5 (2):

"Where such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper, but if the tribunal is precluded on any of the grounds mentioned in para. (b) of the following sub-section from making such an order the tribunal may award such compensation as is provided under the last foregoing section."

G

H

Thus, if a notice under sub-section (1) is served, the tribunal, in this case the learned county court judge, may, if he considers the grant of a new tenancy is, in all the circumstances, reasonable, order the grant of a new tenancy. It is

important to notice that the grant of a new tenancy is in lieu of compensation. The learned county court judge here considered that the grant of a new lease was, in all the circumstances, reasonable, and he so ordered. It was then open to him under the sub-section to make the order "on such terms as the tribunal may determine to be proper", and it is on those words that the question before this court arises. The tenant's notice was followed by an application to the court under the Act, dated June 19, 1952. In the answer of the landlords, delivered on Aug. 22, 1952, para. 3 reads:

"The [landlords] do not admit that the [tenant] would be entitled to compensation under s. 4 of the above recited Act as alleged or at all. It is not admitted that any goodwill has become attached to the said premises within the meaning of the said Act. If (which is not admitted) any such goodwill has become attached to the said premises, the said premises cannot by reason thereof be let at a higher rent than they would otherwise realise."

In para. 5 it is pleaded:

"Vacant possession of the premises is, or, alternatively, will shortly be, required by the [landlords] in order to carry out a scheme of re-development pursuant to their obligations in that behalf contained in the ground lease made Mar. 16, 1951, between the Commissioners of Crown Lands and the [landlords]."

That refers to the clause I have read. The requirement for re-building has not arisen as yet, no scheme has been proposed, and, so far as I understand it, no requisite permission has been given. No. 105, New Oxford Street is part of a large area, or a large number of premises, which the landlords have acquired, and there is nothing to show that there is any immediate haste that they should have possession of the premises. They are certainly not required at this moment for demolition or re-building. In due course the case was referred, according to the practice under the Act, to Mr. Wilfrid Price as referee, and he reported to the county court judge. The application was heard before His Honour JUDGE DALE at the Westminster County Court on May 13, 1953. Whether a case was made out which entitled the judge to make an order under s. 5 (2), i.e., whether it was shown that rights had accrued which could not be adequately met by compensation, was not, I think, seriously challenged on the hearing, having regard to the findings of the referee. The question then arose of for what term the grant of a new lease should be made. The referee had reported that it ought to be a seven-years' term, but on examining the correspondence between the parties the judge came to the conclusion that they had rather decided the matter for themselves, and that the new lease ought to be for a five-years' term, that being the measure of their agreement.

In the tenant's original lease cl. 3 (2) enabled the term granted to the tenant's predecessors to be determined. It reads:

"That the term hereby granted may be determined by the lessor on any one of the quarter days hereinbefore mentioned on the lessor giving to the lessees at least six months' previous notice in writing in that behalf if the lessor shall require the demised premises or any part thereof for or in connection with the carrying out of any scheme of improvement development or re-building in connection with any neighbouring property of the Crown."

The judge had to consider whether the new lease should include some such term or be for five years outright, and, after hearing argument, he concluded that the landlords should have a right to determine the lease if the premises were really required for the purpose of re-building. A short note of the order made on May 23 reads:

"Order new lease five years. Twelve months' notice, rent £475. Clause 3 (2) re-drafted based on wording of s. 5 (5) of Act. Counsel to agree draft

order. Report adopted with amendments. Applicant to have costs, scale 3."

The rent suggested by the referee in his report was £500 on the basis of a seven years' lease. When the county court judge decided that the lease should be for five years only, he reduced the rent from £500 to £475. "Clause 3 (2) re-drafted", meant "to be re-drafted".

Counsel drafted a clause in the suggested form, and an order dated May 13, 1953, was drawn up (though not, we were told, until after the amendments had been agreed) in these terms: A

"It is ordered that a new tenancy of the holding situate at and known as No. 105 New Oxford Street, London, W.1, mentioned in the said notice be granted to the [tenant] for the term of five years from Mar. 25, 1953, at the yearly rent of £475 and subject to the conditions and stipulations set forth in a draft lease to be agreed between the parties and to be annexed thereto." B

Then there is a provision as to costs, and this further provision:

"And either party is to be at liberty to apply to the court as he may be advised."

The note of the judge contained these words:

"Clause 3 (2) re-drafted based on wording of s. 5 (5) of the Act." C

His attention was called to s. 5 (5) of the Act because the landlords wished the lease to include a term that they should have the right to determine it in certain eventualities. It had been pointed out to the judge that, under the old lease, the tenant could be given six months' notice. In view of what had happened, the judge did not think that six months' notice was reasonable for the new lease, but he thought that the landlords ought to be able to obtain possession on giving twelve months' notice in certain circumstances. The landlords wanted that clause to be included, the judge said that the terms of the clause should be settled by counsel, and it is on this that the dispute arises. Clause 3 (2) in the lease, as settled by counsel, reads: D

"That if at any time during the term hereby granted the demised premises or any part thereof are required by the lessor for or in connection with the carrying out of any scheme of improvement development or re-building in connection with any neighbouring property of the lessor the lessor on satisfying the court that the premises are so required and on giving not less than twelve months' notice in writing to the lessee to expire on any one of the quarter days hereinbefore mentioned may determine the term hereby granted and resume possession of the demised premises upon payment of such compensation as the court may determine to be the value of the unexpired residue of the term hereby granted. For the purpose of this sub-clause the court means the Westminster County Court." E

The result is that the county court judge has determined that, in the new lease, there shall be a clause which will enable the landlords to determine the lease in certain events, but, if they do so, it is obvious that the tenant will lose something of the value of the new lease granted to her in lieu of compensation under s. 4 (1). Counsel for the landlords submits that the order of the county court judge is bad, in that the provision as to compensation in the event of the determination of the lease ought not to appear in the lease, and he asks for it to be struck out. He submits that the judge has no power to order the fixing of the amount of compensation at some future time; in a proper case compensation may be ordered under s. 4 (1), but on an application under s. 5 (1) for a new lease, compensation, *prima facie*, is not payable. Subject to the striking out of that provision as to compensation, he wishes the order to stand. F

The judge need not have ordered that the landlords should have the right to determine the lease during the five-years' period. He was asked to do that by them, and he agreed to insert a clause in the form I have read. Counsel for the tenant G

H

submits that, in so doing, he was granting a new lease on such terms as he, the tribunal under the Act, determined to be proper. The judge's note contains the words "based on wording of s. 5 (5)," but that does not mean that the case is covered by s. 5 (5), and no one suggests that it is. But s. 5 (5) contains words which the judge thought he could apply to the circumstances of this case if he felt disposed to enable the landlords to determine the lease during the five-years' period.

A Section 5 (5) deals with leases over an extended period, and provides:

B "Every lease granted under this section shall, if the landlord so requires, be subject to a condition that if at any time after the expiration of seven years from the commencement of the term thereof the premises are required for the purpose of carrying out a scheme of re-development, the landlord, on satisfying the tribunal that the premises are so required, and on giving not less than twelve months' notice in writing to the tenant, may determine the lease and resume possession of the premises upon payment of such compensation as the tribunal may determine to be the value of the unexpired residue of the term of the lease."

C Thus, where a lease must extend over more than seven years (because the question only arises after the expiration of seven years) and the landlord requires it, if the lease is determined, the landlord resumes possession on payment of such compensation as the tribunal determines to be the value of the unexpired residue of the term of the lease. That section does not apply to the circumstances of this case, but the principle or wording of it was adopted by the judge in order to cover the position which arose, when, at the request of the landlords, he agreed to insert in the lease a power in the landlords to determine the lease.

D Counsel for the landlords said that the power to fix compensation at a later date, given by s. 5 (5), is peculiar to that sub-section and does not arise anywhere else. That is true. Counsel for the tenant said that the very fact that the power appears in s. 5 (5) and is applied at the option of the landlord shows that it is a reasonable term, and that the judge was merely applying a reasonable term to another case. For a considerable part of the argument I was impressed by this consideration. If a landlord wishes to terminate a lease, under a power which he possesses in order to fulfil his obligations under a building lease, he ought to know what it is going to cost him. Otherwise he may find himself faced with a very heavy liability afterwards. Counsel for the landlords agreed that the judge might have said: "Yes, I give you leave to determine the lease

E if the premises are required for building purposes, on condition that, if the lease is determined at the end of the second year, you shall pay £500, and if at the end of the third year £250, or some such figure." But he said that there was no power to postpone the assessment of compensation in manner provided by s. 5 (5), in any but a case under that sub-section. Counsel for the tenant submitted that it might be questioned whether the judge could do what counsel for the landlords

G said was possible, but, if he could, how could he arrive at the compensation payable in advance without knowing in which year the option to give notice to determine the tenancy was going to be exercised? That does present a difficulty, which makes me feel that the assessment of compensation ought not to be made in advance without knowing the time at which the right to compensation will arise. Compensation which has to be assessed in 1953 for a possible determination

H of the lease at any time during the next five years cannot be more than guessed. Thus it seems to me that, in making the order in the form in which it was made, the judge was getting as near justice as it is possible to get in a case of this kind. The landlords desired the right to terminate. The judge was entitled to grant a new lease on such terms as he determined to be proper, and he thought those terms were proper. I do not think that this court ought to decide that the judge had no such power. It is obviously the sort of power which ought to be given to a judge in such circumstances, and I should hesitate a long time before holding

that he had no such power, when the very thing that he has done meets the justice of the case.

This case can be, and, I think, ought to be, regarded also in another way. There had been a long consideration by the referee, and there was argument and discussion before the judge. If the judge had said to counsel for the landlords: "I am disposed to put in a clause enabling you to determine the lease during the five-years' period, but I must protect the tenant in some way. I do not know when you may think it desirable to determine the lease, or when you will be able to satisfy me that you are going to re-build speedily, but suppose it is done in this way, that I give you the right to terminate the lease on notice, but I reserve until a later date the question of compensation", I feel sure that counsel appearing would have said: "That seems to be a very reasonable way of dealing with it." Otherwise the judge could have said: "Unless something of that kind is done, I do not propose to insert a clause giving you leave to determine the tenancy during the period. I do not know at this date how I can do justice between the parties without some such provision." Or he might have thought that, as the new lease was to be for five years and not seven years, the rent should be reduced further. If he had thought that the new lease might well not last for as long as five years, he might have said that the rent should be, perhaps, half the amount, or if he had thought it might only last one year, he might have said that, in the circumstances, the tenant should have the premises for a very small rent for the one year. But he reached the conclusion that he would do what the landlords wished him to do, namely, enabled them to determine the lease, and he left the compensation to be assessed at some other date. If that were wrong, and the submission of counsel for the landlords were right, it would be the duty of this court to send the case back to the county court judge for further consideration. He would have to look at the matter anew, and he might reduce the rent in the way I have suggested, or he might say: "I will not have that clause in at all." It would be a matter for his consideration. I do not think such a course would help the landlords very much. Though I ought not to express any opinion, the order which was made gave to either party liberty to apply to the court. Either party can apply to the judge on the working out of the order. There is no difficulty about the order, which appears to me to be in accordance with the principles of natural justice. The case is different in form from any other that there has been under this Act so far as I know, but I am satisfied that the order of the county court judge was one which he could make in the circumstances of this case, and I am in favour of dismissing this appeal.

JENKINS, L.J.: I agree. The learned county court judge ordered the grant to the tenant of a new lease for a term of five years at a rent of £475 a year. He further directed that the new lease should include a clause which, as finally settled, was in these terms:

"That if at any time during the term hereby granted the demised premises or any part thereof are required by the lessor for or in connection with the carrying out of any scheme of improvement development or rebuilding in connection with any neighbouring property of the lessor the lessor on satisfying the court that the premises are so required and on giving not less than twelve months' notice in writing to the lessee to expire on any one of the quarter days hereinbefore mentioned may determine the term hereby granted and resume possession of the demised premises upon payment of such compensation as the court may determine to be the value of the unexpired residue of the term hereby granted. For the purpose of this sub-clause the court means the Westminster County Court."

The sole question in this appeal is whether it was within the powers of the learned judge under s. 5 (2) of the Landlord and Tenant Act, 1927, to direct the inclusion in the new lease of this clause. Counsel for the landlords has contended

that this clause exceeded the powers conferred by s. 5 (2). He was not concerned to object to that part of the clause which enabled the landlords to determine the term on notice, but he did strongly object to that part of it which, in the event of their taking that course, required them to pay as compensation a sum determined to be the value of the unexpired residue of the term granted by the new lease. In order to judge whether that contention is right, it is necessary to look at some of the provisions of s. 5. Sub-section (1) states the circumstances in which a tenant can claim a new lease, and enables him, if he wishes to claim one, to serve on the landlord within a prescribed period a notice requiring a new lease of the premises in question. The most material sub-section is sub-s. (2), which provides:

“Where such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper, but if the tribunal is precluded on any of the grounds mentioned in para. (b) of the following sub-section from making such an order the tribunal may award such compensation as is provided under the last foregoing section.”

The language of that sub-section is apt to confer on the tribunal a most ample discretion. The new tenancy ordered to be granted can be for such period not exceeding fourteen years, and on such terms as the tribunal may determine to be proper. Under those words I have no doubt that it is competent to the tribunal to direct the grant of a new lease for a term not exceeding fourteen years determinable by notice at some specified time or on the happening of some specified event. I think that appears from the words in the sub-section “being a term of years absolute”. Under s. 25 (1) of the Act that expression is to have the same meaning as it bears in the Law of Property Act, 1925, and the Law of Property Act, 1925, s. 205 (1), definition (xxvii), reads:

“‘Term of years absolute’ means a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest) . . .”

The material words are “either certain or liable to determination by notice.” Plainly, it was open to the tribunal to order the grant of a new lease for five years certain, or, if it thought fit, for five years liable to be determined by notice at some specified time or on the happening of some specified event. Whether any provision for determination by notice was to be inserted, and, if so, at what time or in what event and on what terms it was to be exercisable, were matters falling wholly within the discretion of the tribunal. The present case was not one in which the landlords were in a position to object to the grant of any lease for any of the reasons stated in s. 5 (3) (b) (ii), (iii), or (iv) of the Act of 1927, for the landlords were not able to give any definite assurance that they had any immediate intention of pulling down or re-modelling the premises, or that vacant possession of the premises at that time was required in order to carry out a scheme of re-development, or that for any other reason the grant of a lease of the premises would not be consistent with good estate management. Being unable to rely on any of those reasons, they agreed that the case was a proper one for a new lease. Nor could they say under sub-s. (4) that the premises, though not required immediately on any such ground as aforesaid, would be so required after the lapse of

a certain period. In that event, under sub-s. (4), it would have been open to them to insist that the term of the lease should not extend beyond the expiration of the certain period in question, unless the lease was made subject to the condition that the landlord might at any time after the expiration of that period, on giving not less than six months' notice in writing, resume possession of the premises if he required them for any such purpose as aforesaid. Finally, the landlords could derive no assistance from sub-s. (5), which provides that:

"Every lease granted under this section shall, if the landlord so requires, be subject to a condition that if at any time after the expiration of seven years from the commencement of the term thereof the premises are required for the purpose of carrying out a scheme of re-development, the landlord, on satisfying the tribunal that the premises are so required, and on giving not less than twelve months' notice in writing to the tenant, may determine the lease and resume possession of the premises upon payment of such compensation as the tribunal may determine to be the value of the unexpired residue of the term of the lease."

The landlords, therefore, could not insist on the insertion of a provision for determination of the kind provided for in sub-s. (5), because the lease here was only to be for a period of five years, and sub-s. (5) deals only with a period of more than seven years from the commencement of the term.

The position, then, was that the landlords could not insist on any provision for determination being inserted in the new lease in this case. They could not insist, but they were entitled to represent to the tribunal that it would be right and proper that such a stipulation should be inserted in order that they might not be hampered in the event of its becoming necessary for them to take possession of the premises for the purpose of a re-building or development scheme. It was, however, open to the tribunal, when that suggestion was made, to take the view that a plain provision for determination would be unfair to the tenant, inasmuch as the security of tenure provided for her by means of a new lease for the term of five years in lieu of compensation for goodwill, would, or might, thus be rendered virtually illusory. If that was the view of the tribunal, I cannot see any reason why it should not have been within its discretion to conclude that it would be wrong and unfair to the landlords not to give them any opportunity of determining this tenancy at all, and, on the other hand, wrong and unfair to the tenant to insert in the new lease a provision simply enabling the landlords to determine without any provision that, in the event of their doing so, they should compensate the tenant for losing the benefit of the residue of the term then remaining to run. I cannot see any ground for holding that, on its coming to this conclusion, it was not within the powers of the tribunal under the section to direct the insertion in the new lease of a clause in the terms of the clause now in dispute.

Counsel for the landlords argued that, although it might be permissible for the tribunal to make the provision for the determination of the term conditional on the payment by the landlords to the tenant of compensation in the form of some fixed amount, diminishing as the unexpired residue of the term diminished, it could not be right to include in the clause a provision under which the amount of compensation was left to be determined by the court on a future occasion. In my view, there is no substance in that objection. It seems to me that the provision requiring the compensation to be determined by the court supplies the best method of ensuring that the figure arrived at will be the right one, and a fair figure to both parties. I see no objection to such a provision in principle, nor, to my mind, is there really any procedural objection. What the learned judge did in effect was to adapt to the particular circumstances of this case the provisions of s. 5 (5), the material terms of which are, indeed, reproduced almost verbatim in the disputed clause. Sub-section (5) contemplates in certain events the insertion, *mutatis mutandis*, of a clause in these very terms in the lease ordered to be granted, and it contemplates, just as this clause does, that the

compensation should be determined by the tribunal, i.e., the appropriate county court. I should find it difficult to hold that a procedure prescribed in certain cases by the Act itself in sub-s. (5) is not capable of being applied for the purpose of working out the provisions of a similar clause such as the clause now in dispute. The order for the grant of the new lease has annexed to it the form of the lease to be granted, and states on its face that the form of lease is so annexed, and it includes a provision to the effect that the parties are to be at liberty to apply to the court as they may be advised. Procedurally, it does not seem to me that there should be any real difficulty in bringing before the court under that liberty to apply any matter which it is necessary for the court to determine under the provisions of the clause in question.

Accordingly, for these reasons and those given by my Lord, I think that the county court judge came to a right conclusion and that the appeal should be dismissed.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Markham Thorp & Co.* (for the landlords); *Herbert Oppenheimer, Nathan & Vandyk* (for the tenant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BANK VOOR HANDEL EN SCHEEPVAART, N.V. v. ADMINISTRATOR OF HUNGARIAN PROPERTY.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Keith of Avonholm), December 14, 15, 16, 17, 1953, January 25, 26, 27, 28, April 1, 1954.]

Crown—Crown servant—Liability to income tax—Custodian of Enemy Property—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1).

On July 3, 1940, gold belonging to a Dutch banking company was transferred from safe deposit in London to the Custodian of Enemy Property by a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939. On July 24 the custodian sold the gold and retained the proceeds as enemy property. He subsequently used the proceeds to purchase Treasury bills at a discount and paid income tax on the profit made. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the Treaty of Peace (Hungary) Order, 1948, he transferred the proceeds to the administrator. On July 30, 1951, the Dutch banking company obtained judgment against the administrator for the amount of the proceeds of the sale of the gold, and it was conceded by the administrator that any sums earned by the proceeds while in the hands of the custodian should go with the proceeds. The Dutch company claimed that it was entitled to these sums without deduction of the income tax paid by the custodian in respect of the profits on the Treasury bills, on the ground that Crown status attached to the custodian, and, therefore, he was not liable to income tax. It was conceded that, if the custodian was not liable to pay tax, the amount paid by way of tax should be treated as having passed to the administrator.

HELD (LORD MORTON OF HENRYTON and LORD KEITH OF AVONHOLM dissentiente): the custodian was a servant of the Crown and received the income in the course of his duties; on the construction of the Act of 1939, and especially s. 7 (1) thereof, the arrangements for the disposal of the income were to be made (and could be made without the authority of Parliament) by the Crown which was not bound to ensure that each item of

property was returned to its former owner; that afforded the Crown sufficient interest to entitle it to claim that the income was immune from tax; and, therefore, the bank was entitled to recover the full amount of the income without deduction of tax.

Austrian Property Administrator v. Russian Bank for Foreign Trade (1932) (48 T.L.R. 37), *London County Territorial & Auxiliary Forces Assocn. v. Nicholls* ([1948] 2 All E.R. 432), and *Re Munster* ([1920] 1 Ch. 268), approved.

Mersey Docks v. Cameron, Jones v. Mersey Docks (1865) (11 H.L. Cas. 443), applied.

Metropolitan Meat Industry Board v. Sheedy ([1927] A.C. 899), distinguished.

Decision of the COURT OF APPEAL sub nom. *Bank Voor Handel en Scheepvaart, N.V. v. Slatford* ([1952] 2 All E.R. 956), reversed.

AS TO WHEN THE CROWN IS BOUND BY STATUTE, see HALSBURY, Hailsham Edn., Vol. 31, p. 521, para. 681; and FOR CASES, see DIGEST, Vol. 42, pp. 689-693, Nos. 1036-1082.

FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 337.

Cases referred to:

- (1) *Mersey Docks v. Cameron, Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443 (11 E.R. 1405); 20 C.B.N.S. 56 (144 E.R. 1024); 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 38 Digest 466, 286.
- (2) *Smith v. Birmingham Union*, (1857), 7 E. & B. 483; 119 E.R. 1326; sub nom. *R. v. Smith*, 26 L.J.M.C. 105; 29 L.T.O.S. 76; 21 J.P. 694; 38 Digest 467, 295.
- (3) *Amherst (Lord) v. Sommers (Lord)*, (1788), 2 Term. Rep. 372; 100 E.R. 200; 38 Digest 465, 285.
- (4) *R. v. Stewart, R. v. Stainsby, R. v. Breton, R. v. Foster*, (1857), 8 E. & B. 360; 120 E.R. 134; sub nom. *R. v. Stewart, R. v. Edwards, R. v. Lake, R. v. Stainsby, R. v. Breton, R. v. Foster*, 27 L.J.M.C. 81; 30 L.T.O.S. 114; 22 J.P. 480; 38 Digest 433, 70.
- (5) *Lancashire J.J. v. Stretford Overseers*, (1858), E.B. & E. 225; 120 E.R. 492; sub nom. *R. v. Lancashire J.J.*, 27 L.J.M.C. 209; 31 L.T.O.S. 116; sub nom. *Stretford Overseers v. Lancashire J.J.*, 22 J.P. 705; 38 Digest 481, 395.
- (6) *Hodgson v. Carlisle Local Board of Health*, (1857), 8 E. & B. 116; 120 E.R. 43; sub nom. *R. v. Hodgson*, 29 L.T.O.S. 246; 38 Digest 465, 278.
- (7) *R. v. Manchester Overseers*, (1854), 3 E. & B. 336; 23 L.J.M.C. 48; 22 L.T.O.S. 241; 18 J.P. 218; 118 E.R. 1167; 38 Digest 465, 283.
- (8) *R. v. Shepherd*, (1841), 1 Q.B. 170; 10 L.J.M.C. 44; 5 J.P. 241; 113 E.R. 1095; 38 Digest 434, 77.
- (9) *Coomber v. Berks J.J.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 38 Digest 465, 281.
- (10) *Re Munster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; 28 Digest 95, 1914.
- (11) *Re Gourju's Will Trusts*, [1942] 2 All E.R. 605; [1943] Ch. 24; 112 L.J.Ch. 75; 168 L.T. 1; 2nd Digest Supp.
- (12) *Re Ring Springs, Ltd.'s Letters Patent*, [1944] 2 All E.R. 421; [1944] Ch. 180; 113 L.J.Ch. 100; 170 L.T. 189; 2nd Digest Supp.
- (13) *Re Pozol's Settlement Trusts*, [1952] 1 All E.R. 1107; [1952] Ch. 427; 3rd Digest Supp.
- (14) *Austrian Property Administrator v. Russian Bank for Foreign Trade*, (1932), 48 T.L.R. 37; Digest Supp.
- (15) *Reuter (R. J.) Co., Ltd. v. Ferd Mulhens*, [1953] 2 All E.R. 1160.
- (16) *Greig v. Edinburgh University*, (1868), L.R. 1 Sc. & Div. 348; 32 J.P. 627; 38 Digest 472, 327.

- (17) *Fox v. Newfoundland Government*, [1898] A.C. 667; 11 Digest, Replacement, 666, 521.
- (18) *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899; 137 L.T. 782; Digest Supp.
- (19) *London County Territorial & Auxiliary Forces Assocn. v. Nichols, London County Territorial & Auxiliary Forces Assocn. v. Parker*, [1948] 2 All E.R. 432; [1949] 1 K.B. 35; [1948] L.J.R. 1600; 31 Digest, Replacement, 636, 7446.
- (20) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.
- (21) *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 11 Digest 546, 499.

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APPEAL by the plaintiff bank from an order of the Court of Appeal dated Nov. 3, 1952, reported [1952] 2 All E.R. 956, reversing an order of DEVLIN, J., dated Jan. 18, 1952, reported [1952] 1 All E.R. 314.

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The plaintiff, a Dutch banking company, brought an action claiming inter alia (i) a declaration that the first defendant, the Custodian of Enemy Property, was a trustee for the State of the Netherlands and for the plaintiff bank of gold deposited in London of which the plaintiff bank was the owner immediately before May 20, 1940, and of balances due at that time to the plaintiff bank from certain banks in London, and that he was liable to account to the plaintiff bank for the same and all interest and dividends accruing thereto; (ii) damages against the first defendant for conversion of the gold; (iii) a declaration that sums transferred by the first defendant to the second defendant, the Administrator of Hungarian Property, in April, 1950, being the sum received by the first defendant on the sale of the gold and the sum total of the bank balances (less a fee retained by the custodian under the Trading with the Enemy (Custodian) Order, 1939, art. 7) were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that the plaintiff bank was absolutely entitled to them; and (iv) an order for recovery of the sums with interest thereon.

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On July 3, 1940, the gold was transferred from safe deposit in London to the Custodian of Enemy Property under a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939. On July 24, under an order made under the Act and order of 1939, the custodian sold the gold and retained the proceeds as enemy property. He acquired the bank balances from the banks holding them under instructions contained in letters from him, dated Jan. 19, 1950, as moneys held by the banks since May 20, 1940, for his account and subject to his direction. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (c) of the Treaty of Peace (Hungary) Order, 1948, the custodian transferred the proceeds and the bank balances to the administrator.

On July 30, 1951, DEVLIN, J., gave judgment in the action for the custodian against the plaintiff bank and judgment for the bank against the administrator for the sums claimed and interest thereon at four per cent., with liberty to apply if the amount due in respect of the sums earned by the proceeds of the sale of gold by the custodian were not agreed, it having been conceded that these sums should go to the plaintiff bank if it was successful in the action ([1951] 2 All E.R. 779). The amount was not agreed, and the plaintiff bank applied to the judge to determine the amount due. The plaintiff bank claimed that judgment should be entered for £2,224,367 6s. 11d. The administrator contended that the sum should be £2,148,041 8s., the difference of £76,325 18s. 11d. being income tax paid by the custodian in respect of profits made from the purchase by the custodian of Treasury bills at a discount. The plaintiff bank contended that the custodian was a servant of the Crown and was exempt from income tax and should not have paid the tax. DEVLIN, J., held that the custodian received the proceeds

of sale for a Crown purpose and was, therefore, exempt from liability to income tax, and, accordingly, he gave judgment for the plaintiff bank.

The Administrator of Hungarian Property appealed to the Court of Appeal and the appeal was allowed.

Russell, Q.C., and *Littman* for the appellants, the bank.

The Attorney-General (Sir Lionel Heald, Q.C.), *J. H. Stamp*, *J. P. Ashworth* and *R. J. Parker* for the respondent, the Administrator of Hungarian Property. A

The House took time for consideration.

Apr. 1. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the Custodian of Enemy Property for England and Wales (hereafter referred to as "the custodian") was assessed to income tax in respect of income derived from certain investments made by him during a period of nearly ten years, ending in the year 1950. The custodian paid the tax, amounting to a total of over £70,000. By reason of certain concessions made from time to time since the writ was issued in this action, the only question remaining for decision in your Lordship's House is whether the custodian was bound to pay that tax or whether he could have claimed immunity by the application of the general principle that the Sovereign, by virtue of the prerogative, is exempted from income tax. The custodian was a defendant in the action, but is not a party to this appeal. B C

The events leading up to the appeal to this House are as follows:—The appellants are, and were at all material times, bankers, incorporated in the Netherlands and with their head offices at Rotterdam, Holland. Immediately prior to May 20, 1940, they were the owners of 585 bars of gold and certain U.S.A. gold eagles deposited on their behalf with the City Safe Deposit and Agency Co., Ltd., Throgmorton Avenue, in the City of London, and they were also the creditors of certain banks in London in sums amounting to £18,790 3s. 8d., being balances standing to the appellants' credit with such banks. In May, 1940, Germany invaded the Netherlands. On May 20, 1940, the Netherlands became "enemy territory" and the appellants, accordingly, became "enemies", and the said gold and balances became "enemy property", in each case within the meaning of the Trading with the Enemy Act, 1939. By a vesting order dated July 3, 1940, as varied by a further order dated July 22, 1940, made under the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, the Board of Trade vested the legal title to the said gold in the Custodian of Enemy Property and empowered him to sell the same. On July 24, 1940, the custodian sold the gold for nearly two million pounds and, from time to time thereafter, invested and re-invested the proceeds of sale and profits of such investment and re-investment (together with other funds in his hands as custodian as one mixed fund) in the purchase at discount of Treasury bills, such investments producing during the period July 24, 1940, to Apr. 12, 1950, profits, or "fruits" as they have been called, amounting to £151,454 17s. 2d. By letter dated Apr. 6, 1950, the respondent, the Administrator of Hungarian Property, demanded the proceeds of the sale of the gold, and also the bank balances, from the custodian, on the ground that they were subject to a charge under the Treaty of Peace (Hungary) Order, 1948, made under the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947. On or about Apr. 12, 1950, the custodian, in compliance with this demand and a certificate accompanying it, transferred to the respondent the sum of £1,962,852 14s. 9d., being the proceeds of the sale of the gold, plus the bank balances, less the custodian fee. No part of the sum of £151,454 17s. 2d. representing the "fruits" was transferred by the custodian to the respondent. The demand and certificate were based on the assumption that the property in question belonged to, or was held or managed on behalf of, a Hungarian D E F G H

national, but in the course of the present action *DEVLIN, J.*, held that this assumption was incorrect.

The appellants issued their writ in the present action on Jan. 12, 1950, against the custodian and the present respondent. Against the custodian they claimed, *inter alia*, delivery up of the gold or its value. This claim was dismissed by *DEVLIN, J.*, and there was no appeal against his decision. Against the respondent the appellants claimed a declaration that the proceeds of sale of the gold and the bank balances were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that the appellants were absolutely entitled thereto. They also claimed payment of these moneys with interest.

During the course of the trial of the action before *DEVLIN, J.*, the appellants contended that, if they succeeded in their claim against the respondent, they were entitled not only to the capital sum representing the actual proceeds of sale of the gold, but also to the "fruits" of the investment thereof, namely, any interest or other money which the capital sum earned whilst in the hands of the custodian, even though such "fruits" had not actually been transferred by the custodian to the respondent. At this point it was agreed on behalf of the respondent that these "fruits", whatever they were (their precise amount not having been ascertained at this time) should be treated as being part of the actual proceeds of sale in the hands of the respondent. *DEVLIN, J.*, in giving judgment for payment of the capital sums in question in favour of the appellants, said ([1951] 2 All E.R. 800):

"The interest payable on the proceeds of the gold bars has not been separately earmarked, but the custodian says that while it was in his hands it would have earned on the average from 1940 to 1950 about three-quarters per cent. per annum. The Solicitor-General is willing to treat these fruits as part of the proceeds in the hands of the administrator, and, accordingly, the judgment which I give will be for the amount which the administrator actually received increased by that addition."

DEVLIN, J., directed that the precise figure for which payment was to be entered should, if possible, be agreed between the parties, with liberty to apply in the event of such agreement not being reached.

Thereafter correspondence took place between the solicitors for the respective parties, but no agreement was reached, the dispute being whether the proper figure to be taken for the profits or "fruits" was, as the appellants contended, £151,454 17s. 2d., being the agreed gross amount of the profits earned by the said gold proceeds from the discounting of Treasury bills by the custodian during the period in question, namely, from July 24, 1940, to Apr. 12, 1950; or was, as the respondent contended, the gross amount of such interest less the sum which the custodian had paid, or purported to pay, as income tax in respect of the profits in question. The matter was, accordingly, restored to *DEVLIN, J.*, for further consideration.

At the hearing a discussion took place whether or not the "concession" or "agreement" made by the respondent at the trial of the action, that the "fruits" should be treated as part of the proceeds of sale in the hands of the respondent, was binding. Counsel on behalf of the respondent eventually conceded that, if the court were to hold that the custodian was not liable to pay tax, then the sum which had been paid by way of tax should be treated as having passed to the respondent and should be included in the amount of the judgment. This concession was made subject to certain reservations which are not material for the purposes of this appeal. The only question, therefore, which remained to be decided by *DEVLIN, J.*, and the only question which came before the Court of Appeal was whether or not the custodian was liable to pay income tax on the sum in question. *DEVLIN, J.*, held that he was not so liable. The Court of Appeal held that he was. The same question, and no other, is now before your Lordships' House for decision.

One further concession must be mentioned. It is conceded by counsel for the appellants that the produce or "fruits" of the investments made by the custodian are "annual profits or gains" within the ambit of the charge created by sched. D to the Income Tax Act, 1918. They are, it is agreed, annual profits or gains arising or accruing to a person residing in the United Kingdom (viz., the custodian) from property situate in the United Kingdom, within the meaning of para. 1 of the schedule. They would, therefore, *prima facie*, fall within the terms of para. 1 of the Miscellaneous Rules Applicable to sched. D. That paragraph provides that:

"Tax under this schedule shall be charged on and paid by the persons . . . receiving . . . the income in respect of which tax under this schedule is hereinbefore directed to be charged . . .",

and it is not in dispute that the custodian was the person "receiving" the income in question within the meaning of that provision. It is also agreed that the "fruits", having been derived from the realisation of Treasury bills bought at a discount, must be treated as "created income" for income tax purposes and are, therefore, exempt from the provisions in the Finance Act, 1944, as to the custodian's liability for tax. In these circumstances it was submitted by counsel for the respondent that the burden lay on the appellants to establish that, during the years in question, the custodian was entitled to claim immunity from tax under the general principle already mentioned. I think that this submission is clearly well founded.

The custodian was appointed by the Board of Trade in exercise of the power conferred on that board by the Trading with the Enemy Act, 1939, s. 7 (1), and it will be convenient at this stage to refer to certain portions of that Act and of regulations subsequently made, which were relied on as throwing light on the question whether the custodian was liable to pay income tax during the years in question, or was entitled to claim Crown immunity from tax. The following provisions appear in the Act of 1939 (as amended by the Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092), reg. 3, as amended by S.R. & O., 1940, No. 1289):

"2. (1) Subject to the provisions of this section, the expression 'enemy' for the purposes of this Act means— . . . (e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business;"

Having regard to the definition of "enemy territory" set out below, there is, of course, no doubt that the appellants became "enemy" within this definition through no fault of theirs, when their country was occupied by the Germans in May, 1940, and their property became "enemy property" within the definition in s. 7 (8) quoted hereafter.

"7. (1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint Custodians of Enemy Property for England, Scotland and Northern Ireland respectively, and may by order— . . . (b) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that custodian of such enemy property as may be prescribed: . . . (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects— (i) property which has been, or is required to be, vested in a custodian by or under the order . . . and any such order may contain such incidental and supplementary provisions as appear to the Board of Trade to be necessary or expedient for the purposes of the order . . . (3) Where, in pursuance of an order made under this section,— . . . (b) any property, or the right to transfer any property, is vested in a custodian, . . . neither the payment, vesting or

direction nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time—(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy subject, or (ii) some person who was so interested, and who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject . . . (7) All fees received by any custodian by virtue of an order under this section shall be paid into the Exchequer of the United Kingdom. (8) In this section—(a) the expression ‘enemy property’ means any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject; . . . 15. (1) In this Act the following expressions have the meanings hereby respectively assigned to them: . . . (b) . . . ‘enemy territory’ means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty . . . 16. This Act shall be without prejudice to the exercise of any right or prerogative of the Crown.”

This Act was followed by the Trading with the Enemy (Custodian) Order, 1939, made by the Board of Trade. It is only necessary to quote the following provisions:

“3. (i) The custodian shall, subject to the provisions of the next succeeding paragraph and except in so far as the Board of Trade either generally or in any specific case may otherwise direct or order, hold any money paid to him under this order and any property or the right to transfer any property vested in him under any vesting order until the termination of the present war, and shall thereafter deal with the same in such manner as the Board of Trade shall direct. (ii) The custodian, acting under a general or special direction of the Board of Trade, may at any time pay over any particular money paid to him under this order or transfer any particular property in respect of which a vesting order has been made to or for the benefit of the person who would have been entitled thereto but for the operation of the Act or any order made thereunder or to any person appearing to the custodian to be authorised by such person to receive the same.”

The Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092, as amended), made under the Emergency Powers (Defence) Acts, 1939 and 1940, contained the following provisions (added by S.R. & O., 1940, No. 1381):

“4.—(3) Notwithstanding anything in the said s. 7 . . . a custodian shall, if the Treasury so directs, pay or transfer, to such persons as may be specified in the direction—(a) any money so specified which has been paid to the custodian as being money which, but for the existence of a state of war, would have been payable to or for the benefit of—(i) an individual resident in any enemy territory which is not under the sovereignty of a Power with whom His Majesty is at war, or in any area in relation to which the provisions of the principal Act apply as they apply in relation to enemy territory, (ii) an individual or body of persons (whether corporate or unincorporate) carrying on business in any such territory or area . . . (b) any property so specified, being property which, or the right of transfer of which, has been vested in the custodian as being property belonging to, or held or managed on behalf of, any such individual or body of persons as is mentioned in para. (i), para. (ii) or para. (iii) of sub-para. (a) of this paragraph.”

The provisions which I have quoted sufficiently reveal the position of the custodian, both generally and in relation to the particular property and income now under consideration, and it is only necessary to add that the powers of direction vested in the Board of Trade and the Treasury respectively by these

provisions were never exercised in regard to that property and income during the relevant period.

The first of the payments of income tax made by the custodian was a sum of over £44,000 paid in September, 1945. This payment may be taken as an example, since all the payments were made on the same footing, and the question now before the House may be stated in the following terms: The custodian having been assessed to tax in this amount, could he have claimed Crown immunity with success in September, 1945? If he could, the appellants succeed. If he could not, they fail.

Counsel for the appellants called in aid the words of BLACKBURN, J., in *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1). BLACKBURN, J., delivering the opinion of five of the consulted judges, said (11 H.L. Cas. 464):

"Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office, *Smith v. Birmingham Union* (2); the Horse Guards, *Lord Amherst v. Lord Sommers* (3); or the Admiralty, *R. v. Stewart* (4), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, *Lancashire JJ. v. Stretford Overseers* (5); to county buildings . . . *Hodgson v. Carlisle Local Board of Health* (6); or occupied as a county court, *R. v. Manchester Overseers* (7); or for a jail, *R. v. Shepherd* (8). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign; so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu. And the decisions are uniform, and were not disputed at the Bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes farther."

Much of the argument in this House and in the courts below centred round the question whether the custodian was "strictly a servant of the Sovereign" or was a person who could be "considered in consimili casu".

My Lords, having regard to the reasons for his appointment, the nature of his duties, and the control exercised over him by the Board of Trade, I incline to the view that he was a servant of the Crown; but it is unnecessary for me to pursue this matter further, because I am satisfied that, even on this footing, the appellants must fail. A servant of the Crown cannot claim immunity from tax in all cases merely because he is a servant of the Crown. He claims immunity on behalf of the Crown, not on his own behalf, and it is, of course, clear that he cannot claim immunity in respect of income arising from his own private investments. It is equally clear that he can claim immunity if the income in question forms part of the personal revenue of the Sovereign, but, in my view, he can only claim immunity in respect of other income if he can show that such income is wholly applicable for "the purposes of the government of the country", to quote again BLACKBURN, J. No one of the "long series of cases" to which BLACKBURN, J., alludes directly covers the point now in issue, as they were all cases dealing with the occupation of property, but I think that the opinion which I have just expressed is a logical deduction from these cases and from the decision of this House in *Coomber v. Berks JJ.* (9).

If the custodian had tried to resist payment of income tax in September, 1945, could he have established that the income in question was wholly applicable for the purposes of the government of the country? In agreement with the

Court of Appeal, I am satisfied that he could not. In *Re Munster* (10) RUSSELL, J., had to consider the position under the trading with the enemy legislation passed during the first world war. He held that the custodian was not assessable to supertax as agent or receiver for an "enemy" whose property in this country had been vested in the custodian and produced a substantial income. In the course of his judgment the learned judge said ([1920] 1 Ch. 277):

- A " . . . in my judgment . . . pending its disposition by Order in Council after the determination of the war, the property is removed from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of peace (referred to in the preamble) and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view, under s. 5."

Later, after dealing with one objection which had been raised against this view of the Act, he continued (*ibid.*, 279):

- C " The second objection urged against this view of the Act of 1914 is that it involves the existence of a period of time during which there is no beneficial owner of the property and that this state of affairs is contrary to ordinary legal conceptions and principles. That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the custodian has certain limited powers of dealing with the property."
- D The view just expressed was applied to the recent Trading with the Enemy legislation by SIMONDS, J., in *Re Gourju's Will Trusts* (11) ([1942] 2 All E.R. 607), and again in *Re Ring Springs, Ltd.'s Letters Patent* (12) ([1944] 2 All E.R. 424), where he referred to the position as "anomalous—otherwise almost unknown to our law", and by the Court of Appeal in *Re Pozot's Settlement Trusts* (13) ([1952] 1 All E.R. 1114).
- E I agree with the comment of SIR RAYMOND EVERSHED, M.R. ([1952] 2 All E.R. 966) in the present case that

"The conception of beneficial rights being 'in suspense' is, no doubt, at first sight somewhat strange and novel",

- F but I accept, as he did, the reasoning of RUSSELL, J., in *Re Munster* (10), and I think it is equally applicable to the legislation now under consideration. Immediately before the vesting order was made in 1940 the property which was the source of the income in question belonged beneficially to the appellants. Their beneficial interest was "suspended", and, in September, 1945, the custodian could not tell whether the beneficial interest in the capital or the income, or both, would ultimately be restored to the appellants, or transferred to other persons. Either of these events might result from a direction of the Board of Trade under art. 3 of the Trading with the Enemy (Custodian) Order, 1939, or from a direction of the Treasury under reg. 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, or from "arrangements to be made at the conclusion of peace", to quote s. 7 (1) of the Trading with the Enemy Act, 1939. I am prepared to assume that the income in question might have been paid into the Treasury at a later date, in pursuance of some such direction or arrangement,
- H but, even on this assumption, it was, in my view, impossible for the custodian to show that it was Crown income in September, 1945. It was, in fact, income which belonged to nobody at that date; all beneficial interests were suspended, and, at that date, the custodian had no power to apply it to any purpose whatsoever, public or private. His duty was simply to hold it. In these circumstances, as the income admittedly came within the words of the taxing provisions of the income tax legislation, and as the custodian was admittedly the "person receiving

the income ", within these provisions, I can see no grounds on which he could have discharged the burden which lay on him of proving Crown immunity. Thus, the only question arising on this appeal must be answered in favour of the respondent.

Ordinarily, a Crown servant, whose duties involve the holding of property and the receipt of income in that capacity, would be holding Crown property; but the custodian is a Crown servant of a most unusual kind, appointed temporarily in a time of great emergency. Property belonging to private persons—some of them enemies, some of them friends whose country has been overrun by enemies—is vested in him. He is told: "You are to keep this property until you are instructed to transfer it to someone. That someone may be the person whose property has just been vested in you, and whose beneficial ownership is suspended meanwhile. It may, however, be another person. Meanwhile, you will receive the income from the property, or invest it to produce income if it is at present unproductive, and simply hold all income until further instructions are given to you." I think it would never occur to such a servant to claim that such income was Crown income and immune from tax. Apparently, it never occurred to the custodian to do so, and I think he was quite right.

The conclusion which I have reached is not, in my view, inconsistent with any of the authorities cited in argument. In *Austrian Property Administrator v. Russian Bank for Foreign Trade* (14) the question whether the administrator was liable to pay income tax on the income produced by any property which might be vested in him from time to time did not arise for decision and I do not know what view the Court of Appeal would have taken on that question. Nor have I formed any view whether the recent case of *R. J. Reuter Co., Ltd. v. Ferd Mulhens* (15) was or was not rightly decided. I am prepared to assume in favour of the appellants that the powers of the Board of Trade were as wide as they were held to be in that case; on that assumption, I am still of opinion that this appeal should be dismissed for the reasons which I have stated. I say no more about *Reuter's* case (15), as I understand it may come before your Lordships' House on appeal. I would dismiss the appeal.

LORD REID: My Lords, the appellants, a Dutch company the shares of which were owned by a Hungarian, were held to have become an enemy within the meaning of the Trading with the Enemy Act, 1939, because, and only because, it continued to trade in Holland after the German occupation of that country. It owned certain gold bars in this country and, under orders of the Board of Trade, these bars were vested in the Custodian of Enemy Property and were sold by him. He invested the proceeds from time to time in Treasury bills. The profits from these investments were assessed to income tax in his hands, and he paid the tax. Admittedly, the sole question now before your Lordships is whether he was liable to pay that tax. The developments by which that became the question at issue in this case were peculiar, and detailed consideration of those developments does not assist me towards the decision of this question. I think it unnecessary to say more about them than that the artificialities which have been introduced into this case by the form of the concession made by the Crown before *DEVLIN, J.*, are such that they may well require a decision by your Lordships which is difficult to reconcile with common sense.

The custodian was liable to pay income tax on the income received by him unless he was entitled to rely on the Royal Prerogative and plead Crown immunity as an answer to the assessments made on him. The first question to be determined is whether the custodian is a servant of the Crown who can plead Crown immunity or, if not, whether he is a person in consimili casu with such a Crown servant. If he does not come within either of those classes, then the case is at an end and the respondent succeeds. But, if he does, then it is argued that the question still remains whether the circumstances of this case are such as to warrant the plea of Crown immunity. One of the peculiarities of this case

is that it is the Attorney-General on behalf of the respondent who seeks to limit the application of the Royal Prerogative. It is said that the Income Tax Acts do not bind the Crown and that is, undoubtedly, true, at least to this extent: tax is not payable in respect of income received by the Sovereign, nor is it payable in respect of Crown income received on behalf of the Crown by a servant of the Crown in the course of his official duties. But the authorities show that it is a difficult matter to determine who is to be regarded as a servant of the Crown in this connection. And it may also be a difficult matter to determine whether a servant of the Crown can plead immunity from tax in respect of all income which it happens to be part of his duty to receive or whether it is also necessary that the income should in some sense be Crown income, or applicable for Crown purposes.

A The starting point of any discussion of these questions must be three decisions of this House: *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1); *Greig v. Edinburgh University* (16); and *Coomber v. Berks JJ.* (9). In the *Mersey Docks* case (1) a non-profit earning statutory corporation claimed immunity from local rates; in *Greig's* case (16) a similar claim was made by a university; and in *Coomber's* case (9) the justices claimed immunity from income tax under sched. A. So none of these cases was concerned with a servant of the Crown in any ordinary sense, and in each the immunity claimed was from taxation or rating in respect of the occupation or ownership of land. Though these decisions do not govern this case, speeches in all of them contain statements of principle which may be of decisive importance, but in examining those statements one must always, I think, bear in mind the nature of the issue in these cases.

B In the *Mersey Docks* case (1) the sole question was whether a corporation not subject to control by the Crown or by a Minister and whose revenues were not Crown revenues could claim Crown privilege on the ground that it was performing a public duty. BLACKBURN, J., gave a long opinion for the majority of the consulted judges. He recognised that a long series of cases had established that where property, though not in Crown occupation, is occupied for the purposes of the government of the country, no one is rateable in respect of such occupation, and said (11 H.L. Cas. 465):

F "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu".

I have found no indication that he thought that, if immunity is claimed on behalf of the Crown by an actual servant of the Crown, the right to immunity depends on whether the claim is made by a superior or by a subordinate servant of the Crown, or depends on the purpose for which the Crown proposes to use the property. LORD WESTBURY, L.C., in the course of his speech, said (*ibid.*, 501):

H "The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption".

The use of the phrase "direct and immediate servants" has given rise to an argument that LORD WESTBURY meant to distinguish between highly placed servants like Ministers and subordinate servants. I do not so read his words. He was contrasting those who were, in fact, servants of the Crown with those, like the officials of the Mersey Docks Board, who were not. He had no occasion to contrast one grade of actual servants with another: he cannot have intended

to deny the right of any servant of the Crown to assert the Crown's rights on the Crown's behalf, and by

"the direct and immediate servants of the Crown whose occupation is the occupation of the Crown itself"

he appears to me simply to have meant those whose position under the Crown is such that their occupation is the Crown's occupation. LORD CRANWORTH said (*ibid.*, 508):

"The Crown not being named is not bound by the Act. It follows therefore, that lands or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown, that this mistake has arisen".

LORD CRANWORTH, apparently, regarded all servants of the Crown as having the same right to claim exemption.

Greig's case (16) so closely resembled the *Mersey Docks* case (1) that there is little in it that is new. But, in view of the importance sought to be attached to the words "direct and immediate" servants of the Crown used by LORD WESTBURY in the *Mersey Docks* case (1), I think it well to quote what LORD WESTBURY said in *Greig's* case (16) (L.R. 1 Sc. & Div. 354):

"The true ground of exemption was ascertained and expressed by this House in the *Mersey Docks* case (1); and it was found to rest altogether upon this fact, that the poor laws did not include the Crown, the Crown not being named in the statute. The result therefore was that Crown property, and property occupied by the servants of the Crown, and (according to the theory of the constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to poor rate".

There is no distinction there between different grades of servants of the Crown.

In *Coomber's* case (9) it was decided that immunity from income tax under sched. A is similar to immunity from poor rates. LORD BLACKBURN said that the Act showed no intention to impose tax on property belonging to the Crown and did not take away (9 App. Cas. 66)

"the exemption, by virtue of the prerogative, of property actually occupied or enjoyed by the Crown".

He then said that the administration of justice, the preservation of order, and the prevention of crime are functions (*ibid.*, 67)

"that by the constitution of this country . . . do, of common right, belong to the Crown",

and after discussing earlier cases he added (*ibid.*, 69):

"I do not say that the assize courts, maintained by the county for the administration of the Queen's justice in the Queen's Court, are quite so clearly occupied by the servants of the Crown as those courts which are maintained by the Woods and Forests out of the general revenue of the country. Nor do I say that the police station, maintained by the county for the maintenance of the police, is quite so clearly occupied by the servants of the Crown as a barrack maintained for soldiers, and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the purposes of the administration, or those purposes of the government which are, according to the theory of the constitution, administered by the Sovereign."

The only passage in LORD WATSON's speech which I think it necessary to quote

is one in which he deals with a part of the speech of LORD WESTBURY in the *Mersey Docks* case (1). LORD WATSON said (*ibid.*, 74):

"The precise language of that definition satisfies me that the noble and learned Lord meant to affirm, and did affirm, that the exemption extended not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the government of the country. And seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and inalienable functions of a constitutional government, I have no hesitation in holding that assize courts and police stations have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities."

This appears to me to make it clear that LORD WATSON thought that the distinction was between those who were actual servants of the Crown and those who were not, and that he understood LORD WESTBURY as having drawn the same distinction. I can find no trace in *Coomber's* case (9) of any distinction between different grades of servants of the Crown, or of any idea that there may be actual servants of the Crown whose grade is such that they cannot plead the immunity of the Crown in the ordinary way.

In my opinion, there is nothing in these cases which requires us to limit the class of servants of the Crown to Ministers and the like, or to exclude subordinate servants of the Crown. Those in consimili casu are typically bodies like the justices, independent of the Crown, asserting Crown privilege, not for the benefit of the revenues of the Crown, but for the benefit of their own revenues, in order that the functions which they are carrying out shall not be prejudiced, and it is easy to see why such independent bodies can only be permitted to claim Crown privilege in respect of a very limited class of functions, and only if the property or money in respect of which immunity is claimed is wholly devoted to those functions. But the case of a subordinate servant of the Crown is very different.

If a Minister receives income to be used in the service of the Crown it does not matter whether the purposes for which it is to be used are, or are not, purposes which, if carried out by independent bodies, would put them in consimili casu with servants of the Crown: in all cases he can claim Crown immunity. And I can see no possible reason why, if a subordinate servant of the Crown receives income to be used in the service of the Crown, he should not be entitled to assert the same privilege. Neither the Minister nor the subordinate asserts the privilege on his own behalf: both assert it on behalf of, and for the benefit of, the Crown. If that is not so and a subordinate servant of the Crown is subject to the same limitations as an independent body in claiming immunity, then what happens if it is part of the duty of the subordinate to receive money to be used in the Crown's service but for a purpose which would not entitle an independent body to the privilege? Is the Crown to be prejudiced because it so happens that its money is payable to a subordinate instead of to a holder of high office? Such considerations make me unwilling to hold that there is any essential difference between superior and subordinate servants of the Crown unless I am compelled to do so. It was not necessary to consider the position of a subordinate servant in any of the cases decided in this House, and I do not think that, in fact, it was separately considered. I think we are free to hold that there is no such essential distinction.

I do not get much assistance in this matter from the later cases which were cited. None of these cases involved a claim for immunity by an actual servant of the Crown. In most of them the claim for immunity was made by some body more or less closely associated with the government or with the performance of functions of a governmental character, and in all of them the issue appears to me to have been whether the status, duties or functions of the claimant were such as to entitle the claimant to be regarded as in consimili casu with servants of the

Crown. Some of them deal with the degree of control exercised over the claimant by the government and I shall have to examine them from that point of view, but if I come to the conclusion that the custodian is an actual servant of the Crown I shall find it unnecessary to consider what puts a person or body in consimili casu with such a servant. I shall, therefore, turn to the question whether the custodian is a servant of the Crown. But I think I ought to say that my silence as to these cases must not be taken to imply that I have formed an adverse view about any of them.

It was suggested by DEVLIN, J., at one point in his judgment in this case that there is now no such thing as a servant of the Crown in the strict sense. I cannot agree. Ministers are pre-eminently Her Majesty's servants: a purist might find some anomaly in that because, by constitutional practice, the Sovereign can only act on the advice of a Minister. But no one denies that Ministers come within the category of servants of the Crown for the present purpose. And with regard to others I can see no difficulty at all. The Crown (through or with the advice of a Minister) controls them and directs their activities in a way which, to my mind, makes the term "servant" quite appropriate.

In my judgment, the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. In the ordinary way, a civil servant's duties are not prescribed though his salary may be fixed in Parliament and I have no doubt that he is a servant of the Crown. But when a statute creates an office it may give to the holder more or less independence from Ministerial control so that the officer has, to a greater or less extent, a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purpose. But I cannot find that the custodian has any such independent discretion. His appointment was authorised by the Trading with the Enemy Act, 1939, s. 7. He does not determine what property is to vest in him and he cannot control its disposal. Section 7 (1) (d) gives to the Board of Trade very wide powers to impose duties and liabilities on the custodian, and the sub-section further entitles the Board of Trade to put in its order such incidental and supplementary provisions as appear to the board to be necessary. It is true that, by s. 7 (1) (f), it is left to the custodian to determine what returns, accounts and other information he requires, but that appears to me to be a minor matter and, indeed, it may be that even then the Board of Trade could give him directions. I have not found anything else in the Act which gives him any independence. Not only has he no discretion as to the disposal of property or funds which have been vested in him, but he can be directed as to how he is to invest funds while in his hands. It may be that directions cannot (in theory at least) be given to him informally but must be given by formal order, but that cannot, in my opinion, make a difference. Further, he is given power to sue for and recover moneys payable to him under the Trading with the Enemy (Custodian) Order made by the Board of Trade, but that does not appear to me to be important because it would seem that the Board of Trade can control his exercise of this power.

It may be that, in practice, the custodian is given fairly wide discretion. A master often gives wide discretion to his servant. The question is not how much independence the custodian, in fact, enjoys, but how much he can assert and insist on by reason of the terms of his appointment or the nature of his office. In view of the need during the war for widespread government control it would be rather surprising to find that the custodian had, to any material degree, been exempted from direct and immediate control, and, in fact, I do not think that he was.

I find support for the views which I have expressed in two judgments of the Privy Council where the questions were whether debts due to certain boards closely connected with the government were entitled to priority as Crown debts. In *Fox v. Newfoundland Government* (17) SIR RICHARD COUCH examined the powers of the board which claimed this right and said ([1898] A.C. 672) that they

A “indicate that it [the board] is not to be a mere agent of the government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the government.”

And in *Metropolitan Meat Industry Board v. Sheedy* (18) VISCOUNT HALDANE said ([1927] A.C. 905):

B “Their Lordships agree with the view taken by the learned judge in the court below that no more are the appellant board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.”

D I can find no such independent powers or discretions committed to the custodian. I, therefore, hold that the custodian is a servant of the Crown, and it is clear that he received this income in the course of his official duties. The appellants argue that that is enough to establish the right to claim immunity from tax. The respondent, on the other hand, argues that that is not at all conclusive, and that what really matters is the character of the income: if the income is Crown income then tax is not due, but if it is not, and it is only received by the custodian to be held until the time comes to pay it to some private person, then there is no immunity from tax. I am bound to say that this appears to me to be reasonable and not in conflict with any of the decisions, and I am prepared to assume that, if a case arose in which it was the duty of a Crown servant merely to hold property with accruing income for a period and then to pay it to some as yet unascertained private person, it would be held that tax is payable on the income accruing. That would be because, in such a case, payment of tax could not possibly prejudice any Crown interest or purpose.

E While it may be that a Crown servant could not claim Crown immunity in respect of his performance of statutory duties which served no Crown purpose at all, I can find nothing to justify the argument that Crown immunity can only be claimed by the Crown (or its servants on its behalf) if it is required to protect some direct or financial interest of the Crown; and still less can I find any support for the argument that immunity cannot be claimed by the Crown unless the Crown alone is interested in the benefit which it will bring. I have already said that there is, in my view, an essential difference between the immunity of the Crown itself and immunity which may be claimed by independent bodies on the ground that they are performing functions of a governmental character. G There is every reason for strictly limiting the right of such bodies to claim immunity, but I can see no ground for applying those limits to the Crown itself. If an Act of Parliament does not bind the Crown, then the Crown can claim immunity from its provisions whether its interest to obtain immunity in a particular case is large or small or direct or indirect.

H In *Austrian Property Administrator v. Russian Bank for Foreign Trade* (14) the administrator was held to be an agent of the Crown. It was his duty to

collect debts due to Austrian nationals, and he would have failed in this action unless he was entitled to plead immunity from the provisions of the Statute of Limitations. The money which he received was not to go to the Crown: it was to go, at least in the first instance, to meet claims by British subjects against Austrian nationals, and it does not appear that in any event funds received by the administrator would have been applied for the benefit of the Crown. But it was not even suggested that this was a reason for denying to the administrator the right of a Crown servant to plead Crown immunity from the Act. It was enough that, in carrying out his duties, the administrator was fulfilling a Crown purpose. SCRUTTON, L.J., said (48 T.L.R. 39):

"... the administrator, being an agent of the Crown, under the prerogative is not bound by the Statute of Limitations":

and GREER, L.J., said (*ibid.*):

"... unless the Crown has in some way been deprived of the right to say: 'The Statute of Limitations does not affect a claim by the Crown,' then the appeal must fail".

In my opinion, that case was rightly decided and I can see no difference in principle between Crown immunity from the provisions of the Statute of Limitations and Crown immunity from the provisions of the Income Tax Acts. In either case a Crown servant fulfilling a Crown purpose can claim that immunity whether or not the resulting financial benefit is to go to the Crown.

I now turn to consider the legal position of property vested in the custodian and the rights of the Crown with regard to it in order to see whether, at the relevant time, the Crown had any interest in the matter. At first sight it might seem sufficient to say that, whatever the position may have been during the war, the income has now come to belong to the appellants and the Crown's interest in it was, at best, potential: but for two reasons I cannot accept that simple way out of the difficulty. In the first place, the income only came to belong to the appellants through the act of the Crown, and, secondly, the question before the House is whether the custodian was liable to pay income tax, and liability to pay tax must be determined when the assessment is made or appealed against and in light of the facts then existing. I do not think that it was disputed that we must look at the position in, say, 1943, when the question would have arisen if the custodian had realised that he might be entitled to claim immunity from income tax. It seems fairly obvious that, if anyone had thought of that at the time, the Board of Trade would have given directions to the custodian that any immunity was to be waived and the tax was to be paid. If that had been done I do not see how any question like the present could have arisen. But we are compelled to decide this case on the basis of what would have happened if the custodian (in effect the Board of Trade) had determined to rely on the Crown's immunity.

The legal position of property vested in the custodian was considered by RUSSELL, J., in *Re Munster* (10). That case was decided under the corresponding legislation of the 1914 war and dealt with property of an enemy subject, but there is no relevant difference between that legislation and the Act of 1939 and the Act makes no distinction between vesting of property of enemy subjects and vesting of property of British subjects or subjects of Allied powers who temporarily became technically "enemies": so the decision and the reasoning in *Re Munster* (10) are still applicable. In that case, property which had belonged to Prince Munster was vested in the custodian and income from it was received by the custodian. The Revenue claimed supertax on that income, but this claim failed because it was held that, on being vested in the custodian, the property was removed from the beneficial ownership of its former owner and, therefore, the income from it was not his income. RUSSELL, J., held that, while the property was so vested, the beneficial ownership of it was in "statutory

suspense or abeyance" and he pointed out that whether Prince Munster would recover and to what extent he would recover the beneficial ownership would depend on the arrangements to be made at the conclusion of peace. It is, to say the least, unusual that beneficial ownership should be in suspense or abeyance, and there has been much discussion of the question whether the original owner has only a hope or expectation that he will get his property back, or whether he retains some shadowy legal right in or to his former property. I think that that question is only academic: whatever the answer to it may be, he cannot, even after he ceases to be an enemy, either sue for the property or assert any right to it. He must wait until something is done either by Act of Parliament or by the Crown to restore his property to him. It was only by an accident that the present appellants were able to raise the present action.

The Crown also has no beneficial right to property while it is in the hands of the custodian, and if one were not to look further than that it might well be that the Crown (or the custodian on its behalf) could not claim that income accruing to the custodian was immune from tax. But I think one must look further. If the Crown had the right at any time to direct the custodian to hand over the property (including accrued income) so that it could be disposed of as the Crown might determine, then I would have no doubt that the Crown had an interest in the income sufficient to entitle it to claim exemption from tax. But if, on the other hand, the Crown had no such right, either during or after the war, and the ultimate disposal of the property vested in the custodian had to be determined by Act of Parliament, then I would hold that income accruing to the custodian was taxable. So it is necessary to examine the relevant legislation to see what the Crown's right was.

The nature of the Crown's interest in, or right to deal with, the income must depend, in the first place at least, on the true construction of the Trading with the Enemy Act, 1939, and, in particular, s. 7 of the Act. The construction of this section was one of the matters involved in the decision of the Court of Appeal in *R. J. Reuter Co., Ltd. v. Ferd Mulhens* (15), and in that case leave to appeal to this House has been granted. It would be improper to prejudice any of the issues in that case unless that is necessary for the decision of the present case. If the view taken by the Court of Appeal on this question is wrong, the power of the Board of Trade is more restricted than if the Court of Appeal is right. So, if I find that, even supposing the Court of Appeal to be wrong, there was still a sufficient interest in the Crown to support Crown immunity, a fortiori there would be a sufficient interest if the Court of Appeal is right and I need not consider which is the correct view.

Section 7 (1) of the Act of 1939 provides that:

"With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace"

the Board of Trade may appoint custodians of enemy property and vest in them such enemy property as may be prescribed, and may, as respects that property, confer on the custodians such rights and powers as may be prescribed. "Enemies" include all persons residing in enemy territory (s. 2 (1) (b)); and "enemy territory" includes any area in the occupation of a Power with whom His Majesty is at war (s. 15 (1)). So, in construing s. 7 it must be borne in mind that enemy property includes not only the property of enemy subjects but also the property of British subjects or friendly aliens who continued to reside in, say, Holland or the Channel Islands during the German occupation. I assume for the purpose of the present argument that the provisions of s. 7 are governed by the initial words which I have quoted, and I assume further that s. 7 did not entitle the Board of Trade during the war to confiscate property of British subjects or friendly aliens who were only enemies by virtue of their place of residence, or otherwise to make it impossible for their property to be returned to them

when they ceased to be "enemies". And I shall further assume that this applied not only to the property vested in the custodian, but also to income from that property received by the custodian. But I rather hesitate to make this assumption in view of the second matter decided by RUSSELL, J., in *Re Munster* (10). Under the Act of 1914 the court had power to give directions to the custodian. Under the Act of 1939 that power is vested solely in the Board of Trade, but the extent of the power appears to be the same. Having decided that supertax was not due, RUSSELL, J., held that he had power to direct the custodian to pay to the Treasury out of the property which had belonged to Prince Munster a sum equivalent to what would have been payable if tax had been due. If that decision is right, the Board of Trade during the last war could have directed payments to be made in lieu of surtax. If, notwithstanding the initial reference in s. 7 to preservation of enemy property, the Crown, through the Board of Trade, could use the general powers conferred by s. 7 to direct payments out of enemy property when no debt was due, then I have some difficulty in seeing what limit there is to the exercise of that power, or what there was to stop the Board of Trade from directing that still greater sums should be paid away and used for Crown purposes. But I shall not pursue that matter and I shall still assume that the Crown were not entitled under the Act of 1939 to take enemy property during the war and use it for Crown purposes. I shall not deal with any of the statutory orders made by the Board of Trade under the Act of 1939, because they could not confer wider powers than the Act authorised. But I must notice the Defence (Trading with the Enemy) Regulations, 1940, because they have the force of an Act of Parliament. Regulation 4 (3) authorises the Treasury to direct the custodian to pay to such person as may be specified money which, but for the war, would have been payable to persons resident in enemy occupied territory, but it does not authorise any such direction in the case of persons resident in territory under enemy sovereignty. So the regulation did not, in general, apply to enemy subjects, but it did apply to those British subjects and friendly aliens who became "enemies" temporarily while their place of residence was in enemy occupation. The regulation cannot have been intended to put them in a worse position than enemy subjects and one of its purposes must have been to release their property and return it to them on their ceasing to reside in enemy occupied territory either because they had escaped or because their place of residence had been re-occupied by Allied forces.

But it is necessary to look not only at the powers of the government during the war to deal with property vested in the custodian, but also at the position on the conclusion of peace. Section 7 (1) of the Act of 1939 provided that enemy property was to be preserved

"in contemplation of arrangements to be made at the conclusion of peace".

If that provision meant that arrangements for the disposal of property vested in the custodian could only be made by a later Act of Parliament, and if the Act of 1939 conferred no power on the Crown to make arrangements, then I would hold that the Crown had no interest in that property at the relevant date. But I do not think that that is the meaning of the Act of 1939. "Arrangements" is not a word which I would expect to be used if the intention was that only a further Act of Parliament could authorise the disposal of the property, but it appears to me to be an appropriate word if the intention was to empower the Crown to make arrangements. The case of the *Austrian Property Administrator* (14) shows that, after the 1914 war, arrangements for the disposal of the former property of enemy subjects were made by the Crown in peace treaties. It is true that such arrangements were confirmed by Acts of Parliament, but we were not referred to any Act of Parliament which made or confirmed arrangements for the disposal of property vested in the custodian which had formerly belonged to British subjects or friendly aliens, and I do not think that the Act

of 1939 can be read as meaning that such property could only be taken out of the hands of the custodian and disposed of by some later Act of Parliament. And if the Crown had power to make the necessary arrangements, can it be said that its power was limited to making arrangements which would ensure that every item of property in the hands of the custodian was returned to its former owner? I think that it must be held that the Crown had some wider power of arrangement and disposal than that. There was certainly no obligation, in the

- A case of enemy subjects, to return all property to its former owner, and the Act makes no distinction in this matter between enemy property formerly owned by enemy subjects and enemy property formerly owned by British subjects or friendly aliens. Accordingly, I cannot think that it was illegal for the Crown to make arrangements by which former property of British subjects or friendly aliens might not all be returned to them. For example, I do not think that it was
- B illegal for the Crown to make arrangements with an Allied government for the disposal of property formerly owned by subjects of that government in terms which did not ensure that each item of property was returned intact to its former owner. It is true that one would not readily assume in peace time that an Act of Parliament conferred power of this character on the government, but this was emergency legislation. If my interpretation of this enactment is correct,
- C then I think that making such arrangements was a Crown purpose which gave the Crown a sufficient interest to invoke its immunity if it chose to do so, and the case of the *Austrian Property Administrator* (14) appears to me to be good authority for this. I will only add that, if the view of the Act of 1939 taken by the Court of Appeal in *R. J. Reuter Co., Ltd. v. Mulhens* (15) is right, then I would have no doubt at all that the Crown had a sufficient interest to entitle it to
- D claim immunity from tax on income received by the custodian.

- It is here that the artificiality of the issue now before your Lordships presses on me. By reason of the concession made by the Crown before DEVLIN, J., we have now to decide whether the custodian was liable to pay income tax. Undoubtedly, he would have had to pay if the Crown had waived its immunity and if he had been directed to pay by the Board of Trade; and if such a direction
- E had been given the appellants would have had no ground for complaint, and certainly they could have made no effective protest either then or now. But, in fact, no such direction was given to the custodian and counsel for the respondent expressly refused to rely on any consideration of this kind. One of the arguments of counsel for the respondent was that it is inconceivable that the Crown would have taken any other course than to return the appellants' property
- F to them and, therefore, whatever the theoretical right or interest of the Crown might be, in fact the Crown had no sufficient interest to support a claim for immunity. But if that be so, it is equally inconceivable that the Crown would ever have attempted to assert its immunity because the only effect of successfully asserting immunity would have been to enable the appellants to receive accrued income which had not borne tax. Nevertheless, by reason of the form of the
- G concession made by the Crown we have no concern with that and we have only to consider whether the Crown had a right to assert its immunity no matter how improbable it may be that the Crown would ever have done so. In my judgment, if the custodian had been directed to assert Crown immunity in this case, and had done so, he would not have had to pay the income tax in question, and, that being so, I have no alternative but to hold that the appeal should be allowed.

- H **LORD TUCKER:** My Lords, this case comes before your Lordships in peculiar and highly artificial circumstances as a result of certain concessions made at the trial by the Solicitor-General representing the Administrator of Hungarian Property as a result of which it is common ground that the only issue is whether Crown immunity from the operation of the Income Tax Acts could have been successfully claimed by the Custodian of Enemy Property in respect of certain discounts received by him in 1942 from the investment of

moneys held by him representing the proceeds of sale of certain gold bars which, at the outbreak of war, had belonged to the plaintiff bank and which had become vested in the Custodian of Enemy Property pursuant to the Trading with the Enemy legislation. It is also agreed that, unless Crown immunity could have been established, the discounts in question would have been taxable on receipt thereof by the custodian.

The plaintiff bank is a limited company incorporated in Holland. Prior to the last war it had deposited certain gold bars in the City of London. In May, 1940, Holland was invaded, and on the 20th of that month became enemy territory for the purposes of the Trading with the Enemy legislation. On July 3, 1940, the Board of Trade, under the Trading with the Enemy Act, 1939, s. 7, made a vesting order transferring this gold to the Custodian of Enemy Property who had been appointed by the board under powers conferred on it by the said section. On July 22 a further order gave the custodian power to sell this gold. On July 24 he sold the gold for the sum of £1,984,120 15s. 5d. and retained the proceeds as enemy property. After the conclusion of hostilities, viz., on Apr. 6, 1950, the Administrator of Hungarian Property, appointed by the Board of Trade under powers conferred by the Treaty of Peace (Hungary) Order, 1948, required the custodian, under art 1. (5) (e) of that order, to transfer to him the proceeds of sale of the gold bars. This step was taken under the erroneous belief that the proceeds of sale were property rights and interest of an Hungarian national and, consequently, subject to the charge imposed by the Treaty of Peace (Hungary) Order, 1948. The plaintiff bank, who had previously demanded the return of these moneys from the custodian before the transfer to the administrator, which demand had been refused, accordingly brought an action against the custodian and the administrator to recover the money. This action was heard by DEVLIN, J. It failed as against the custodian, but succeeded against the administrator.

In the course of the case and before the amount for which judgment should finally be entered had been agreed or otherwise ascertained it was conceded by the Solicitor-General representing the defendants that, for the purpose of this case, any interest or other money which this sale had earned while in the hands of the custodian—referred to as “the fruits”—should be treated as part of the proceeds in the hands of the administrator. A question thereafter arose whether from these “fruits” there should be deducted the sum of over £70,000, being income tax paid by the custodian in respect of discounts resulting from the investment of this money in the purchase of Treasury bills. The matter came again before DEVLIN, J., who decided that the plaintiff bank was entitled to recover “the fruits” in full without deduction of tax on the ground that Crown immunity attached to the custodian in respect of his receipt of this income. This decision was reversed on appeal by the Court of Appeal. There was no appeal by either side from the learned judge’s judgment with regard to the principal moneys. The relevant legislative enactments have been fully set out by my noble and learned friend, LORD MORTON OF HENRYTON, and I need not repeat them.

The question for decision is, accordingly, whether the custodian, in receiving this income under these statutory provisions, falls within any one of the classes of persons in respect of whom the principle of Crown immunity applies. There are three such classes—(i) The Sovereign personally. (ii) His servants or agents. (iii) Persons who are not Crown servants or agents, but who, for certain limited purposes, are considered to be “in consimili casu”.

The first class needs no consideration for present purposes. It is not always easy to ascertain from the decided cases whether a particular decision has been based on considerations applicable to class (ii) or class (iii), but I think that the following propositions emerge from the speeches in this House in the cases of *Mersey Docks v. Cameron* (1), and *Coomber v. Berks J.J.* (9), and the judgments

of the Court of Appeal in the more recent cases of *Austrian Property Administrator v. Russian Bank for Foreign Trade* (14), and *London County Territorial & Auxiliary Forces Assocn. v. Nichols* (19). 1. The immunity extends at least to include all those officers of State and their subordinates who now perform, pursuant to statutory authority, functions of public government which were formerly the peculiar prerogatives of the Crown. 2. Such functions include the making and carrying on of war and the making of treaties of peace and other consequential international arrangements and the performance thereof. 3. It is immaterial whether the person in respect of whom the immunity is claimed is himself an officer of State with Ministerial status, or is a subordinate official of such Minister, or is himself an executive officer of lower status than that of a Minister. 4. The immunity extends to such persons only so long as they are acting in the capacity described above. 5. This immunity also extends to persons who do not come within the class above described but are the owners or occupiers of property exclusively used for the purposes of government. The immunity only protects such persons in respect of liability or disability arising in respect of the ownership or occupation of such property. This is the class numbered (iii) above and generally referred to as "in consimili casu".

My Lords, if these propositions are properly deducible from the principles enunciated in the authorities referred to above, and if the two cases in the Court of Appeal were correctly decided, as I think they were, I have little doubt that the Custodian of Enemy Property in receiving the income in question came within class (ii) and is covered by paragraphs numbered 1 to 4 inclusive above. My reasons for so holding are as follows. The functions of the custodian in receiving and preserving and ultimately disposing of enemy property under the directions of the Board of Trade or Treasury were a necessary part of the machinery of modern government directed to the making and prosecution of the war and the making and implementing of treaties of peace and agreements with other States on the termination of hostilities, which functions were formerly the prerogative of the Crown. The custodian in all essentials was a subordinate of the Board of Trade subject only to the directions of the Treasury under reg. 4 (3) of the Defence (Trading with the Enemy) Regulations. His discretionary powers were negligible, and with regard to the actual receipt and disposal of moneys were non-existent, save as in so far as expressly conferred on him in any particular case by the board. He was in no sense an agent or trustee for the former alien owner whose beneficial interest in the gold bars had been extinguished by the trading with the enemy legislation and who had only a "spes restitutionis" (cf. *Re Munster* (10)). Only the Board of Trade or the Treasury could give directions as to the disposal of these bars or their proceeds and the custodian was bound to comply with their orders.

I have already made passing reference to the case of *Austrian Property Administrator v. Russian Bank for Foreign Trade* (14) as one of the authorities from which the governing principles can be extracted, and, in my opinion—with deference to the contrary view expressed by the Court of Appeal—it is indistinguishable from the present case. The Austrian administrator and the custodian in the present case were both appointed pursuant to statutory authority, in the former case for the purpose of collecting and disposing of enemy moneys at the conclusion of war, in the present case for the purpose of collecting and preserving such moneys during a war. Both the administrator and the custodian were cogs in governmental machinery devised in modern conditions for performing the former prerogative functions of the Sovereign. It is true that SCRUTTON, L.J., and GREER, L.J., appear to have regarded the administrator as performing a Crown function directly derived from the prerogative, but, as SLESSER, L.J., pointed out in his judgment, the administrator was, in fact, acting under statutory authority in precisely the same way as the custodian in the present case, although in both cases the statutory functions represented those which formerly pertained to the prerogative.

This does not, however, dispose of the case. It is still necessary to decide whether this income was Crown income. A servant or agent of the Crown might be charged with the duty of receiving and applying income for the benefit of some person other than the Crown. That is not the position in this case. The beneficial interest was in suspense, but the former owner's interest had been extinguished. It was not *his* interest which was in suspense. I am prepared for present purposes to assume (but not to decide) that an order made before the end of the war appropriating these moneys to the public revenue would have been *ultra vires*. A This does not seem to me decisive. I agree, for the reasons which have been stated by my noble and learned friend, LORD REID, that "arrangements to be made at the conclusion of peace" include arrangements which could be made without the authority of Parliament, and that this gave the Crown a sufficient interest in the fund to invoke the principle of immunity. The fact that at the moment of receipt the income could not be applied exclusively to the public revenue is, as it seems to me, a consideration which would only become relevant B if (as to which I have considerable doubt) the decisions in the "*in consimili casu*" cases, based as they are on the ownership or occupation of real property, can be extended to cover such a case as the present.

My Lords, for these reasons I would allow the appeal. DEVLIN, J., in his judgment put the custodian in the "*in consimili casu*" class, but much of his reasoning seems to me to point rather to the conclusion that the custodian should truly be considered as the servant or agent of the Crown. In the result, however, I agree with his judgment. C

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree with the conclusions reached by my noble and learned friends, LORD REID and LORD TUCKER. The only issue, having regard to the concessions and assumptions on which, by agreement, the case proceeded, is whether, in respect of the "fruits" of investment of the property in question, the Custodian of Enemy Property could successfully have resisted payment of income tax. He could *ex concessis* only have done this if he could have established that he shared the Crown's immunity from income tax. Unfortunately, the leading decisions of your Lordships' House on "Crown immunity" concern immunity mainly in respect of land or buildings: they concern exemption from liability to rates, or sched. A of the income tax: and any principles deduced from these decisions can only be applied by an analogical extension to cases such as the present, where what is involved is not the user of premises but the possession or handling of chattels or funds. D

The principles applied to the occupation of land and buildings (which must form the starting point) seem to include the following: 1. The Sovereign is personally immune, not only from rates and sched. A, but from all direct taxation. This is clear, but irrelevant to the present case. 2. "Servants of the Crown" are immune from rates and sched. A on premises occupied by them as such. This is the result of two other rules—(a) a servant does not "occupy": his master "occupies" through him—hence the servant is immune; (b) the master being in this case the Sovereign, and immune as such, no one is liable. The suggestion that this immunity is limited to cases where the servant is the holder of, or the modern successor to, a small group of ancient offices has been sometimes ventilated, but would appear to have no foundation in principle, or in any authority binding on this House. On this point I strongly agree with what has fallen from my noble and learned friend, LORD REID, who has explored this point in some detail. 3. Persons may enjoy immunity who are not servants of the Crown, but occupy premises, such as assize courts, judges' lodgings, policemen's lodgings, and the like, and do so exclusively for the performance of the functions of the executive government. These persons are in some of the cases described as "in consimili casu" with servants of the Crown. Persons will tend to be placed in this category if the public functions which they discharge are closely connected E F G H

with the exercise of the Royal prerogative; e.g., inter alia, the administration of justice, the preservation of public order, the making of war, and the conclusion of peace. And the courts appear, on some of the authorities, to have taken these last factors into account as relevant in deciding who is a "servant of the Crown" within the second class.

A These principles seem to be most clearly stated in the opinion of LORD CRANWORTH in *Mersey Docks v. Cameron* (1), though they emerge also in *Greig v. Edinburgh University* (16), *Coomber v. Berks JJ.* (9), and *Metropolitan Meat Industry Board v. Sheedy* (18).

B For completeness, perhaps, a fourth principle or rule may be added. 4. The courts will lean against including in any of the exempted categories an aggregation of commercial undertakings brought under some degree of public statutory control: and they will (if the other requirements are satisfied) lean in favour of exemption for persons or bodies who are mere Ministerial instruments of the Crown's will, lacking in themselves any discretion or initiative.

C To adapt these principles, moulded in large measure for a somewhat different purpose, to the facts of such a case as the present is not easy. But the attempt to do so points to the following features of the present case as relevant, and throws them into relief: 1. The custodian is not a commercial corporation subject to public control. 2. He is a public officer appointed and removable by the Crown under statutory powers. 3. He enjoys in substance no discretion of his own. In practically every matter he must do what the Board of Trade (or, in some cases, the Treasury) direct him to do. 4. Subject to their control—the Crown's control—he collects, handles, invests, and is intended ultimately to distribute in accordance with treaties to be made by the Crown, the property which comes to him (in which, needless to say, he has no personal interest). As counsel for the respondent put it, every act of his has "O.H.M.S. stamped on it." 5. The decision of RUSSELL, J., in *Re Munster* (10), though made under the Trading with the Enemy Amendment Act, 1914, seems to me, in general, an accurate description of the status and functions of the custodian of enemy property and the character assumed by property vested in him under the corresponding Act of 1939. He is not the agent or trustee of the aliens, enemy or friendly, who were owners of the property before it came into his hands. When such property vests in him it ceases thereupon beneficially to belong to its original owners: and though, in pursuance of "arrangements to be made at the conclusion of peace" (s. 7 (1) of the Act of 1939), viz., in pursuance of treaties of peace to be negotiated by the Crown, the Crown could re-create a title in the original owners, it could, in my view, equally create such a title in any one else, including itself. The "statutory suspension" of title referred to by LORD RUSSELL OF KILLOWEN seems to me in its context to point, not to the persistence throughout of a temporarily submerged title, but to the extinction of that title, subject to the possibility of its re-birth. VISCOUNT HALDANE's language in *Hugh Stevenson & Sons v. Akt. für Cartonnagen Industrie* (20) ([1918] A.C. 247), which suggests the contrary, is dealing, in my view, not with the statutory, but purely with the common law, position. 6. The functions of the custodian are intimately linked with the prerogative powers of the Crown to declare and wage war and to make peace. He is a conduit pipe for the flow and canalisation of these powers.

H Taking account of these factors collectively, I am of opinion that the custodian is a "servant of the Crown" within the second exempted class, and immune from income tax as regards funds coming into his hands in his capacity as such. I do not think it is a prerequisite to this immunity that those funds must be "Crown income" in the sense of being payable solely and immediately to the central fiscus, or that the immunity is defeated the moment it is shown that the Crown has power to divert them in part or in whole to some other destination. The Crown has, in effect, an unlimited power of disposition over this property. The case of *Austrian Property Administrator v. Russian Bank for Foreign Trade*

(14), which, in my view, was rightly decided, seems to me fatal to the contrary view, and I agree with LORD TUCKER that the attempt to distinguish that case from the present case fails. I am of opinion that the appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, the question whether the Custodian of Enemy Property was immune from payment of income tax on the "fruits" of the property in his hands, or at least on that part of the "fruits" ascribable to the capital sum recovered by the appellant bank, is not, in my opinion, susceptible of easy solution. At the outset there arises a question as to the status of the custodian. Is he a servant of the Crown? If so, in what sense? He was appointed by the Board of Trade under the Trading with the Enemy Act, 1939. Section 7 (1) of the Act in its opening words explains, in my opinion, the primary purpose of his appointment:

"With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace . . ."

I should add here that, by the definition of "enemy" in the Act, this covers property in this country of friendly aliens and British subjects resident in enemy, or enemy occupied, territory. It was strongly contended for the appellants that the custodian was a servant of the Crown in the fullest sense of the term, in that he was at every point, except, possibly, in the matter of investment of moneys, subject to the directions and control of the Board of Trade. He was thus just the hand of the Board of Trade and entitled to all the immunities of the President of the board, one of the traditional officers of State. I am far from satisfied, however, that the custodian was so completely deprived of an independent discretion in all the duties of his office as is suggested.

I do not wish to go through all the provisions of the statute and relative orders. I refer shortly to some of the provisions that seem relevant. Section 7 (1) (f) authorises an order of the Board of Trade to require any person to furnish such returns, accounts, and other information and to produce such documents

"as the custodian considers necessary for the discharge of his functions under the order."

This seems to me to be an order controlling or directing, not the custodian, but other people, and entrusting the custodian with a complete discretion to enforce the order. By s. 7 (2) of the Act the custodian may grant a certificate that any money or property falls under an order of the Board of Trade which shall be evidence of the facts stated therein and exempts any person complying with a requirement or direction of the custodian from liability to any action or other legal proceeding. Section 7 (3) (c) provides that where a direction is given to any person by the custodian in relation to any property "which appears to the custodian" to be property to which an order applies, the direction shall not be invalidated or affected by reason only that at a material time a person interested in the property and who was an enemy or enemy subject had died or had ceased to be an enemy subject, or a person so interested and

"who was believed by the custodian to be an enemy or an enemy subject".

was not an enemy or an enemy subject. These provisions appear to me to give the custodian considerable independent discretion in material and important particulars, and, indeed, to be directed towards enabling the custodian, as an independent official, to prevent the payment of moneys to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace. No doubt, the Board of Trade and, to a lesser extent, the Treasury, are given powers to prescribe the rights, powers, duties and liabilities of the custodian in certain matters and to give directions. Such powers were clearly necessary in the manifold circumstances that might arise with reference to enemy property during the war. Such, for instance, are the powers taken to

themselves by the board to direct the custodian in certain matters under art. 3 of the Trading with the Enemy (Custodian) Order, 1939, and given to the Treasury (but never, we were given to understand, exercised) by reg. 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, as amended. But the provisions of the Board of Trade orders were not all of this character. A number were plainly intended to arm the custodian with powers to carry out the independent functions given him by the statute. For example, under art. 1 (vii) and (viii) of the

- A Trading with the Enemy (Custodian) Order, 1939, the custodian has power to sue for and recover any moneys payable to him under the order in his own name. Again, art. 5 of the same order directs persons who hold or manage for, or on behalf of, an enemy or an enemy subject, any property, to furnish to the custodian such returns, accounts and other information and produce for inspection such documents "as the custodian may require". Generally, it may be said that the
- B Board of Trade was the order-making authority. But within the scope of these orders, and for the purpose of carrying out the purposes of the statute, supplemented by these orders, it seems clear that the custodian had considerable independent statutory power and authority.

- We were referred to three decisions of this House which were thought to throw light on the question of who was a servant of the Crown. I do not find
- C these decisions very helpful on this point. The matter for decision was not who was a servant of the Crown, but what property was exempt from rateability or taxation under sched. A, in respect of the uses to which it was put. The decisions were that the exemption extended only to property that was occupied for what I shall call for the moment Crown purposes. In that connection was instanced property occupied by the Sovereign or by her servants for her. Various passages
- D from these cases have been quoted by two of your Lordships and I refrain from adding to their number. I am satisfied from the speeches in these cases that this House was considering the kind of occupation which permitted an appeal to the principle of Crown exemption from tax, and that any reference to servants of the Crown was to emphasise the nature of the occupation. There is a reference to occupation by the Sovereign in person which plainly establishes the exemption.
- E There are references to occupation "by her servants for Her Majesty", by

"the direct and immediate servants of the Crown whose occupation is the occupation of the Crown itself",

- by "the immediate and actual servants of the Crown". Such persons would include, of course, menial servants of the Crown who were occupying for the Crown. There are further references to "servants of the great departments of State", "in all which cases the occupiers might strictly be called the servants of the Crown". Lastly, there are references to persons who are not servants of the Crown at all, "not strictly servants of the Crown", "bare trustees for public purposes" being purposes "required and created by the government of the country" and, therefore, "to be deemed part of the use and service of the Crown". These correspond to persons described by BLACKBURN, J., in the
- G *Mersey Docks* case (1) as in consimili casu with servants of the Crown.

- In all this there is little that throws light on what constitutes a person a servant of the Crown. Obvious cases like a Minister of State, or the Sovereign's coachman need hardly be considered. But it is to be observed that it is his functions or duties that stamp a person as a servant of the Crown, and that it
- H is only in respect of services performed for the Crown and to prevent any detriment to, or liability of, the Crown in its person, property or rights that immunity can be claimed. The Minister performs the traditional functions of the Sovereign. It is not in his official but in his representative capacity that he claims Crown immunity. The coachman drives the Sovereign's coach. Unlike the Sovereign, the Minister or the coachman have not complete immunity. They have immunity only in their capacity of Crown servants. While it is thus, no doubt, easy in some cases to establish the status of a person as a Crown servant by looking either

at his office or at his functions, because each reflects the character of the other, there are marginal cases where it is impossible, in my opinion, to say whether a person is a servant of the Crown without considering what he does. The custodian of enemy property is, I think, such a case. In the first place, there is no contract with, or employment by, the Board of Trade. He is an official appointed by the Board of Trade. It is not clear from reg. 4 (2) of the Defence (Trading with the Enemy) Regulations, 1940, that his appointment could be recalled by the board, though in the event of death or retirement a new appointment could, of course, be made. He is not appointed under an order of the board, and, accordingly, the power in s. 15 (5) of the Act to vary or revoke an order does not apply. He has further, as I indicated at the outset of my opinion, a considerable measure of independence and discretion under the statute, uncontrolled by the Board of Trade. All I can find to say of him, looking solely at his status, is that he is a statutory official.

Agreeing, then, with the Court of Appeal, I think his immunity from tax can be decided only by examining the purposes for which he received the income and his duties in regard to it when it came into his hands. To establish immunity from tax it is necessary to show, as decided in this House in the case of occupation of land or buildings, that he received and held the income for the Crown, or for the purposes of the government of the country, so as to be deemed part of the use and service of the Crown.

The dominant purposes of the appointment of the custodian are, in my opinion, set out in the opening words of s. 7 of the statute. I have already quoted these words. The purposes are twofold; (i) preventing the payment of moneys to enemies; and (ii) preserving enemy property in contemplation of arrangements to be made at the conclusion of peace. Both these may properly be said to be temporary purposes. When war ends enemies will cease to be enemies and fresh dispositions of the property will fall to be made. The custodian is primarily a holder of funds, with incidental powers of administration and investment, and, to a limited extent, of distribution when directed by the Treasury under reg. 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, as amended, or by the Board of Trade under art. 3 (ii) of the Trading with the Enemy (Custodian) Order, 1939. It is not unimportant to observe that a certain control over the custodian by the Board of Trade during war may not carry with it the implications that might arise in the case of control over a public official in times of peace. Every citizen during the war was subject to drastic government controls. The order authorising the custodian to sell the gold vested in him had its counterpart in the regulations affecting all persons holding gold and foreign securities during the war.

It is not suggested that, when property was vested in the custodian, it became the property of the Crown, or that the income was income of the Crown. The contention is that the property constituted a fund held for Crown purposes and subject to the complete control of the Board of Trade or the Treasury. These purposes were withholding comfort from the enemy and distribution either during or at the end of the war. It may be conceded that withholding money from the enemy is a Crown purpose, but this is something quite different from saying that it is being held for the Crown, or to be used or expended in the functions of government. To pay income tax on the income of the fund could in no way prejudice this purpose and, indeed, would be to the benefit of the Crown. I agree that if this were a special fund, held for the use and service of the Crown, to pay tax on its income would be to the prejudice of the Crown, notwithstanding that the tax, if collected, would find its way into the fiscus. But that is not the case here. It would be a somewhat remarkable result that an immunity could be claimed which was of no benefit to the Crown and was, indeed, to its detriment.

It would further be necessary to say that the preservation of enemy property in contemplation of arrangements to be made at the conclusion of the peace was a purpose for the use and benefit of the Crown. The argument was that the

Crown had the sole power of disposition of the property. I will assume that this is so inasmuch as the title is in the custodian, but, unless it can be said that the Crown is quite unfettered in its power of disposal, so that it could divert the property to its own uses, or at its will away from the original owners, that would not, in my opinion, avail the appellants. Such powers could only come from the exercise of the royal prerogative, by order or direction of the Board of Trade or Treasury under the Act of 1939, or by some separate statutory enactment.

A The extent of the prerogative to seize the property of persons in this country was considered very fully by this House in *A.-G. v. De Keyser's Royal Hotel* (21). From the speeches of all their Lordships it appears that, in ancient times, the Crown could take and use temporarily in time of war and for the defence of the realm the property of its subjects, without compensation, when necessity arose. But such a power had not been exercised since the time of the Stuarts, and had been superseded, so far as the taking of land was concerned, by statutory powers

B allowing property to be taken on payment of compensation. Such a power, under the prerogative, had been exercised only in time of danger, was a power of user, and was of temporary effect. There is no suggestion that it carried with it any power of confiscation. The use was only such as was required by the exigencies of the occasion. From that decision it appears clear that there was

C never a prerogative to confiscate the property of a subject in time of war; that, when the exigency of war had passed, the property would return to the owner; and that, if the disposition of property during war was dealt with by the legislature, that superseded any necessity of invoking the prerogative. The prerogative is reserved by s. 16 of the Act of 1939, but that can only be quantum valeat, and if the prerogative never covered power to confiscate property of a

D subject during war for war purposes the reservation can be disregarded. It was not, as I understood, relied on by the appellants. Further, if the royal prerogative in the days of its full vigour did not extend to confiscation of a subject's property in time of war, I am not prepared to assume that the legislature intended to confer a statutory power to confiscate a subject's property in 1939. Such a power would require to be very clearly shown by the language of the statute and never to be presumed.

E Lastly, as the whole purpose of seizing enemy property during the war was to remove it from enemy use or control, that object was achieved by the legislature's vesting it in the custodian. No other purpose would seem to be necessary that would call for the exercise of the prerogative. I conclude, accordingly, that enemy property, so far as it belonged to British subjects, could not be

F deflected to Crown uses and had, when the war was over, to go back to its owners, either in its original form, or in the form it took as the result of transactions with it in the course of its administration in the custodian's hands. The same can be said, I think, with equal force, and some may think a fortiori, about the property of friendly aliens. This, indeed, was clearly the view of the Executive in transmitting proposals to the Royal Netherlands government which led to the

G Anglo-Dutch property agreement of October, 1944.

In the case of the property of enemy subjects different considerations arise. There are a number of judgments of this House in which this question has arisen as well as cases in the courts below. These may come up for consideration on another occasion. As the Act of 1939 does not discriminate between different categories of enemy property it may be difficult to support the exercise of special

H powers under the Act with regard to the property of enemy subjects which could not be exercised with reference to the property of British subjects or friendly aliens. It is more likely that such powers would be sought outside the Act and they obviously would arise under the provisions of peace treaty legislation. On these matters I reserve my opinion. We were referred to *R. J. Reuter Co., Ltd. v. Ferd Mulhens* (15). That also was a case relating to property of an enemy subject. There were various grounds on which the judges of the Court of Appeal based their decision. For the purposes of the present appeal I find it unnecessary

to express any opinion as to the soundness of the decision, or, if sound, as to the ratio on which it should be supported. I also find it unnecessary to consider whether *Austrian Property Administrator v. Russian Bank for Foreign Trade* (14) was rightly decided or whether, if it were, the ratio of the decision would have exempted the administrator from income tax on income received by him. The official was a different kind of official, originating from a peace treaty confirmed by Act of Parliament and dealing with property which had been diverted from the owners to be used for carrying out one of the purposes of the treaty. Different considerations, in my opinion, apply to such a case. A

The effect of a vesting order on the rights of the owner of the property vested was considered in *Re Munster* (10). I do not find it necessary to examine closely the conception of a statutory suspense of the beneficial interest in the property as expressed by RUSSELL, J., in that case, though I prefer the language of LORD PARMOOR in *Hugh Stevenson & Sons v. Atk. für Cartonnagen Industrie* (20), where he says ([1918] A.C. 258): B

“Two Acts of emergency legislation have been passed, based on the principle that enemy property on land is not confiscated, although the right to enjoyment is suspended during the war.”

The point is, in my opinion, immaterial, as it is agreed that the vesting order does not confiscate the property of the owner. There must thus be something left with him. Whether this be called a right of property or a vestige of property it is more, in my opinion, than a mere spes successionis. If it be supposed that the fetter or impediment on the enjoyment of the property, or the suspension of the beneficial interest, flies off, the full right of property would revive. Something of that sort must, indeed, have happened here when the property passed from the custodian to the Administrator of Hungarian Property. This all goes to show how difficult it is to show that the custodian was holding the property in question, or receiving the income of the property for Crown uses, or for the purposes of government. For the reasons I have given, I think he was not. Accordingly, I agree with my noble and learned friend, LORD MORTON OF HENRYTON, that, in September, 1945, and, indeed, during the whole time the property was vested in the custodian, it was impossible to show that the income received was Crown income or was received for the purposes of the government of the country. Unless this can be shown, the custodian was liable in tax. The Court of Appeal arrived, in my opinion, at a sound judgment. I would dismiss the appeal. C D E

Appeal allowed.

Solicitors: *Hardman, Phillips & Mann* (for the appellants); *Solicitor, Board of Trade* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re WILSON (*deceased*). GRACE v. LUCAS AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 11, 12, 26, 1954.]

Adoption—Foreign adoption—Adopter domiciled in England—Intestacy of adopter—Rights of adopted child—Adoption Act, 1950 (c. 26), s. 13 (1).

The deceased and his first wife were British subjects domiciled in England.

In 1939, while staying in America, they decided, being childless, to adopt a Canadian child, and went to Canada with this object. By an adoption order, dated Nov. 3, 1939, and made by the Superior Court at Montreal in the province of Quebec under the law of that province, they were authorised to adopt P., a Canadian infant, who had lived with them for the probationary period of six months required by the law of Quebec. They returned to England with P. soon after the order was made. They did not apply for an adoption order in England as they were advised by a solicitor in Montreal who had arranged the adoption that it was not necessary to do so. In 1946 the deceased's first marriage was dissolved and he re-married. In 1953 he and his second wife were killed in an accident. On the question whether P. was entitled to participate in the property of the deceased (being personal property) which was not effectively disposed of by his will,

HELD: the capacity of an adopted child to succeed to property was a matter to be determined, not by the law governing the adoption, but by the law governing the succession, which, in the case of personal property, was the law of the deceased's domicile; an adoption order made under a foreign jurisdiction could not be brought either expressly or by implication within the provisions or principles of the Adoption Act, 1950, s. 13 (1); and, therefore, P. was not entitled to participate in the property of the deceased as to which he died intestate.

FOR THE ADOPTION ACT, 1950, s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 477.

Cases referred to:

- (1) *Re Goodman's Trusts*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, 135.
- (2) *Re Andros*, (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 3 Digest 372, 131.
- (3) *Re Luck*, [1940] 3 All E.R. 307; 164 L.T. 172; sub nom. *Re Luck's Settlement Trusts*, *Re Luck's Will Trusts*, [1940] Ch. 864; 109 L.J.Ch. 380; 2nd Digest Supp.
- (4) *Re Fletcher*, [1949] 1 All E.R. 732; [1949] Ch. 473; [1949] L.J.R. 1255; 2nd Digest Supp.
- (5) *Ross v. Ross*, (1880), 129 Massachusetts Reports 243.
- (6) *Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129; [1926] 1 W.W.R. 657; 20 Sask. L.R. 407; Digest Supp.
- (7) *Re An Infant*, (1933), 34 S.R.N.S.W. 349; 51 N.S.W.W.N. 62; Digest Supp.
- (8) *Re Pearson, Equity Trustees Exors. & Agency Co., Ltd. v. Michaelson-Yeates*, [1946] V.L.R. 356; [1946] A.L.R. 387; 2nd Digest Supp.
- (9) *Re Brophy*, [1949] N.Z.L.R. 1006.

ADJOURNED SUMMONS to determine whether the estate of Guthlac Wilson, deceased, as to which he died intestate was to be held on trust (a) for the first and second defendants, sisters of the deceased, in equal shares absolutely, or (b) for the third defendant, Philip Guthlac Wilson, the adopted son of the deceased, on the statutory trusts mentioned in the Administration of Estates Act, 1925, s. 47, and subject thereto for the first and second defendants, as aforesaid.

The third defendant was adopted by the deceased and his first wife, who were British subjects domiciled in England. The adoption was effected by an order

dated Nov. 3, 1939, and made by the Superior Court of the District of Montreal in the province of Quebec in Canada under the law of the province (the Adoption Act, Revised Statutes of the Province of Quebec, 1925, c. 196, as amended). No adoption order was obtained in England. In 1946 the deceased and his first wife were divorced and each re-married. By his will, dated July 3, 1947, the deceased gave his residuary estate to his second wife absolutely. In 1953 he and the wife were killed in an accident, it being uncertain which survived the other. The question arose whether the third defendant was entitled to participate in the estate of the deceased as to which, in the events which had happened, he died intestate.

J. L. Arnold for the plaintiff, the executor.

Goff, Q.C., and *Harold Lightman* for the first and second defendants, the deceased's sisters.

Bradburn for the third defendant, the adopted child.

Cur. adv. vult.

Mar. 26. **VAISEY, J.**, read the following judgment. This summons, intituled in the matter of the estate of Guthlac Wilson, deceased, to whom I will refer as the testator, raises the question of the devolution of the property (which, in fact, was personal property) as to which he died intestate, and, particularly, of the rights, if any, of his adopted son, the infant defendant, Philip Guthlac Wilson, who is now about fifteen years of age. The adoption was effected, not under English law, but under the law of the province of Quebec, in circumstances which I must presently describe. For some, and, perhaps many, purposes an adoption so made would, in my judgment, be recognised as valid in this country, but the point, and the only point, which I have to decide is whether it entitled the infant defendant to participate in or succeed to the property of the testator not effectively disposed of by his will as though he had been the testator's own child.

The testator was married twice. He was by profession a consulting engineer which necessitated his making journeys to many different parts of the world. His first marriage took place at Shanghai on May 30, 1933. Thereafter, he and his first wife lived for some years in India, making periodic visits to England. In about 1937 or 1938 they went to live in the married quarters of Harvard University in the State of Massachusetts, where the testator was studying for a degree, and it was while they were residing there, their marriage having been childless, that they decided to adopt a child. They had come to the conclusion that it would be better to adopt a Canadian rather than an American child, and for that purpose they went to Montreal in the province of Quebec, and obtained from the Superior Court of that province an order, dated Nov. 3, 1939, effecting under the law of that province the adoption of the infant defendant as the child of the testator and his first wife. It is clear, and there is no dispute about it, that the testator and his first wife were British subjects domiciled in England during the whole period of their marriage, and, in particular, at the time when they obtained the adoption order in Quebec. It is also clear on the evidence that the only reason why no adoption order was ever sought in this country was that the testator and his first wife were advised by a solicitor of the welfare organisation in Montreal who arranged the adoption that there would be no necessity for any such step to be taken. This advice was, unfortunately, accepted and relied on, and, therefore, the status of the infant defendant as an adopted child of the testator and his first wife depends entirely on the order of the court of Quebec.

I will next describe shortly the history of the infant defendant so far as it may be material for the purposes of this judgment. He was born in Montreal on Apr. 7, 1939. He began a probationary period of residence with the adopters (as required by the law of Quebec) on May 4, 1939. Shortly after the making of the order he was taken to England and remained there with the adopters until August, 1940, when the testator's first wife, on account of the air raids,

took him back to America where they stayed with friends until 1942. In November, 1942, she returned to England to rejoin the testator, leaving the infant defendant in the United States. In October, 1943, he returned to this country in the care of a friend to rejoin the adopters. The testator's first marriage was dissolved on Jan. 7, 1946, by decree of the Probate, Divorce and Admiralty Division of this court on the petition of the wife, who later married again and is now Mrs. Mainwaring. No order as to custody or maintenance was asked for or made, it having been agreed between the parties that the infant defendant should remain, as he did, with Mrs. Mainwaring. The testator voluntarily paid her an annual allowance of £200 for him and a similar allowance for herself, and these he continued to pay for the rest of his life. He never ceased to recognise and treat the infant defendant as his own child, giving him handsome presents at Christmas and on his birthday. For some time after the divorce he visited the infant defendant frequently, but as these visits seemed to upset the child the testator agreed at Mrs. Mainwaring's request to give them up. The testator also married again. By his will, dated July 3, 1947, he appointed his second wife and the plaintiff, Henry Grace, to be his executors, and bequeathed certain books to the plaintiff and a policy of insurance for £5,000 to his wife, requesting her (but in such terms as not to impose any legal obligation on her) to use the proceeds or part thereof for the benefit of the infant defendant during his minority. He then gave the rest of his estate, both real and personal, to his wife absolutely. He died on Mar. 29, 1953, being killed in an aircraft accident together with his wife. It was uncertain which of them survived the other, but she was the older of the two, and is, therefore, under the Law of Property Act, 1925, s. 184, presumed to have died before him. Consequently, except as regards the books bequeathed to the plaintiff, he died intestate as to the whole of his estate. He had no real estate, but his personal estate was of a net value of upwards of £20,000. He left no issue or parent him surviving, and the persons entitled under his intestacy to his personal estate, in the event of the infant defendant being held not to be so entitled, are his two sisters, the defendants, Dione Naronia Margaris Lucas and Orrea Pernel.

It is clear that, under s. 13 (1) of the Adoption Act, 1950, where, at any time after the making of an adoption order under that Act, an adopter dies intestate, his property is to devolve in all respects as if the adopted person were a child of the adopter born in lawful wedlock. It is noticeable that under s. 13 (4) the references in that section to an adoption order are to include references to an adoption order made in Northern Ireland, but with that exception the adoption orders referred to in the Act are orders made by the courts in this country: [see s. 1 (1) and s. 45 (1)]. In the present case we have an order made under an alien jurisdiction at the suit of persons domiciled, not in the country to which that jurisdiction belonged, but in England, and it is difficult to see on what basis an adoption order made under a foreign jurisdiction could be brought either expressly or by implication within either the provisions or the principles of s. 13. It must be remembered that adoption in the sense of the transfer of parental rights and duties in respect of a child to a person other than the child's natural parent and their assumption by such other person is unknown to the common law, and the principle of legal adoption was introduced into our law for the first time by the Adoption of Children Act, 1926. It would certainly be very surprising if the artificial relationship arising from an adoption effected under an alien jurisdiction were to give rise to rights of inheritance such as are properly derived through a natural relationship. It must always be remembered that, while the effect of an adoption may be superficially much the same, however and whenever made, the methods of making it, and the conditions under which it is possible to make it, and the consequences of its being made, are subject to almost infinite variations of detail. Thus, in some countries adoption can only be made with the consent of the person adopted, and there are all manner of qualifications and limitations on the creation of the relationship which can seldom, or, perhaps

never, be identical in the case of any two systems of law. Reference may be made to the article "Adoption" by the late SIR ALFRED HOPKINSON, which is to be found in the more recent editions of the *ENCYCLOPAEDIA BRITANNICA* [e.g., 14th ed., 1929]. In some cases, adoptions in foreign countries are subject to restrictions and regulations more or less analogous to, but never, I suppose, identical with, those which obtain in this country. In other cases the divergence is very wide. In some countries, I understand, the adopted person may be of any age, i.e., not necessarily an infant. And it can hardly be supposed that any process calling itself an adoption, irrespective of its content, could possibly give rights of succession under the English law of intestacy to the adopted person. For example, an adoption effected under Indian or other oriental law could hardly be supposed to have any such consequence, and though the position is not so obviously anomalous in regard to adoptions made under systems substantially, although not exactly, similar to ours, the question inevitably arises where the line is to be drawn. For example, am I to scrutinise the laws of the province of Quebec, which are by no means the same as the English law of adoption, and see whether, in my judgment, they come sufficiently close to the English law to oblige or allow me to say that an adoption effected in that province is for the relevant purposes exactly the same in its consequence as one made under the law of England. Such a task is, in my judgment, quite beyond my powers. It must always be remembered that the testator and his first wife were never domiciled in the province of Quebec and that they merely, as it were, stayed within the jurisdiction for no other purpose than the adoption of the infant defendant. What the position would have been if the adopters in the present case, as well as the infant, had been domiciled in Quebec I need not inquire. But, if this adoption were effective for the purposes of an intestate succession, it would, apparently, be quite possible for would-be adopters to pay a short visit to any country whose laws were less stringent than the laws of their proper domicile so as to give the adoption the same effect as if they had proceeded under the laws of their proper domicile. I have already said that the adoption in this case would, no doubt, be recognised for some purposes, however irregularly obtained, as, for example, for the purposes of orders for custody, if such had been sought at the time of the testator's divorce.

In *THEOBALD ON WILLS*, 11th ed., p. 282, it is pointed out that adoption is, in the absence of statutory provision, governed by the law of the domicile of the adopter and of the child, but that it does not follow that the law will determine whether an adopted child can succeed to property as a child of the adopter. The question is said to be whether the capacity of the adopted child to succeed to property is a matter of status governed by the law governing the adoption, or a matter of succession governed by the law governing the succession, which is, of course, in the case of movables, the law of the testator's or intestate's domicile. It is said that there is no English authority on the question and that Dominion authorities conflict. It is stated that the analogy of the cases on legitimation suggests that the law governing the adoption would be applied, but, in my view, the analogy is inapplicable and the matter is one to be determined by the law governing the succession. I cannot see how our Adoption Act could contain any provision for recognising and giving effect in England to an adoption effected under a foreign law, having regard to the extreme divergence which exists between the various kinds of adoption which are to be found under the various systems of foreign law.

I will now refer briefly to the various authorities to which my attention was called. They do not afford any clear guidance on the point which I have to consider. I will say at once that those relating to legitimation have, I think, to be applied, if at all, with great caution, for in contrast to adoption the meaning of legitimation is plain and unambiguous. When a person is said to have been "legitimated" there is little, if any, room for doubt as to what is intended: it means that he has been placed in the position of one born in lawful wedlock.

Adoption, on the other hand, is the creation of a purely artificial relationship with characteristics which are quite undefined. They vary from place to place, as I have already said. In *Re Goodman's Trusts* (1) a majority of the Court of Appeal, reversing a decision of SIR GEORGE JESSEL, M.R., held that a child legitimated according to the Dutch law was entitled to a share in the personal estate of an intestate as one of her next of kin under the Statute of Distributions (22 & 23 Car. 2, c. 10). *Re Andros* (2) is a decision of KAY, J., where he held that a bequest of personalty in an English will to the children of a foreigner was to be construed to include children legitimated by the law of their father's domicile. *Re Luck* (3) decided that an adoption effected under Californian law could not be taken by the English courts to have rendered the adopted child legitimate on the ground that the father was not domiciled in California at the date of the son's birth. Perhaps the nearest case to the present is *Re Fletcher* (4), but the point now in issue was not decided and the case is really only an authority for the proposition that, in the absence of legitimate children (a circumstance known to a testator), adopted children could take as children on the true construction of a testamentary instrument.

I now come to *Ross v. Ross* (5), decided in Massachusetts in the United States of America. In that case a child adopted in another State, where the parties were domiciled at the time, was held to have the same rights of inheritance as legitimate offspring in the property of the adopting father. That case was decided in 1880 and shows that, while adoption was unknown to the law of England or Scotland, it had already been introduced from the law of France or of Spain into a large proportion of the States of the Union. In *Burnfiel v. Burnfiel* (6), a Canadian decision, it was held that a person adopted under one jurisdiction recognising adoption could not claim the status of a child under a jurisdiction not recognising adoption so as to claim to inherit property situate within the latter jurisdiction. That case was decided in 1926. In 1933, in *Re An Infant* (7), decided in New South Wales, it was held that an order for adoption might be validly made under the New South Wales statute [the Child Welfare Act, 1923] where at the time of the making of the order the adopting parents, or parent, and the child to be adopted were either resident or domiciled in New South Wales. The effect of such orders outside New South Wales was considered, and it was, apparently, thought that the case of legitimation differed in material respects from the case of adoption. In 1946 *Re Pearson* (8) was decided in the State of Victoria, and it was there held that the question whether or not an infant was issue of an adopter for the purposes of a will must be determined by the law of his domicile, and that, under the law of his domicile, the infant in question was not such issue as the will was prior in date to the adoption order. Finally, there is *Re Brophy* (9), a decision of the Supreme Court of New Zealand, where a child adopted under the law of the State of New York was held not entitled to take under a gift to "issue" contained in the will of a testatrix domiciled in New Zealand, although, had he been adopted in New Zealand, he would, *prima facie*, have taken.

DICEY'S CONFLICT OF LAWS, 6th ed., at p. 512, puts the matter thus:

"The question whether an adopted child can succeed as a child . . . under an intestacy . . . is (semble) determined by the law governing the succession, that is, the law of the domicile of the . . . intestate at the date of his death in the case of movables . . ."

There follows some discussion whether English courts would give any effect to an adoption effected in a foreign country and the question is left, as far as I can understand, indeterminate. In my judgment, if the testator had been domiciled in Quebec at the time that the infant defendant was adopted, the case of the latter would have been different and very much stronger. But the fact is that the advice which the testator received that an adoption by the English courts was a superfluous precaution was, as I think, erroneous. In CHESHIRE'S PRIVATE

INTERNATIONAL LAW, 4th ed., p. 402, the conclusion, apparently, is that recognition of a foreign adoption will have to be refused in all cases where any one of the two parties, i.e., either the adopter or the child, is domiciled in England. It is clear that the adoption order of the Superior Court of the province of Quebec was perfectly valid according to the law of Quebec, which permitted adoptions to be made at the suit of persons outside its jurisdiction, but I decide, on the whole, that the infant defendant is not entitled, and have come to the conclusion that the estate of the testator as to which he died intestate should be held in trust for the sisters of the testator, in equal shares absolutely. I will so declare and there will be the usual order for payment of costs out of the testator's estate.

Order accordingly.

Solicitors: *Hancock & Willis* (for all parties other than the third defendant); *Le Brasseur & Oakley* (for the third defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

THE BUNGALOWS (MAIDENHEAD), LTD. v. MASON.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 9, 1953.]

Rent Restriction—Death of tenant—Conversion of statutory tenancy into contractual tenancy—Acceptance of new rent book containing new conditions of tenancy—Right of daughter of tenant to remain in possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

The defendant's father, M., was, at the date of his death in 1949, the tenant of premises to which the Rent Restrictions Acts applied. After his death his widow continued in occupation as a statutory tenant under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In February, 1952, the landlords' agent and rent collector, H., called at the premises with a new rent book, and it was agreed between him and the defendant, acting as her mother's agent, that the widow should become the tenant. Her name was entered in the rent book, and the defendant's attention was drawn to the "Regulations and conditions of the tenancy" printed on the cover which differed from those under which the original tenancy had been granted to M. On the death of the widow the landlords claimed possession of the premises from the defendant who claimed the protection of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

HELD: the position of a statutory tenant could, by agreement, be converted into that of a contractual tenant; the landlords through H. had offered the widow a tenancy on new conditions, and rent had been paid and accepted on that basis, and so she had become a contractual tenant; and, therefore, on her death the defendant was entitled to the protection of s. 12 (1) (g).

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 999.

Case referred to:

(1) *Murray, Bull & Co., Ltd. v. Murray*, [1952] 2 All E.R. 1079; [1953] 1 Q.B. 211; 3rd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE ELDER-JONES, at Windsor County Court, dated June 24, 1953, whereby he dismissed a claim by them for possession.

Tapp for the landlords.

Sir Shirley Worthington-Evans for the defendant.

SOMERVELL, L.J.: The plaintiffs were landlords claiming possession, and the defendant was the daughter of a man who was admittedly tenant of the

premises at the date of his death in 1949. His widow, Mrs. Mason, the defendant's mother who remained in possession, paying rent, would, therefore, be presumed to be a statutory tenant, and on the learned judge's finding that was the position. She was a statutory tenant until February, 1952. At that time the landlords had recently bought the reversion of this house among other houses. Mrs. Mason was bedridden, and the defendant dealt with rent collectors and other matters and paid the rent. Mr. Harvey, who was employed by the landlords as agent and rent collector, called at the house with a new rent book although there was space in the old rent book for further entries. He asked certain questions, and, according to his evidence, it was agreed that Mrs. Mason should be the tenant. There is no dispute that Mrs. Mason's name was put on the rent book, which contained conditions differing from those in the previous rent book which may be presumed to have been the conditions under which the original tenancy was granted, and which would have applied to the widow as statutory tenant when she remained in possession after her husband died. The defendant gave evidence that Mr. Harvey drew her attention to the conditions, which were headed: "Regulations and conditions of the tenancy". Counsel for the landlords contended that we should regard them, not as terms of the tenancy, but simply as regulations, but in view of the heading and their wording it seems to me quite plain that they must be treated as conditions of the tenancy. They were brought to the defendant's attention as agent for her mother.

In those circumstances it seems to me that there was ample evidence on which the learned judge could find, as he did, that the landlords, by Mr. Harvey, offered Mrs. Mason, through the agency of the defendant, a tenancy on new conditions. That was accepted, and rent was paid and accepted on that basis. From that time, as it seems to me, Mrs. Mason became a contractual tenant, and so the defendant is entitled to the benefit of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on her mother's death.

There are two other matters, I think, I should mention. One is that a week after the rent had been accepted and, in my opinion, the contract concluded, Mr. Harvey called again and pasted on the rent book a note indicating that Mrs. Mason held as successor of her husband, but, of course, it was too late to alter the contractual position which had already been set up. Counsel for the plaintiffs also sought to argue a point which he admitted he had not taken below, namely, that, where a person is in possession as a statutory tenant, as a matter of law his position cannot by agreement be turned into that of a contractual tenant. That point was not taken below, and, having looked at some observations by McNAIR, J. [in *Murray, Bull & Co., Ltd. v. Murray* (1)], on which counsel said he was going to rely, it seems to me plain that the point is a bad one. All I would say about that case is that McNAIR, J., was not dealing with this point. He was dealing with a case where it was suggested that the position of a statutory tenant had been worsened by being turned into that of a licensee. For these reasons I think this appeal fails and must be dismissed.

G DENNING, L.J.: I agree.

ROMER, L.J.: I agree.

Appeal dismissed.

Solicitors: *William Foux & Co.* (for the landlords); *T. W. Stuchbery & Son*, Windsor (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

SICHEL *v.* SICHEL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 22, 1954.]

Divorce—Maintenance of wife—Committal order against husband—Duration—Need for renewal yearly—Debtors Act, 1869 (c. 62), s. 5—Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I., 1952, No. 2209), r. 6 (1).

On Dec. 8, 1950, the registrar made an order in favour of the wife for the payment of interim maintenance by the husband. On Oct. 3, 1952, on the wife's application, a judgment summons was served on the husband in respect of his failure to pay under that order. On Mar. 23, 1953, an order was made under the Debtors Act, 1869, s. 5, committing the husband to prison, the order to be suspended on certain conditions which were fulfilled. On an application by the wife that the order for commitment be renewed for a further year,

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HELD: the Matrimonial Causes (Judgment Summons) Rules, 1952, now governed the procedure of the Divorce Court when exercising its jurisdiction under the Debtors Act, 1869; those rules were silent with regard to the necessity for the renewal of an order of commitment after the expiration of one year; there was no limitation as to the period of time for which it existed and it continued in operation until the debt in respect of which it had been made had been wiped out; and, therefore, the application was unnecessary and would be dismissed.

FOR THE DEBTORS ACT, 1869, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 294.

APPLICATION by the wife, ex parte, to extend an order of KARMINSKI, J., dated Mar. 23, 1953.

On Feb. 14, 1946, the wife was granted a decree nisi of dissolution of the marriage. On Dec. 8, 1950, the registrar ordered the husband to pay a weekly sum for the interim maintenance of the wife and of the child of the marriage. On Aug. 16, 1952, the husband was in arrears under the order of Dec. 8, 1950, in the sum of £62. On Sept. 18, 1952, on the wife's application, a judgment summons was issued against the husband and served on him on Oct. 3, 1952. On Oct. 21, 1952, the judgment summons was adjourned to allow the husband to apply for a reduction in the amount of the maintenance. On Feb. 12, 1953, on the husband's application, the order of Dec. 8, 1950, was varied by a reduction in the amount of the award. On Mar. 23, 1953, the judgment summons, adjourned from Oct. 21, 1952, came before KARMINSKI, J., who made an order that the husband be committed to prison, such order to be suspended on certain conditions as to payment by the husband of arrears of maintenance.

K. B. Campbell for the wife.

WILLMER, J.: This is an application to extend the period of time in respect of a committal order made on Mar. 23, 1953. In practice, however, its purpose is to obtain a decision that the application is unnecessary.

In RAYDEN ON DIVORCE, 6th ed., pp. 360, 361, LATEY ON DIVORCE, 14th ed., p. 1023, and the ANNUAL PRACTICE, 1954, p. 743 (note to R.S.C., Ord. 42, r. 3, sub nom. Committal), it is stated without qualification that it is necessary to apply for the renewal of a committal order after the expiration of one year. By an order of the Lord Chancellor dated Jan. 1, 1884, the jurisdiction under the Debtors Act, 1869, s. 5, was assigned to the judge sitting in bankruptcy, and by the Bankruptcy Rules, 1915, r. 379,

"The County Court Rules [1936, Ord. 25, r. 56 (4)] as to the committal of judgment debtors shall . . . apply to all courts exercising jurisdiction under s. 5 of the Debtors Act, 1869 . . ."

The Bankruptcy Rules, 1952, however, which were made on Dec. 5, 1952, by r. 383 specifically except from the County Court Rules cases where the High Court is

“exercising jurisdiction in respect of any order or judgment made or given in a matrimonial cause.”

- A The Matrimonial Causes (Judgment Summons) Rules, 1952, however, were made on Dec. 18, 1952, and came into operation on Jan. 12, 1953, and they now govern the procedure of this court when exercising its jurisdiction under the Debtors Act, 1869. They are silent with regard to the necessity for the renewal of a committal order after the expiration of one year. As has, I think rightly, been pointed out by counsel, there is good reason for that, having regard to the form of order which it is competent for a judge of this Division to make. In many cases it would be almost an absurdity if year by year application had to be made to renew a committal order made on a judgment summons in this Division. I say “year by year” advisedly, because it is common knowledge that many cases arise in this Division in which it is necessary to suspend the operation of a committal order for what must on any view be a long period. In those circumstances, it is, I think, rightly contended, that it would be absurd if a creditor had to come back here once a year to go through the formality of having the committal order renewed. I can only infer, from consideration of the rules themselves, that the omission of any reference to the necessity of renewing a committal order after the duration of one year was deliberate, having regard to the nature of order which it is competent to make under the rules.
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- D In my judgment, so far as committal orders made in this Division are concerned, there is now no limitation as to the period of time for which they exist, other than the period during which any part of the debt remains due. A committal order made in this Division under the Matrimonial Causes (Judgment Summons) Rules, 1952, continues in operation until the debt in respect of which it was made has been wiped out, and it is no longer necessary to make application to this court at the end of the year to renew the committal order. For those reasons I hold
- E that this application was unnecessary.

Application dismissed.

Solicitor: *G. Parry Jones* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

R. v. SEYMOUR.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Pearce, JJ.),
April 5, 1954.]

*Criminal Law—Larceny—Recent possession of stolen property—Indictment—
Direction to the jury.*

Where there is no positive evidence that a prisoner has stolen property, but he is found in possession of property shortly after it has been stolen, and the evidence is as consistent with larceny as with receiving, the indictment should contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to determine whether the prisoner was the thief or whether he was a receiver, and they should be reminded that a man cannot receive from himself. If they find a verdict of guilty on one count, they should be discharged from giving a verdict on the other count.

Cases referred to:

- (1) *R. v. Loughlin*, (1951), 35 Cr. App. Rep. 69; 2nd Digest Supp.
- (2) *R. v. Christ*, [1951] 2 All E.R. 254; 115 J.P. 410; 2nd Digest Supp.

APPEAL against conviction.

The appellant, Alfred James Seymour, was convicted on Jan. 14, 1954, at Reading Borough Quarter Sessions, of receiving property knowing it to have been stolen, and was sentenced to three years' imprisonment.

F. L. Clark for the appellant.

Kenneth Jones for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before the learned recorder of Reading of receiving a gun knowing it to have been stolen, and was sentenced to three years' imprisonment.

There is a tendency nowadays, which we have tried to correct in several cases to which I will refer in a moment, if there is no what I may call positive evidence that the prisoner stole goods—for instance, evidence of his being seen to go into a shop or to have run away, or of his finger prints being found—to think that, if he is found in possession of stolen property shortly after it is stolen so that it can fairly be said that he is in recent possession, the only justifiable verdict is one of receiving and not one of stealing. In *R. v. Loughlin* (1) we held that where it is proved that premises have been broken into and property stolen therefrom and very soon after the breaking the prisoner has been found in possession of that property, it is open to the jury to find him guilty of breaking and entering, and the jury should be so directed. The jury in that case had been directed that they should find the prisoner guilty of receiving only, and so this court quashed the conviction. Where it is proved that property has been stolen, and that, very soon after the larceny, the prisoner was found in possession of the property, it is open to the jury to find him guilty of larceny, and they should be so directed.

It is necessary, in cases of receiving, that the jury should have it explained that they must be satisfied that the prisoner received the property from somebody else. Very likely one cannot say who the other person was because one does not know the thief. For instance, supposing stolen property is found in the possession of a shopkeeper who deals in that particular property, the jury are entitled to say: "He did not steal the property himself, but we think he is a 'fence' ", but there are a great many cases where I do not think anybody who applies his mind to the case can have any doubt that the person found in possession of the property is the thief. If he is the thief, he cannot be found guilty of receiving

because a man cannot receive from himself, but must receive the property from somebody else.

In the present case, for some reason which I do not understand, the indictment charged the appellant with receiving only. The evidence was that on Nov. 7 or 8, 1953, a Belgian folding gun was stolen from a hut on an allotment. The next thing known about that gun was that a few days afterwards it was in the possession of the appellant—within such a time after the theft that the doctrine of recent possession could be applied. Counsel on his behalf put forward the case that the gun of which he had possession was not the gun stolen. The jury rejected that. The evidence was overwhelming that it was the gun which had been stolen and that he had made away with it before he was arrested. He was in possession of this gun a few days after the stealing, and, therefore, said counsel: “You may come to the conclusion that he was the thief, and, if he was, you cannot find him guilty on this indictment which charges him only with receiving”. In my opinion, the right verdict would have been one of larceny.

The court desires to lay this down. In cases where the evidence is as consistent with larceny as with receiving, the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the larceny count. Equally, if they come to the conclusion that it is larceny, they should be discharged from giving a verdict on the receiving count. Sometimes this court has had to quash a conviction because there has been a conviction of receiving, and the court has come to the conclusion that the evidence showed larceny and not receiving. If a verdict of Not Guilty has been returned on the larceny count, the court cannot substitute, under s. 5 (2) of the Criminal Appeal Act, 1907, a verdict of guilty of larceny for a verdict of guilty of receiving, but, if the jury are discharged from giving a verdict on the larceny count and the court considers that the proper verdict is larceny and not receiving, they can substitute that verdict. In the present case we cannot alter the verdict from receiving to larceny because there was no charge of larceny in the indictment. If, therefore, this question, which has come before this court, not only in *Loughlin's* case (1), but in *R. v. Christ* (2), arises, I hope attention will be called to this matter. It is much better to put into indictments both counts, although, as the case develops, it becomes only either a case of larceny or one of receiving. Although it is a pity that a guilty man should escape the consequences of his crime, the conviction in the present case must be quashed.

Appeal allowed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Sheppard & Fullbrook, Reading (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SOLOMONS v. R. GERTZENSTEIN, LTD., AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), March 1, 2, 3, 11, 1954.]

Statutory Duty—Breach—Competence of civil action at suit of injured person—Failure to maintain fire escape in good order—Employee on premises injured in fire—Liability of receiver appointed by mortgagees of premises—"Owner"—London Building Acts (Amendment) Act, 1939 (c. xevii), s. 33 (1), s. 133 (2).

The plaintiff was employed by a manufacturing furrier who occupied premises on the second floor of 36, Gerrard Street, Soho. The second defendants, who were the lessees of the whole building under the head lease, had mortgaged their interest in the premises to a building society, and the third defendant was a receiver appointed by the society when the second defendants fell in arrear with their payments of interest. On Nov. 10, 1950, a fire broke out on the premises, and the plaintiff, who was on the third floor, being unable to escape by the stairs, climbed out of a window at the back of the premises and was injured. There was a trap-door on the third floor leading to the roof of the premises and a ladder with hooks to fix on the trap-door, which had been constructed in 1925 on the order of the London County Council to comply with the requirements of the London Building Acts (Amendment) Act, 1905, regarding the provision of adequate means of escape in case of fire, but at the time of the fire the ladder was not in position and was lying in a passage way on the third floor. In an action for negligence and/or breach of statutory duty, His LORDSHIP having found that the fire was an accidental fire starting from a short circuit for which none of the defendants was to blame,

HELD: (i) by reason of the escape ladder not being in position, there had been a breach by the "owner" of the premises of his duty to maintain means of escape in an efficient condition under the London Building Acts (Amendment) Act, 1939, s. 133; the third defendant was the "owner" within s. 33 (1) and s. 133 (2); and, therefore, he was responsible for the default.

(ii) where a duty imposed by an Act of Parliament is intended for the benefit of the public generally a right of action is not given to an individual who may suffer an injury from its breach, but where the duty is imposed for the benefit of a particular, ascertainable class, such as workers in a building, any member of that class injured as a result of the breach has a right of action against the person responsible for the breach, and, therefore, the plaintiff had a right of action against the third defendant for damages for breach of his duty under s. 133 of the Act and against the second defendants who were liable for his acts or defaults.

FOR THE LONDON BUILDING ACTS (AMENDMENT) ACT, 1939, s. 33 and s. 133, see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 1214 and 1279.

Cases referred to:

- (1) *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; Digest Supp.
- (2) *Watts v. Battersea Corpn.*, [1929] 2 K.B. 63; 98 L.J.K.B. 273; 140 L.T. 594; 93 J.P. 137; Digest Supp.
- (3) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 38 Digest 154, 38.
- (4) *Doe d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 31 Digest, Replacement, 321, 4569.
- (5) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 24 Digest 911, 80.

ACTION for negligence and/or breach of statutory duty.

The plaintiff was employed by a manufacturing furrier who occupied premises on the second floor of No. 36, Gerrard Street, Soho, London, W.1. The first

defendants, who were also manufacturers in the fur trade, occupied premises on the ground and first floors of the building. There were several other tenants on the premises carrying on various trades, and the premises were subject to the Factory Acts. The second defendants were the lessees of the building under a head lease and were entitled to the reversion of the various tenancies created, including those of the plaintiff and first defendants. They had mortgaged their interest to the Skipton Building Society, and, as they were in arrear with their payments of interest, the society had appointed the third defendant as a receiver. The second defendants were under covenant to keep the entrance to the premises and the staircase clean and lighted, and were in possession of the staircase and landings. The staircase ran from the basement to the top of the premises, serving a series of landings and half landings. It was separated from the back wall of the premises, and had a balustrade which at each landing or half landing formed a fence between the staircase and the space between the staircase and the back wall. The back wall was panelled. On the first half landing there was an aperture in the wall, nearly in the corner and covered with a grid, and behind it was an air shaft for ventilation down which ran some electric wires. The space between the stairs and the back wall at the first half landing had been covered with wire netting supported by battens to prevent objects falling down through the space to the basement. On this wire the first defendants had piled wrapping paper, cardboard cartons, and packing materials in a large stack. On Nov. 10, 1950, at about 7 p.m. the plaintiff came out of a room on the second floor and found smoke ascending from the stack of paper which was on fire. He told his employer and they both ran down the stairs with buckets of water. The plaintiff then went to a lavatory on the third floor for more water while his employer telephoned the fire brigade. Suddenly a sheet of flame burst out reaching the second and third floors. The plaintiff, who was then by the lavatory on the third floor, seeing he could not get down the staircase, climbed out of a window at the back of the premises to try to climb down a pipe. His arm caught in a curve or junction of the pipe and was broken and he remained suspended until he was rescued by the fire brigade some twenty to twenty-five minutes later. His employer was severely injured and a woman on the premises was killed.

HIS LORDSHIP found as a fact that the fire was started by a short circuit which set fire to the wooden panelling on the back wall which in turn set fire to the stack of paper; that the paper did not burn freely and did not cause the sudden flash of flame which did most of the damage; that the first defendants were not negligent in storing the paper where they did; and that the fire was an accidental fire and was not caused by the negligence of any of the defendants. HIS LORDSHIP referred to *Collingwood v. Home & Colonial Stores, Ltd.* (1).

Lord Hailsham, Q.C., and Perrett for the plaintiff.

Marven Everett, Q.C., and Lester for the third defendant.

The first and second defendants did not appear.

Curr. adv. vult.

Mar. 11. LORD GODDARD, C.J., read a judgment in which he stated the facts and continued: I now come to the allegation of breach of statutory duty which affects both the second and third defendants. It is alleged that there was a breach of s. 133 of the London Building Acts (Amendment) Act, 1939, and it is necessary that I should deal with the evidence relating thereto. It seems that in or about February, 1925, which was long before either the second or third defendants had anything to do with the premises, a notice had been served by the London County Council under s. 12 of the London Building Acts (Amendment) Act, 1905, requiring the owners of the premises to comply with the section to the satisfaction of the district surveyor. The evidence on this point was given by an officer of the London County Council who had a note of the service of this notice, but no copy of it was produced. He said, however, that this was what the notice would

require, that such work as was done was completed in April, 1925, and there was nothing to show that the district surveyor had not been satisfied. Under that section the county council could require that there should be a trap-door in a suitable position constructed in accordance with the provisions of the section, which I need not set out in full, with a fixed or hinged step-ladder leading to the roof, or other proper means of access to the roof. It was not suggested by either side that there had ever been a fixed or hinged step-ladder provided, but there had been a ladder with hooks on it which could be fixed on to the trap-door. Having no other evidence than that which I have set out, I must assume that this was regarded by the district surveyor as an adequate means of access to the trap-door and that he was satisfied with the ladder. Another witness from the London County Council said that he had surveyed the property about six months before the fire and did so because the factory inspector had called the attention of the council to the premises. He had, apparently, prepared some survey drawings, and he said in his evidence that at the time of his survey there was no ladder giving access to the trap-door. It seems almost inexplicable that a further notice was not served by the county council or some proceedings taken, but there was no evidence that any communication of any sort had been addressed to anyone calling attention to the absence of the ladder. In fact, I find that there was an adequate ladder with hooks provided and kept on the premises, but the ladder was not always—and, as I find, only seldom—kept in position. It is now known that at the time of the fire it was lying in one of the passageways leading to the lavatories on the third floor. It is not altogether clear in which passageway it was, nor do I think it matters. I am satisfied it was not in position on the day of the fire.

The first thing to consider is who is responsible for the consequences, if any, of the disregard of the original requirements of the county council. By the time of the fire the relevant statute was the London Building Acts (Amendment) Act, 1939. Part V of that Act has the cross-heading: "Means of escape in case of fire". An owner is defined by s. 33 (1) as meaning

"... the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person ..."

The second defendants admit that they were the landlords of the premises at the material times. In fact, they were the owners in equity having mortgaged their interest to the Skipton Building Society in 1949. On Sept. 27, 1949, the building society appointed the third defendant to be receiver of the income and of the rents and profits of the premises, and at all material times thereafter he acted as receiver. There seems no escape, therefore, from the position that he was for the purposes of Part V of the Act of 1939 the owner of the premises. By s. 109 (2) of the Law of Property Act, 1925, the receiver is deemed to be the agent of the mortgagor who is solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. Section 35 of the Building Act deals with protection against fire in old buildings, and this building is an old building within the meaning of the Act. The section provides, among other things, that where an old building is a building in which more than ten persons are normally employed at any one time above the first storey or on or above any storey which is at a greater height than twenty feet the council may at any time serve on the owner of the building a notice requiring him to provide such means of escape as in the circumstances of the case can be reasonably required. There is a proviso that the provisions of s. 35 (1) shall not apply to any building which has been provided with means of escape in accordance with, among other Acts, the Act of 1905 so long as such means of escape are properly maintained.

Turning now to s. 133, which is in Part XII of the Act, the cross-heading of which is "Miscellaneous", sub-s. (1) provides:

"All arrangements and safeguards for lessening danger from fire provided in pursuance of the provisions of the London Building Acts ... shall be kept

and maintained in good condition and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such safeguards or arrangements."

Sub-section (2) provides:

A "All means of escape in case of fire and all safeguards to prevent the spread of fire and any arrangements in connection therewith provided in pursuance of the provisions of Part V . . . of this Act or otherwise shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such means of escape safeguards or arrangements."

B There is a penalty of £20 and £5 a day for contravention of or failure to comply with the provisions of the section.

I have already said that I am obliged to hold that the receiver is the owner within the meaning of these sections, and it would be impossible to construe the word "owner" in s. 133 in any way differently from the construction placed on it by s. 33 (1) as the sections are both dealing with the same matter, namely, means of escape in case of fire. That a receiver can be the owner is, I think, made clear by the reasoning in *Watts v. Battersea Corpn.* (2). Moreover, in the present case the third defendant did have some duty of management in the sense that it was his duty as representing the landlords and as the agent of the mortgagors to see that the staircase, landings and so forth were kept in good order, and, as he told me, he would receive and deal with any complaints from the tenants. I am obliged to find that there had been a fairly consistent disregard of the escape precautions because I am quite satisfied that this ladder was not kept in position though it may have been up from time to time. It was certainly not in position on the night of the fire. If it had been, it is contrary to common sense to suppose that the plaintiff would not have used it and got out on the roof from which he might have been rescued with comparative ease and the same applies to the unfortunate woman who lost her life. I dare say, if the plaintiff had searched about, he might have found the ladder, but with a fire raging as it was, and we know the injuries that were inflicted on his employer one floor down, it is too much to expect that a man will go hunting around to find a ladder and not make use of the first means of escape that occurs to him, hazardous though that means may be.

F The principal question that has been argued on this part of the case is whether the disregard of the statutory requirements—because on my findings neither safeguards nor means of escape were kept in good condition or efficient working order—gives a cause of action to the plaintiff, or whether, as a penalty is provided in the Act, that is the only remedy that is available. On this point a large number of cases were cited, but I do not think it necessary to burden this judgment by setting all of them out. There are cases both ways, some giving a remedy by action, others holding that the only remedy is to prosecute for the penalty or to enforce the obligation in the particular manner prescribed by the Act. I will briefly, however, refer to *Pasmore v. Oswaldtwistle Urban Council* (3) where the EARL OF HALSBURY, L.C., quoted with approval ([1898] A.C. 394) what LORD TENTERDEN said in *Doe d. Rochester (Bp.) v. Bridges* (4) (1 B. & Ad. 859):

"where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner",

and LORD MACNAGHTEN said ([1898] A.C. 397):

"Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act

which creates the obligation and on considerations of policy and convenience ”.

It is worth noticing that that case dealt with the duty of a local authority to make sewers, and the decision was that that duty could not be enforced by an action for mandamus at the suit of a private person, the only remedy being a complaint to the Local Government Board. That case, of course, deals with a wholly different state of affairs from those we find in the present case where obviously the precautions to be taken and maintained are for the benefit of the people who may be working in the particular house in which the local authority have required them to be provided.

I can see no reason why these precautions are not to be regarded in exactly the same way as the precautions required to be taken for fencing machinery and so forth under the Factory Acts. A person injured by a disregard of those statutory requirements has a right of action although the factory owners are at the same time liable to a penalty. The reasoning in *Groves v. Lord Wimborne* (5), always regarded as the leading case on this subject, seems to me to be eminently applicable to the present case. One of the factors which entitles the London County Council to call for adequate means of escape is the number of people working on the premises, and there can be no doubt that by reason of some of the work that was carried on there the premises in the present case fall within the definition of a factory under s. 151 of the Factories Act, 1937. I can see no reason, therefore, why a person injured because the means of escape were not maintained in proper working order should not have a cause of action. The principle that I would endeavour to state is that where a duty imposed by the Act is intended for the benefit of the public generally a right of action is not given to an individual who may suffer an injury from its breach, but where the duty is imposed for the benefit of a particular ascertainable class, such as workers in a building, anyone injured as a result of the breach has a right of action. It does not seem to me that it necessarily follows that, if the London County Council required certain precautions to be taken in such places of public resort as theatres or a stadium or large exhibition hall and if a fire took place and persons were injured, everyone of them would have a cause of action. It is not necessary to decide this, but it seems to me there may be a considerable difference between the public who resort or are invited to resort to such places and workers in a building in which precautions are ordered to be taken for the benefit of those workers.

For these reasons I am of opinion that the plaintiff has a cause of action against the third defendant as the owner of the premises and also for what it is worth against the second defendants who are liable for his acts or defaults.

Judgment for plaintiff.

Solicitors: *Herbert Baron & Co.* (for the plaintiff); *Spiro & Steel* (for the third defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

MINISTER OF HEALTH v. ROYAL MIDLAND COUNTIES
HOME FOR INCURABLES, LEAMINGTON SPA, GENERAL
COMMITTEE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
March 15, 16, 25, 1954.]

A *National Health Service—"Hospital"—"Treatment"—"Institution for the reception and treatment of persons"—Home for incurables—National Health Service Act, 1946 (c. 81), s. 6 (1), s. 79 (1).*

A home for incurables, established in 1874, was a charity regulated by a trust deed dated June 27, 1884, and by rules and bye-laws. The object of the home was to give relief, by admission to the home or by pensions, to persons of good character and limited or reduced income, who were suffering from incurable or chronic diseases, or incapacity owing to injury or wounds. No person suffering from insanity, epilepsy, cancer or pulmonary tuberculosis, was eligible as an in-patient, and no person was admitted unless he required medical supervision and nursing. There were three classes of patients:

B (i) paying patients, and (ii) free patients, both residing in the home, and
C (iii) pensioners residing elsewhere. Immediately before the appointed day

(July 5, 1948) under the National Health Service Act, 1946, the main purpose of the home was to provide the patients with the care and attention they required in pleasant surroundings with the necessary nursing under adequate medical supervision. The staff included both domestic staff and nursing staff.

D Although palliative medical treatment, treatment for intercurrent complaints, and physiotherapy were provided, such provision was subsidiary to the main purpose of the home. Patients were admitted on the footing that no curative treatment would be given for their complaints, which in every case had to be regarded as incapable of cure. There was considerable liberty of movement, patients being free largely to do as they pleased, and many of them going away for holidays in each year of a month's duration or thereabouts. On the question whether the home was a voluntary hospital which was transferred to the Minister of Health under s. 6 (1) of the Act of 1946,

E
F HELD: the word "treatment" as used in the definition of "hospital" in s. 79 (1) of the Act of 1946 included not only medical treatment by doctors, but also nursing, and, therefore (DENNING, L.J., dissentiente), on the facts as found by the arbitrator, the home was a hospital which vested in the Minister under s. 6 (1).

Decision of VAISEY, J., ante, p. 14, reversed.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (1), s. 79 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 339, 403.

G Case referred to:

(1) *Royal Victoria Hospital v. Wheatley*, (1951), unreported.

H APPEAL by the Minister of Health from an order of VAISEY, J., dated Dec. 9, 1953, reported ante, p. 14, on a Special Case stated by HAROLD CHRISTIE, Esq., Q.C., an arbitrator appointed to determine whether the Royal Midland Counties Home for Incurables at Leamington Spa (hereafter called "the home") was a hospital within the meaning of the National Health Service Act, 1946, s. 79 (1), and whether the interests in and attaching to the home were transferred to and vested in the Minister of Health on July 5, 1948 (the appointed day under the Act) by virtue of s. 6 (1) of that Act.

The matter was referred to arbitration in accordance with the provisions of s. 6 (5) of the Act of 1946 and of the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888). The arbitrator made his award in the form of a Special Case.

The arbitrator found as a fact that immediately before the appointed day under the Act (July 5, 1948) the main purpose of the home was to provide the patients with the care and attention they required in pleasant surroundings with the necessary nursing under adequate medical supervision. He found that, although the provision of palliative medical treatment, treatment for inter-current complaints, and physiotherapy were objects of the home, they were subsidiary to its main purpose and could not be regarded as either independent or concurrent purposes. A

VAISEY, J., held that the home was not a hospital within s. 79 (1) and was not transferred to the Minister under s. 6 (1).

Cross, Q.C., and Denys B. Buckley for the Minister of Health.

Russell, Q.C., and H. E. Francis for the general committee of the home.

Cur. adv. vult. B

Mar. 25. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The question in this case is whether in terms of s. 6 (1) of the National Health Service Act, 1946, an institution known as the Royal Midland Counties Home for Incurables at Leamington Spa was by virtue of that Act "transferred" to the Minister of Health on July 5, 1948, being the vesting date under the Act. The sub-section provides: C

" . . . there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital . . . "

The answer to the question depends on whether the institution I have named was a "voluntary hospital"—or, rather, since no question arises as to its voluntary character, a "hospital"—within the section; and that question was submitted to the arbitrament of HAROLD CHRISTIE, Esq., Q.C., pursuant to rules made under s. 9 (8) of the Act. D

The problem in every case is *prima facie* one of fact or degree, i.e., whether, as a fact, on the relevant date the institution in question answered the description of a "hospital" as defined by the Act. In the present case the question posed was answered negatively by the learned arbitrator, and his award, having been stated in the form of a Special Case, was affirmed by VAISEY, J. It is plain that the arbitrator went into all the facts and circumstances relating to the home (as I shall for brevity call the institution here in question) with the greatest care and thoroughness. His award extended to thirty paragraphs, and he attached to it very numerous exhibits. In this court we have not examined those exhibits or been involved in any consideration of the evidence. The question has been whether, on the face of the award, the learned arbitrator has in any respect misdirected himself by misconstruing the relevant provisions of the Act; and, if so, what, on the facts as found, the true construction should be, or, possibly, whether the arbitrator has found the necessary facts at all. E

Certain facts are clear. They were found by the learned arbitrator and are not now at all in dispute. Thus: (i) All the "inmates" (to use for present purposes a word of negative significance) of the home are sufferers from incurable diseases; but those suffering from certain diseases or disabilities, notably insanity, cancer and tuberculosis, are, and always have been, excluded: so that the inmates may generally be described as persons suffering from, and incapable of being cured of, rheumatic or arthritic complaints, on the one hand, and, on the other, nervous complaints (for example, Parkinson's disease). (ii) On the vesting date (July 5, 1948) there were 112 such "inmates" at the home, a figure slightly, but insignificantly, less than the average over a number of years. The home also provided "pensions" to other incurably disabled persons who lived in their homes and were no part of what may be called the complement of the home, receiving no "treatment" (however that word be construed) at the home. F

At the vesting date there were twenty such pensioners. These pensioners may be disregarded for the purposes of the present appeal. (iii) The fact that the "inmates" suffered from the diseases of the kind I have mentioned and that they were "incurable", is not, and never was, a sufficient reason for their reception at the home. It is, indeed, well known that many people are afflicted with some form of rheumatism or arthritis from which they cannot be cured. Rule 2 of the rules of the home was in the following terms:

- A "The object shall be to give relief by admission to the home or by pensions as hereinafter provided, to persons of good character, of limited or reduced income who are suffering from incurable or chronic disease, or incapacity owing to injury or wounds. No person suffering from insanity, idiocy, imbecility, epilepsy, cancer or pulmonary tuberculosis, past or present, shall be eligible as an in-patient, and no case shall be admitted unless it requires medical supervision and nursing. Persons suffering from epilepsy and cancer shall be eligible for pensions."

B The arbitrator found, and the respondents admitted, that this rule was "observed in principle". I emphasise the use of the word "relief" in the first line of the rule and the penultimate sentence: "No case shall be admitted unless it requires medical supervision and nursing". (iv) The staff of the hospital included both domestic staff and nursing staff. The numbers of the former are not stated in the award. As regards the latter I cannot do better than set out, in toto, para. 10 of the award:

- C "In 1948 there were forty-eight full-time and twenty-nine part-time members of the nursing staff. The matron (Mrs. Parr, formerly Miss G. Lingwood) told me that the proportion of nurses to patients was slightly less than in a general hospital and that there would be rather more State registered nurses in a general hospital. I think this may have been an understatement. Anyhow, it is clear that the senior members of the nursing staff at the home were, generally speaking, older than in a general hospital and that the nursing required was more routine and of a slower tempo. Mrs. Parr spoke highly, and I have no doubt deservedly, of the high standard of cleanliness observed by the nurses under her."

- D (v) The medical staff of the home consisted of a visiting physician and a visiting surgeon, who visited the home regularly on alternate days. There were also an honorary dental surgeon and an honorary ophthalmic surgeon who attended "patients" when required, but there was no resident medical officer. (See para. 7 of the award.) (vi) The diseases of the "inmates" being, ex concessis, incurable, there was, of course, no "treatment" at the home designed to cure them. There was, however, at the relevant date "palliative treatment" being administered to about one-third of the "inmates", by which I understand to be meant treatment of the nature of physiotherapy, massage, etc., designed to alleviate suffering or arrest the disease. Medical attention and "treatment" was also available and administered in the case of "inmates" who might from time to time suffer additionally from what may be called casual illnesses, e.g., influenza, bronchitis or pneumonia. It may be added that an "inmate" who died commonly died as a result of such a "casual" complaint—the diseases from which they suffered not being per se fatal, but, no doubt, such as to render the sufferers more susceptible to the consequences of casual illnesses. (vii) Finally, there was considerable liberty of movement, "inmates" being free largely "to do as they pleased", and many of them going away for "holidays" in each year of a month's duration or thereabouts.

These, broadly, are the facts as they were found, and so far there is no dispute on them. I shall have occasion later to refer to certain more detailed conclusions or inferences on the part of the learned arbitrator, but it will be convenient now to recite the essential definitions. Section 79 (1) of the Act provides that:

"... unless the context otherwise requires ... 'hospital' means

[not, be it observed 'includes'] any institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation . . . 'illness' includes [not, in this case, 'means'] mental illness and any injury or disability requiring medical or dental treatment or nursing."

Two points may be made at once on these definitions. First, it is, to my mind, clear from the references to "any maternity home" and "any convalescent home requiring", etc., that the word "hospital" is intended to have, and has, a wider significance for the purposes of the Act than that of what may be called an ordinary general hospital. Secondly, the test, so far as relevant, is that the institution should be one both for "reception" and for "treatment". No question here arises as regards "reception". The contest in this case is in reference to the second limb. Are the words "for treatment" here satisfied? A
B

The conclusion of the arbitrator was expressed by him in para. 17 of his award, thus:

"In view of the foregoing and after considering the evidence and agreed documents I find as a fact that immediately before the appointed day the main purpose of the home was to provide the patients with the care and attention they required in pleasant surroundings with the necessary nursing under adequate medical supervision. The provision of palliative medical treatment, treatment for intercurrent complaints, and physiotherapy were, of course, objects of the home, but I hold that they were subsidiary to its main purpose and could not be regarded as either independent or co-ordinate purposes." C
D

It has been the argument of the appellant Minister that this paragraph involves, *ex facie*, a misconstruction of the Act, and particularly of the essential word "treatment", and so is wholly vitiated. It is said that the language I have quoted, and especially in its context the phrase "with the necessary nursing under . . . medical supervision", shows clearly that in the arbitrator's view the word "treatment" in the definition of "hospital" is confined to medical (or dental) treatment so as to exclude nursing or, at least, so much of nursing as has been called "routine nursing" as distinct from nursing which is in form and fact medical treatment, and that such a view gives altogether too narrow an interpretation to "treatment". In my judgment, the arbitrator did so construe the word "treatment". I think that conclusion inevitably follows from the second part of the paragraph I have quoted in which the arbitrator seems to me clearly to indicate that the only "treatment" provided by the home was the palliative treatment I have mentioned, and the treatment required to deal with casual illnesses. I think the same conclusion flows also from the latter part of para. 21 of the award in which the arbitrator expressly rejected the argument of counsel for the Minister for a construction of the word "treatment" wide enough to comprehend skilled nursing. He said: E
F
G

"Although no doubt it is often the duty of a trained nurse to give treatment I do not think nursing itself, especially the type of nursing given at the home, is 'treatment' within the meaning of the definition of the Act. Moreover the definition of 'illness' does at any rate indicate that nursing and treatment are two different things."

See also para. 23 of the award: H

"I think, too, that 'treatment' means medical or surgical treatment, in which I would include the giving of drugs either to cure the disease, to mitigate or alleviate the symptoms or to relieve pain, and physiotherapy directed to the same purposes."

I am unable to accept this narrow view of "treatment". In my judgment, "treatment" in the definition of "hospital" includes not only medical treatment

(I can leave out, for present purposes, dental treatment) in the sense that the patient or subject is looked after and attended to by a doctor, but also nursing in the sense that the subject or patient is looked after and attended to by persons professionally trained to look after and attend to the sick. In my view, such a conclusion follows inevitably from a reading together of the two definitions of "hospital" and "illness", for, so read together, "hospital" means (inter alia)

- A "any institution for the reception and treatment of persons suffering from . . . any . . . disability requiring . . . nursing."

And, I add, "requiring nursing as distinct from medical or dental treatment". This view of the definitions is, to my mind, supported by the generally broad scope given to the word "hospital", to which I have already alluded. But counsel for the home sought to escape from this result by contending that, in reading the definition of "illness" into the definition of "hospital", there was a contrary context requiring the exclusion, in effect, of the words "or nursing". It would, in my judgment, be highly surprising if such a contrary intention emerged from the reading together of two adjacent definitions, and certainly not less so where the second is introduced by the word "includes". It is true that from other sections of the Act a distinction may be discerned between "treatment" and mere "care" (which I assume to comprehend "looking after" by persons not professionally trained for such purpose)—see, for example, the reference to "the care of persons suffering from illness" in s. 28 (1). Counsel for the home also sought to derive support from s. 9 (1), a provision designed to give, in certain circumstances, a significance to the word "hospital" expanded beyond the definition, which, after referring to "treatment by or under the direction of medical or dental practitioners", excepts from the scope of the Act premises forming part of a larger institution "of which the main purpose is not therapeutic." From this last reference counsel for the home pressed on us the unlikelihood of an intention by Parliament that the Minister should take over any single institution "of which the main purpose is not therapeutic", a word which (as he contends) is not apt to describe an institution for the treatment of the sick otherwise than medically (or dentally). I do not find it necessary (any more than did the Scottish Court of Session in the case later mentioned) to define the word "therapeutic" in its context in s. 9 (1), for I am clearly of opinion that the inferences drawn by counsel for the home from his other references to the Act are insufficient to confine, as he wishes, the meaning of the word "treatment" in the definition of "hospital". Indeed, these references tend to confirm my own strong impression that if in its definition of "hospital" Parliament had intended to confine "treatment" to medical or dental treatment, Parliament would, following its own example, have said so in clear and obvious terms.

We were referred to definitions of "hospital" taken from other Acts, by no means in *pari materia*, e.g., the Road Traffic Act, 1930, but I have not, for my part, been able to derive any assistance from them towards the solution of the present problem. Nor have I been able to discover any useful application to the present case of the alleged principle of the interpretation of statutes that provisions tending to be confiscatory in effect should be construed in favour of the subject. Assuming (though I do not concede) that the National Health Service Act, 1946, has any confiscatory flavour, still the problem here is, having interpreted the definition provisions of the Act according to their ordinary sense, to decide whether, on the facts, the Royal Midland Counties Home for Incurables is comprehended by the definition—a process which does not seem to me to give any sensible scope for the application of the principle invoked.

On the other hand, I have been much assisted towards my conclusion by the decision of the Inner House in the Scottish case of the *Royal Victoria Hospital v. Wheatley* (1). Both the learned arbitrator and VAISEY, J., regarded the facts of the Dundee Hospital as very different from the facts of the Leamington Home for

Incurables. I agree that they are different. The matter was put thus epigrammatically by VAISEY, J., in the course of his judgment (ante, p. 18):

“ . . . while the home at Leamington is essentially a place in which its inmates come to live, the hospital at Dundee is one where they come to die.”

I may observe, in passing, that, since the Leamington inmates are all suffering from incurable diseases, they must be taken to have come there to die as well as to live. Still, it is true that in the *Dundee* case (1), in the selection of the persons chosen for admission, preference was given to those whose end was near, and particularly to those suffering from advanced inoperable cancer, a disease expressly excluded at Leamington. It followed, therefore, that, at least to a substantial extent, the inmates of the Dundee hospital died directly from the diseases from which they unhappily suffered. But although the precise point argued before us does not appear to have been expressly taken in the Scottish court, it seems to me clear from the opinion of the learned Lord President that he interpreted the word “treatment” in the sense which I have attempted to express. LORD COOPER said:

“By a hospital for incurables I mean a hospital for the reception of patients whose recovery is not expected . . . and for whom all that can normally be done is to provide skilled nursing and alleviation of suffering . . .”

Then, later, he thus interprets the relevant definitions in the corresponding Scottish Act, the National Health Service (Scotland) Act, 1947:

“ . . . there is transferred to the Secretary of State every institution for the reception and treatment of persons suffering from . . . any disability requiring . . . nursing.”

I may add that, to judge from the facts recited in the Lord President's opinion, the relative extent of the medical (or nursing) facilities provided at Dundee was certainly no greater than that provided at Leamington. I should, for my part, be very slow to arrive at a conclusion on the meaning of the relevant sections of the National Health Service Act, 1946, which was at variance with the interpretation put in Scotland on the corresponding enactment applicable in Scotland.

But my conclusion on the matter of construction is not the end of the present case, for there remains the question whether, none the less, the findings of fact of the learned arbitrator remain valid in favour of the home; or, alternatively, whether, having regard to the facts as found, we can, or ought, now to determine the essential question between the Minister and the home. It is on this part of the case that I have, for my part, felt the greatest difficulty.

I have had the advantage of reading in advance the judgment about to be delivered by DENNING, L.J. He agrees with my conclusion on the meaning properly to be attached to the word “treatment”, but, even so, he is of opinion that the findings of the learned arbitrator mean, and should be taken as deciding (as a matter of fact), that the Leamington home was not on the relevant date within the scope of the Act. My brother particularly cites an earlier passage from para. 21 of the award (from which I have already taken a later extract). DENNING, L.J., quotes:

“Such treatment as was given was merely subsidiary to the real purpose of the home [which was to] provide the patients with the care and attention they required in pleasant surroundings.”

In short, according to DENNING, L.J., a home from home. I regret that I have been unable to arrive at the same conclusion. Treating the question as one of interpretation of the award, of discerning from the terms of the award what would have been the arbitrator's conclusion on the facts had he construed the definitions in the same sense that I have done, my inclination is to the opposite conclusion to that of DENNING, L.J. The language which DENNING, L.J., has quoted from para. 21 was stated by way of answer (and must, therefore, be read

in reference to) to the argument put forward by counsel for the Minister for the view that the home did give the patients medical treatment, and that it existed for that purpose. So read, the language quoted seems to me, I confess, at best inconclusive. But there are unquestionably passages in the award tending to support what I will call the "home from home" view. Thus, in para. 16:

A "I am quite satisfied that the atmosphere of the place was much more homelike than that of any hospital, everything was much less formal, even the records and reports."

In para. 14:

B "No doubt the matters I have mentioned in this paragraph constituted palliative and symptomatic treatment, but they formed only a relatively small part of the activities of the home. The quantity of drugs and dressings consumed bears no relation to the requirements of an ordinary hospital of comparable size."

Again, in para. 11:

C "The policy of the committee was to admit those who were likely to settle down for life and make the premises their permanent home. Only those applicants were accepted whose disease had reached such a stage that no real improvement in their condition could be expected. On the other hand, patients who were likely to die shortly were not accepted."

And, perhaps strongest of all, in para. 13:

D "Mr. Badger, the secretary told me that he was often asked by the relatives of prospective patients what sort of treatment they could expect and he always replied: 'You can expect no treatment whatsoever here' . . . but I am satisfied that patients were admitted on the footing that they would get the care and attention and nursing they required but could not expect any specific treatment for their complaint."

E On the other side, however, are passages tending, as it seems to me, no less strongly in the opposite direction. I have already stated the substance of para. 7 (as to the extent and character of the medical supervision) and quoted in full para. 10 (as to the extent of the nursing staff). By no means less cogent is the fact that (as I have earlier recited) the terms of r. 2 of the home's rules were "observed in principle"; and r. 2 concluded (it will be recalled) with the words

F "and no case shall be admitted unless it requires medical supervision and nursing."

I add the following two citations from para. 9 of the award:

G "On application for admission each patient had to supply a medical certificate that he was suffering from a specified disease, was considered to be incurable and eligible under r. 2. About a month after admission Dr. Clayton would report to the committee whether the patient was suitable for retention in the home."

H I have, therefore, been conscious of a serious doubt in my own mind whether, in the absence of a full examination into the whole of the evidence, this court is in a position to substitute a final conclusion in the matter of its own for that of the arbitrator. As I said at the beginning of my judgment, the question being one of fact may, in the end, be one of degree. A hospital, as VAISEY, J., observed, is not a hospital within the Act because it is called a hospital, or excluded from the Act because it is called a home. Equally, I conceive, an inmate cannot be said to be receiving treatment from persons professionally qualified to tend the sick because those persons are called, or call themselves, nurses. On the other hand, the court will naturally be reluctant to refer the matter back to the arbitrator for still further debate, particularly after so comprehensive a series of findings as we have in the present case. And I have had the advantage of

reading in advance the judgment about to be delivered by ROMER, L.J., who has reached a clear conclusion that the findings of fact by the arbitrator lead inevitably to a result in favour of the Minister, once the correct interpretation of the word "treatment" is substituted for that which was at the root of the arbitrator's essential para. 17.

In all the circumstances, and after anxiously considering the various passages in the award which I have extracted and, for convenience, set out above, I have felt satisfied that my inclination, already stated, can be properly justified, and to agree, accordingly, with ROMER, L.J., in holding that the Royal Midland Counties Home for Incurables at Leamington was a "hospital" within the meaning of the National Health Service Act, 1946, and that the property vested, accordingly, in the Minister on July 5, 1948.

In my judgment, the appeal should be allowed and (subject to any argument by counsel as to costs) that an order should be made as prayed in the notice of appeal.

DENNING, L.J.: It is very necessary to get the activities of the Royal Midland Counties Home in true perspective. The people who come to the home are not suffering from killing diseases like cancer, nor infectious diseases like tuberculosis, nor from distressing afflictions like epilepsy. They are simply people who are suffering from disabling complaints like arthritis or Parkinson's disease. Very few are bed-ridden. Most of them get about in wheelchairs or with sticks. They are people who would be looked after in their own homes if their relatives could manage it, but, as their relatives cannot manage it, they are taken in by the home. They stay there for years—the average length of stay is ten years—and quite half of them regularly go away for holidays of a month or so. While there, they can do anything they like within reason. When their time comes to die, they do not, as a rule, die from their disabling complaint, but from one of the fortuitous supervening illnesses to which all mankind is subject. The staff, of course, do all they can to make life bearable for them. They give some of them physiotherapy. To others they give, when necessary, sleeping-tablets, aperients, hyoscine, and so forth; but the amount of drugs and dressings is far less than would be used in an ordinary hospital. Such being the activities of the home, the question is whether it is to be taken over by the State under the National Health Service Act, 1946. The arbitrator went very carefully into the case in all its aspects—it took five days before him—and he came to the conclusion that it was not a "hospital" within the meaning of the Act and not taken over by the State, and VASEY, J., affirmed his decision. We have had very little of the material before us that was before the arbitrator. We have only had his findings. On them I must say that I agree with him.

The key to the legal position lies in the fact that the Act draws a sharp distinction between "treatment" and "care": see s. 24 and s. 28 of the Act. If an institution is provided for the reception and "treatment" of incurables, it is a hospital and is to be taken over by the State; but if it is provided only for the reception and "care" of them it is not. Where is the line, then, to be drawn in this regard between "treatment" and "care"? Neither is defined in the Act, but "treatment" means, I think, the exercise of professional skill to remedy the disease or disability, or to lessen its ill effects or the pain and suffering which it occasions; whereas "care" is the homely art of making people comfortable and providing for their well-being so far as their condition allows. "Nursing", too, is not defined, but it covers, I think, both treatment and care. Some part of it, indeed an important part, is the exercise of professional skill, but a goodly part, perhaps the larger part, is just kindness and attention.

When the Act, therefore, defines "illness" as including any disease or disability requiring mental or dental treatment, or nursing, it means, I think, a disability which requires the exercise of professional skill, as distinct from a disability which only requires care and attention. Likewise, when the Act defines "hospital"

as an institution provided for the reception and treatment of persons suffering from illness, it means an institution provided for the exercise of professional skill on them, as distinct from an institution provided for the care of them. There are, of course, many institutions which have both objects. Their purpose is to treat persons suffering from illness by the exercise of professional skill, and to look after them as well. The position of these institutions depends, I think,

A on their main purpose. If the main purpose is to treat patients for their illnesses by the exercise of professional skill, then the institution is a hospital. But if the main purpose is only to take care of them and make life more comfortable for them, then it is not a hospital but a home, and is not caught by the Acts. A subsidiary purpose may be to treat them by the exercise of professional skill, but this will not make it a hospital if the main purpose is that it should be a home for them. In an old people's home, there are often nurses with professional qualifications, but that does not make it a hospital.

B Some reliance was placed on the provisions for persons suffering from mental defectiveness and for persons during convalescence, but the governing word again is "treatment". If the main purpose of the institution is to treat the mental defectives or the convalescents by the exercise of professional skill, then it is a hospital, but if the main purpose is to take care of them, it is not.

C Turning now to the Royal Midlands Counties Home for Incurables, the rules say that "no case shall be admitted unless it requires medical supervision and nursing." This rule was said of itself to make the home a "hospital" within the meaning of the Act. I do not think so. The rule would be satisfied by only a little professional skill being required for any particular person, whilst the main requirement was to look after him and give him a home.

D It was said also that the arbitrator had in effect found it to be a hospital when he said in para. 17 that the main purpose was to

"provide the patients with the care and attention they required in pleasant surroundings with the necessary nursing under adequate medical supervision."

E I do not think that the arbitrator was there saying that much professional skill was needed. All he had in mind was the modicum of nursing and medical supervision which was necessary to satisfy the rule. I think the key to the award is the finding of the arbitrator in para. 21 that "such treatment as was given was merely subsidiary to the real purpose of the home" which was, as he had said, to "provide the patients with the care and attention they required in pleasant surroundings." In short, it was a home from home.

F Thus interpreted, I see nothing wrong with the award. The arbitrator is the person to say on which side of the line any particular case falls. He has in effect held this to be a home and not a hospital, and we should, I think, uphold his decision. The Scottish case was simply a case on the other side of the line where the main purpose was treatment. I realise that this case is very much on the border line. Different minds may well come to different conclusions, but in a border-line case I think the scales should come down on the side of independence. The voluntary charitable institutions have served this country so well that Parliament can only have intended to take them over when the overriding public interest demands it. If the position is left in doubt, they should be left to carry on their good work undisturbed. This was the view of VAISEY, J., and I agree

H with him. I would dismiss this appeal.

ROMER, L.J.: It appears to me that the question whether or not the home for incurables is within the vesting provisions of the National Health Service Act, 1946, turns largely on whether the definition of "illness" in s. 79 (1) of the Act is applicable to that word where used in the definition, in the same section, of "hospital". The importance of this point lies in the fact that persons who are suffering from "illness" as defined in s. 79 (1) include not only those who require

medical or dental treatment, but also disabled persons who do not need either of those kinds of treatment, but who do require nursing. Counsel for the home, who was fully alive to the latent dangers to his argument which lurk in the definition of "illness", tried, naturally enough, to avoid them by saying that there is a repelling context in the definition of "hospital" which does not permit of its application.

It is clear that disabled persons who require nothing more than nursing (leaving aside for the moment the precise significance of that term) are within the general scope and purview of the Act as expounded in s. 1. By that section the Minister of Health is charged with the duty of promoting the establishment of a comprehensive health service designed to secure improvement in the physical and mental health of the people and the prevention, diagnosis and treatment of illness, and to provide appropriate services accordingly. Now, whether or not the definition of "illness" in s. 79 (1) is incorporated in the definition of "hospital", it plainly applies to illness as used in s. 1, and, therefore, disabled persons who require nursing, but who do not require medical or dental treatment, are included amongst the persons for whose benefit the comprehensive health service was to be established. It is envisaged in s. 1 that illness may be the subject of "prevention, diagnosis and treatment", and in the light of the definition of "illness", the only "treatment" that the disabled persons whom I have mentioned could receive, if they are to receive any at all, would be such "nursing" as their condition required. In relation to such persons, therefore, I deduce that the word "treatment" in s. 1, if it is to have any meaning, can only be equivalent to "nursing". I would also infer that just as these persons are within the beneficial scope of the Act, so also the institutions where they receive their treatment would *prima facie* be within its operation. The objection of counsel for the home to the incorporation of the definition of "illness" in the adjoining definition of "hospital" was based on the view that the word "treatment" in the latter definition means only medical or dental treatment, and that treatment of that kind is inapt in relation to persons who require nothing more than nursing. If, however, I am right in thinking that s. 1 contemplates nursing as being a form of treatment, this argument obviously loses its force, for if nursing is included in treatment for the purposes of s. 1 there can be no sufficient reason why it should not also be within it for the purposes of the definition of "hospital"; and especially in view of the inference to which I have above referred. I would, accordingly, insert parenthetically in the definition of "hospital", after the word "illness", the words "including mental illness and any injury or disability requiring medical or dental treatment or nursing." If so read, the word "treatment" which precedes the parenthesis would, by necessary inference, include the nursing of disabled persons and be in line with the scope of treatment envisaged by s. 1. To put the matter in another way, I am of opinion that Parliament had three forms of treatment in contemplation under the Act, i.e., medical, dental and nursing, and that the last has an independent existence of its own, although in the considerable majority of cases it would co-exist with one of the other two.

On this view, then, and unless the word "nursing" in r. 2 of the home's regulations bears a meaning different from that in the definition of "illness" in the Act, it would seem to follow that the home is a hospital for the purposes of the Act, for under the rule it is an essential condition of entry into the home that the candidate should be incurable or incapable and require nursing. I see no reason to presume any such difference in meaning, and, inasmuch as the arbitrator has found that the principle of the rule is observed by the committee, the home is, *prima facie*, in my judgment, within the Act.

If, then, I am right in this view, the burden is on the home to show that the nature of its activities and the lines on which it is actually run are such as to exclude it from the operation of the Act. It has been suggested on their behalf that the institution is in substance a "home from home", and that most of the

nursing which is provided is designed merely to making the patients more comfortable, as distinct from giving them relief from pain. I do not doubt that there are certain passages in the award, to which SIR RAYMOND EVERSHED, M.R., has referred in his judgment, which seem to point in that direction, but the award as a whole does not, in my opinion, support the suggestion, and some of the findings are quite inconsistent with it. Notwithstanding the homelike

- A receive the nursing which they require, which seems to me to be no more and no less than that which was in contemplation in the legislative definition of "illness" in relation to disabled persons. It is true that "nursing" means more than the mere "care" of persons suffering from illness (see s. 24 and s. 28 of the Act) and, presumably, refers to nursing of a professional character; but that the
- B nursing in the home falls within this category is shown, in my opinion, by the fact that the staff consists of forty-eight full-time and twenty-nine part-time paid nurses under the general control of a matron, and under the supervision of medical practitioners, and by the further fact that about one-third of the patients receive palliative treatment of various kinds which the nurses administer. Moreover, as appears from para. 10 of the award, the differences between the
- C nursing staff at the home and that at a general hospital are differences merely of degree and not of character. If the arbitrator had found that all that the patients required was care and attention, and that that was substantially all they got, the position would have been very different. He did not, however, so find, and, indeed, such a finding would have been inconsistent, as it seems to me, with his statement that the principle of r. 2 was being observed by the
- D committee of the home. In my opinion, accordingly, whatever may be the true scope and meaning of "nursing", the home has failed to show, and the arbitrator has not found, that that which is in fact provided at the home does not fall within it.

- The essential point on which I find myself at variance with the learned arbitrator is in the view, which emerges from para. 17 of the award, that the
- E nursing which is provided by the home is not in itself "treatment", as that word is used in the definition of "hospital", but is properly to be included in the word "reception", and that the only "treatment" which is given in the home is the administering of palliatives and of other symptomatic relief. As I have already said, professional nursing is, in my judgment, "treatment" in relation to incurables in the same way that it is, as I think, envisaged in the
- F definition as "treatment" in relation to convalescents. I am, accordingly, of opinion that the home vested in the Minister in July, 1948, as being a "hospital" for the purposes of the Act. I find comfort and support for this view in the decision and judgments in the *Royal Victoria Hospital* case (1). The similarity between that case and the present appears from the following statement of the
- G objects of the Royal Victoria Hospital, which I quote from the judgment of the Lord Ordinary (LORD BLADES):

- "In terms of its charter of incorporation the objects of the corporation are the maintenance of a hospital in or near Dundee for the reception and treatment of indigent and other persons in Dundee and district who are suffering from incurable disease and are thereby rendered incapable of
- H performing ordinary duties and the giving of such relief and attendance as the corporation may deem proper to such outdoor patients as the corporation may admit; provided that no patient suffering from insanity (congenital or acquired) shall under any circumstances be admitted into the hospital. Incurability is the feature common to all cases admitted to the hospital and the alleviation of suffering is all that can be hoped for."

Then, in the course of his judgment, LORD BLADES, after referring to the definition

of "hospital" and "illness" in the National Health Service (Scotland) Act, 1947 (which are in the same terms as the definitions in the Act of 1946), said:

"I do not think that it will be disputed that a person suffering from an incurable disease is suffering from a disability requiring medical treatment or nursing."

On appeal to the Inner House, the Lord President (LORD COOPER) expressed a similar view. He said:

"There is transferred to the Secretary of State every 'institution for the reception and treatment of persons suffering from . . . any disability requiring . . . nursing.' On the terms of the pursuer's charter and in view of the evidence it is too plain for argument that the Royal Victoria Hospital is such an institution."

It is true that the practice of the hospital was to give priority of admission to patients whose disease had progressed to such an extent that their expectation of life was short, whereas in the present case the practice has been not to accept patients who were likely to die in the near future, but I do not myself think that that element gives rise to any relevant difference of principle. It appears to me that to hold that the home is not a hospital is not only irreconcilable with the opinions of LORD BLADES and the Lord President which I have cited, but is also irreconcilable with the actual decision in that case. The decision is not, of course, binding on us, but it is deserving of the greatest respect and consideration, and, in my respectful judgment, it was right.

On the view which I have expressed as to the construction of the relevant definitions, it is unnecessary to consider the alternative point on which the Minister relied, namely, that, even if "treatment" should be confined in the definition of "hospital" to medical or dental treatment, there is in fact a sufficiency of palliative treatment given in the home to bring it within the definition.

For the reasons which I have explained, I find myself unable to agree with the conclusions at which the arbitrator and the learned judge arrived, and I would allow the appeal.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health* (for the Minister of Health); *Farrer & Co.*, agents for *Field & Sons*, Leamington Spa (for the general committee of the home).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

DEVINE v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Denning, L.J., sitting as a judge of the Division),
March 31, 1954.]

A *Medical Report—Agreed report—Production of report by one party—Reciprocal action by other party—Contents of report.*

In a normal case where medical issues are raised, no other arrangements are made, and there is an order on a summons for directions under R.S.C., Ord. 30, that, unless a medical report be agreed between the parties, medical evidence be limited to two witnesses on each side, and one party produces his medical reports for inspection in an attempt to agree the reports, there is an implied understanding that the other party shall reciprocate and do the same. The medical reports can be confined to the medical issues and need not include such things as introductory matters or the history of the case. There is no legal duty on the parties under the order to attempt to agree, but it is highly desirable that they should do so to save costs and the time of medical witnesses.

C *ACTION for damages for negligence.*

The plaintiff, Caroline Beatrice Devine, was employed by the defendants as an operator of an electrical mincing machine at the defendants' canteen at Goodwin Street, Willesden. On Apr. 13, 1950, while operating the machine, she fell from a chair on which she was standing and suffered injury. Later, she began the present proceedings, and, on Jan. 26, 1953, on a summons for directions under R.S.C., Ord. 30, the usual order was made that

“unless a medical report be agreed between the parties the medical evidence be limited to two witnesses on each side”.

E The plaintiff's solicitors forwarded copies of their medical reports to the defendants' solicitors, but copies of the defendants' medical reports were not sent to the plaintiff's solicitors. During the trial the question was raised whether, where one party had given the other party copies of his medical reports in an attempt to agree them, there was any obligation on the other party to reciprocate.

Beney, Q.C., and *Stranger-Jones* for the plaintiff.

Marven Everett, Q.C., and *Tudor Evans* for the defendants.

F **DENNING, L.J.:** A question has arisen as to what should happen when one party has given the other a copy of his medical report or reports. Is there any obligation on the other to reciprocate and also show his? That must depend on the arrangements made at the time, but, in the ordinary case, where one party, usually the defendant, intimates that he would like to see the plaintiff's medical reports for the sake of attempting to agree them, I am clearly of the opinion that G there is an implied understanding that the defendant shall, in his turn, duly show the plaintiff his medical reports. It would be most unfair that one party should disclose his medical reports and that the other party should not.

H There is no suggestion of any intention to act improperly in this case; quite the reverse. Indeed, the solicitor for the defendants, when he refused to disclose his own medical reports, added an undertaking of his own that the defendants would not make use of the information that they had already received. That was done in a praiseworthy endeavour to act quite fairly in the matter, but there was nothing to compel the defendants to give such an undertaking. It does not affect the position. The proper course to adopt, if one party produces his medical reports for inspection, is that the other party should reciprocate and do the same. If they are agreed, they can be used by the court at the trial and the medical men need not be called; but if they are not agreed then the medical witnesses must be called.

Sometimes the medical reports contain matters which go outside the medical issues strictly so called, such as introductory matters, history of the case, and so forth. When the parties make an attempt to agree, there is no need that those matters should be included. The medical reports can be confined to the medical issues strictly so called.

I would add that there is no legal duty on the parties under this order to attempt to agree. It is a matter for the discretion of their legal advisers. It is to be hoped that, in most cases, they will attempt to agree for the sake of saving costs and the time of the doctors, but, in a serious case, it is often of great help to the court to see the medical men themselves.

Solicitors: *H. R. Hodder & Son* (for the plaintiff); *W. H. B. Gilmour*, Solicitor, British Transport Commission (for the defendants).

G.A.K.

R. v. EVENING STANDARD CO., LTD. AND OTHERS. *Ex parte* ATTORNEY-GENERAL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Hallett, JJ.),
March 29, 1954.]

Contempt of Court—Inaccurate report of trial—Mistake of reporter—Liability of newspaper proprietors.

When K., who was charged with the murder of his wife, came before the examining justices, two women B. and D., who appeared as witnesses for the prosecution, gave evidence that K. had told them that he was not married. B. also said that K. had asked her to marry him. On the first day of the trial, the judge, having read B.'s deposition, ruled, in the absence of the jury, that the statement that K. had asked B. to marry him was not admissible. Later, D. gave evidence, and the reporter of an evening newspaper, who was reporting the trial, inaccurately and by a mistake telephoned to the office of the newspaper during the trial stating that D. had given evidence that K. had asked her to marry him, and that inaccurate statement appeared in the newspaper that same evening. K. was later acquitted of the murder. On a motion for a writ of attachment for contempt of court to issue against the proprietors of the newspaper, the editor, and the reporter,

HELD: the inaccurate statement published by the newspaper amounted to a contempt of court in that it was a misrepresentation of the proceedings of a court and might have interfered with the course of justice; the proprietors of the newspaper were vicariously liable for the reporter's mistake: *Re Read & Huggonson* (1742) (2 Atk. 469), applied: and a substantial penalty would be imposed on them; but no separate penalty would be imposed on the editor as he had no reason to suppose that the report telephoned to him by the reporter was inaccurate; and, as the reporter had not intentionally sent out false information, no separate penalty would be imposed on him.

AS TO MISREPRESENTATIONS OF THE PROCEEDINGS OF A COURT, see HALSBURY, Halslham Edn., Vol. 7, p. 7, para. 11; and FOR CASES, see DIGEST, Vol. 16, pp. 22-24, Nos. 169-208.

Cases referred to:

- (1) *R. v. Bolam. Ex p. Haigh*, (1949), 93 Sol. Jo. 220; 2nd Digest Supp.
- (2) *Re Read & Huggonson*, (1742), 2 Atk. 469; 26 E.R. 683; sub nom. *Roach v. Garvan*, Dick. 794; 21 E.R. 480; 16 Digest 6, 1.
- (3) *R. v. Payne*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 16 Digest 23, 190.
- (4) *R. v. Daily Mail (Editor). Ex p. Factor*, (1928), 44 T.L.R. 303; Digest Supp.

MOTION for a writ of attachment for contempt of court against the Evening Standard Co., Ltd., Percy Elland, the editor of the "Evening Standard", and George Embleton Forrest, a reporter, in respect of an article which was published in the "Evening Standard" on Feb. 23, 1954, and which purported to be a report of the trial of one Kemp, who had been charged with the murder of his wife.

A Kemp's wife had disappeared, and was, in fact, dead, a considerable time before his arrest, and part of the case for the prosecution was based on a number of mis-statements which he had made after her disappearance. The reporter, Forrest, who reported the trial, was also present when Kemp was charged before the examining justices. The prosecution called as witnesses a Miss Briggs and a Mrs. Darmody to prove certain statements which Kemp had made to them. B Before the justices Miss Briggs said that Kemp had told her that he was unmarried and that he had asked her to marry him. Mrs. Darmody's evidence was that Kemp had told her that he had been married and that his wife had died.

On Feb. 23, 1954, the trial opened at Chelmsford Assizes. After Miss Briggs, the first witness, had started to give her evidence, the judge, having read her deposition, intervened and, after a discussion with counsel in the absence of the jury, he ruled that the statement that Kemp had proposed marriage to Miss C Briggs after the death of his wife should not be allowed in evidence as it was highly prejudicial to him and was not relevant. Miss Briggs' evidence of what Kemp had said to her was, accordingly, confined to the statement that he was unmarried. Mrs. Darmody then gave evidence, repeating in substance what she had said before the examining justices. She said that she had met Kemp D in a public house, that she had seen him several times, that he had told her that he was not married, that she had asked to see his pay book, and that he had produced a buff-coloured book, saying: "Before I show you this I shall have to tell you I have been married", and that he went on to say that his wife had died two years before in childbirth.

The reporter, Forrest, was in court when Miss Briggs gave her evidence, but, E while the discussion took place between judge and counsel in the absence of the jury, he left the court to telephone to the publishing office of the "Evening Standard", his system of reporting being to take some notes in court, then to go to a telephone to communicate his report to his office, and then to return to court to resume his note-taking before telephoning again. He returned to court before Mrs. Darmody gave her evidence. That evening (Feb. 23) the "Evening F Standard" published a report of the trial under the headline: "Trunk trial story of marriage offer". The report began:

"Mrs. Gertrude Darmody, of Spitalfields, Norwich, said at the assizes here today that a man accused of murdering his wife asked her to marry him".

G The report went on to say:

"Mrs. Darmody said she met Kemp in a public house in September last year".

Then, in inverted commas:

H "He told me he was not married. After I had seen him in the same public house again and he had asked me to marry him, I asked him to show me his army pay book."

The words "and he had asked me to marry him" were wholly inaccurate, no such statement having been made. On the back page of the newspaper, where the report was continued, was the headline: "Accused man 'asked me to marry'".

In his telephone message to the "Evening Standard" office, Forrest said that when Miss Briggs began to give evidence a submission was made by counsel

for the defence in the absence of the jury, and that Miss Briggs collapsed at the end of her evidence and was carried from the court. He went on to say:

"The witness who followed her into the box was Mrs. Gertrude Darmody of 55 Spitalfields, Norwich. She said that she met Kemp, the accused, in a public house there in September last year. 'He told me he was not married. After I had seen him in the same public house again and he had asked me to marry him, I asked him to show me his army pay book.'"

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There followed a short résumé of the rest of her evidence.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), and J. P. Ashworth for the Attorney-General.

Sir Hartley Shawcross, Q.C., and Milmo for the Evening Standard Co., Ltd., and Percy Elland, the editor.

B

G. D. Roberts, Q.C., and T. G. Roche for George Embleton Forrest, the reporter.

LORD GODDARD, C.J., delivered the following judgment of the court. In this case the Solicitor-General moves for a writ of attachment to issue against the editor of the "Evening Standard", the Evening Standard Co., Ltd., and one Forrest, a reporter, in respect of matter which was published in the "Evening Standard" on Feb. 23, 1954, and which purported to be a report of the trial of a man named Kemp on a charge of murdering his wife. The fact that the man was acquitted of the murder is neither here nor there. Fortunately, no damage was done to the prisoner who was on trial, though that is not a matter which concerns the court. The question is one of much more far-reaching importance than that.

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[HIS LORDSHIP stated the facts, and continued:] The evidence which Miss Briggs might have given if the learned judge had not ruled that it was not to be admitted as it was highly prejudicial to Kemp was printed in the "Evening Standard" and attributed to another witness who had not said anything of the kind. Consequently, the public at Chelmsford, including members of the jury, who are no longer locked up when the court has risen, could have bought the paper and read that Kemp had made an offer of marriage to Mrs. Darmody although he had not done so.

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How comes it that this inaccurate statement, a most prejudicial statement, was published? It was suggested that it was a mishearing. I do not think that there could possibly have been any question of mishearing. It seems to the court that the most probable explanation and the inference which should be drawn is that the reporter, going in and out of court, listening to the evidence of one witness and not listening, perhaps, to the evidence of another witness, had at the back of his mind what he had heard before the justices. He remembered that at some time something was said there about an offer of marriage. Miss Briggs' evidence he telephoned to London as evidence of no moment, but he had been in court while Mrs. Darmody had given evidence that she had asked Kemp if he was married. Having this at the back of his mind, he inaccurately and carelessly telephoned what he thought she had said, having got the idea into his mind from what he had heard on the previous occasion.

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This is surely a proper matter to bring before this court. It is as well that the nature of the jurisdiction which this court exercises on these occasions with regard to reports of trials in newspapers should be understood. It is called contempt of court, which is a convenient expression because it is akin to a contempt. The foundation of the jurisdiction is that all misreports, whether they form comments on cases before they are tried or alleged histories of the prisoner who is on trial, as in *R. v. Bolam. Ex p. Haigh* (1), where this court had to intervene, are matters which tend to interfere with the due course of justice. One of the earliest cases in which this jurisdiction was invoked was *Re Read & Huggenson* (*The St. James's Evening Post Case*) (2) before that great judge, LORD HARDWICKE,

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L.C., in 1742. That was a motion to commit two printers for publishing a libel against litigants who had made affidavits in a cause then before the court. It was objected that it was not a matter for the summary jurisdiction of the court because there was a remedy at law for libel. LORD HARDWICKE, L.C., started his judgment by saying (2 Atk. 469):

A “Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard.”

B Having rejected the argument that he could not deal summarily with the case because there was a remedy at law, he went on to deal with three different sorts of contempt. With regard to the third sort, he said (*ibid.*, 471):

“There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.”

C That is the foundation of the summary jurisdiction which this court has exercised now for more than two hundred years in the case of comment before the case is heard, or of the publication of improper information about a case which is to be heard or is not fully heard, or of the misrepresentation of the proceedings in a court. We have frequently said that this jurisdiction should be invoked and should be exercised only in cases of real and serious moment, and, reaffirming

D what LORD RUSSELL OF KILLOWEN, C.J., said in *R. v. Payne* (3) ([1896] 1 Q.B. 580), we have said that the power which the court possesses in such cases should be exercised only where there has been a serious interference with justice. In the present case there might have been a disastrous interference with justice. As LORD HEWART, C.J., said in *R. v. Daily Mail (Editor)*. *Ex p. Factor* (4), the gravity of the penalty or sanction which this court will impose must depend on

E the circumstances of the particular case. If a comment is gratuitously published either in a newspaper or in any other form of public dissemination, this court would not hesitate to impose a severe penalty, even the penalty of imprisonment, as was done in *R. v. Bolam*. *Ex p. Haigh* (1). In this case, however, one cannot avoid coming to the conclusion that there was no intentional interference with the course of justice. Let us take the case of Mr. Forrest first. I cannot believe that

F he for a moment deliberately or intentionally sent out false information. As a responsible journalist, he would know that to do so would place him in the gravest possible difficulty. Nor can one attach moral blame, if I may use that expression, to the editor, who had no reason to suppose that a reporter of the “Evening Standard” had sent him information in an inaccurate form. Therefore, there are mitigating circumstances in this case, and one can only be thankful that the

G misreport did not react unfavourably on the prisoner. But whether it reacted favourably or unfavourably on the prisoner is not the test on which this court interferes. The court interferes to prevent and punish the dissemination of false reports, or improper comments or observations on cases before they are heard. Counsel for the Evening Standard Co. submitted that, while his clients desired to abide by the well understood rule of journalism that the editor and

H the proprietors of a newspaper must in a case such as this take responsibility, the company ought not to be made vicariously liable for the mistake or misconduct of the reporter. I do not think that we could possibly agree with that submission, which seems contrary to what LORD RUSSELL OF KILLOWEN, C.J., and WRIGHT, J., said in *R. v. Payne* (3), where they pointed out that the court would interfere where the publication was intended or calculated or likely to interfere with the course of justice. WRIGHT, J., used the words “likely” and “calculated”, LORD RUSSELL used the words “intended” and “calculated”. Indeed, the

principle goes further than this, because in the case of the *St. James's Evening Post Case* (2), LORD HARDWICKE, L.C., said (2 Atk. 472):

"With regard to Mrs. Read, the publisher . . . by way of alleviation, it is said, that she did not know the nature of the paper; and that printing papers and pamphlets, is a trade and what she gets her livelihood by. But, though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print anything that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous; and so is the rule at law, and I will always adhere to the strict rules of law in these cases."

The court has now to consider what penalties it should impose. We must impose a substantial penalty in this case, because although the misreport may have been the result of misadventure, or mistake, it is a very grave mistake and one which might have done incalculable harm. We do not propose to impose any penalty on the editor because he had no reason to suppose that the report telephoned to him by the reporter was otherwise than accurate. I have already said that the principle of vicarious liability is well established in these cases and must be adhered to. We have had some doubt as to what we should do in the case of the reporter, Mr. Forrest. As I have already said, we think he made an honest mistake and we are quite convinced that he did not deliberately send up that which he knew to be untrue. Perhaps, owing to ill health or other reasons, he had got a confused idea in his mind. We are not, therefore, going to impose a separate penalty on him. We shall order the Evening Standard Co. to pay a fine to the Crown of £1,000 and the costs of these proceedings. The fine must be paid within forty-eight hours.

Order accordingly.

Solicitors: *Director of Public Prosecutions; Allen & Overy* (for the newspaper company and the editor); *Withers & Co.* (for the reporter).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

SKULL v. SKULL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Sachs, J.), March 3, 4, 1954.]

Divorce—Appeal—Divisional Court—Jurisdiction—Application for re-hearing—No appearance entered by applicant—No appeal "in ordinary course" to Court of Appeal—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36 (1).

On Sept. 2, 1946, the husband left the matrimonial home. On Dec. 18, 1946, on an admission by the husband, the justices found proved the wife's complaint that he had deserted her, and made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that he should pay her a weekly sum as maintenance. The husband regularly paid the sum ordered as maintenance. On June 16, 1953, he filed a petition for dissolution of the marriage on the ground of cruelty, and, alternatively, constructive desertion. The wife acknowledged service of the petition, but she did not enter an appearance. She consulted an "assessor" who drafted a document entitled "Particulars of defence" in which it was stated that she denied that she had deserted the husband, and the "assessor" advised her not to attend the hearing. On Nov. 17, 1953, the petition came undefended before the commissioner, who did not read the "particulars of defence", held that the evidence adduced by the husband, though not amounting to cruelty, proved constructive desertion, and granted him a decree nisi. On an application by the wife under the Matrimonial Causes Rules, 1950, r. 36 (1), for a re-hearing of the petition,

HELD: assuming that it was an error of the court within the meaning of r. 36 (1), either (i) to disregard the fact that the wife had obtained an order of the justices on the ground of the husband's desertion which had subsisted, and been implemented by the husband, during the period of the desertion now alleged against her, or (ii) to grant a decree on the ground of desertion on facts which had been held not to amount to cruelty, contrary to the decision in *Pike v. Pike* ([1953] 1 All E.R. 232), nevertheless, as the wife, having failed to enter an appearance, could not appeal in the ordinary course to the Court of Appeal, there was no question of trespassing on the exclusive jurisdiction of that court, and, therefore, the application could be heard, and a re-hearing of the husband's petition would be ordered.

Observations of COURT OF APPEAL in *Prince v. Prince* ([1950] 2 All E.R. 384), applied.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 36, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10. p. 215.

Cases referred to:

- (1) *Prince v. Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 2nd Digest Supp.
- (2) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest, Replacement, 363, 3005.
- (3) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest, Replacement, 360, 2978.
- (4) *Pike v. Pike*, [1953] 1 All E.R. 232; [1954] P. 81n.
- (5) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 2nd Digest Supp.
- (6) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 2nd Digest Supp.
- (7) *Peek v. Peek*, [1948] 2 All E.R. 297; 2nd Digest Supp.

APPLICATION by the wife under the Matrimonial Causes Rules, 1950, r. 36 (1), for the re-hearing of the husband's petition for divorce heard undefended by His Honour JUDGE RICE-JONES, sitting as a Special Commissioner, on Nov. 17, 1953.

The parties were married in October, 1945. On Sept. 2, 1946, the husband left the matrimonial home, and, on a complaint by the wife that he had deserted her, justices issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. On Dec. 18, 1946, when before the justices, the husband admitted that he had deserted the wife. The justices, accordingly, found her complaint proved and made an order in her favour for the payment by the husband of £1 a week as maintenance, deleting the non-cohabitation clause from the order. Thereafter, the husband regularly paid the sum of £1 as ordered. On June 16, 1953, the husband filed a petition for dissolution of the marriage, alleging that the wife had treated him with cruelty, and, alternatively, that by such conduct she had driven him from the matrimonial home and thereby deserted him, and he prayed for the exercise of the court's discretion in his favour. The wife acknowledged the receipt of the petition, but she did not complete the memorandum of appearance. A notice dated Nov. 9, 1953, was served on the wife informing her that the husband's petition would be heard on Nov. 17, 1953. She thereupon consulted an "assessor" who drafted for her a document entitled "Particulars of defence" in which it was stated:

"I deny that I have deserted the petitioner. The facts are that he deserted me."

That document was received by the husband's solicitors on Nov. 16, 1953. On Nov. 17, 1953, the petition came before the commissioner. The wife did not attend court and counsel for the husband objected to the commissioner looking at the "Particulars of defence". The petition was, therefore, heard undefended. The commissioner dismissed the charge of cruelty, but he found that the wife

had deserted the husband and in the exercise of his discretion granted him a decree nisi. The wife served notice of application for a re-hearing of the petition, and in an affidavit in support of the application she stated that she had had a consistent intention to defend the proceedings, that she applied for legal aid, that legal aid was offered to her on payment of a sum of £45, that owing to a decrease in income she did not accept the offer, that she consulted an "assessor" who prepared the "Particulars of defence", and that she was advised that it would be better for her case if she did not appear at the court.

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Kee for the wife.

C. L. White for the husband.

LORD MERRIMAN, P.: The difficulty in the present case is that it is an essential condition of the application of the Matrimonial Causes Rules, 1950, r. 36 (1), that no error of the judge at the hearing is alleged, and it has been held repeatedly, and the Court of Appeal has emphasised the point, that "alleged" does not merely mean alleged as a matter of form. One has not merely to look at the notice of motion. It means alleged as a matter of substance. If a matter is necessarily alleged, if it is a necessary part of the ground on which the re-trial is sought, it is "alleged" whether or not it is formally alleged.

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[His LORDSHIP stated the facts and continued:] The point which troubles me, and was, I think, expressly, at any rate intentionally, left undecided by the Court of Appeal in *Prince v. Prince* (1) is: What is the situation in regard to the allegation or non-allegation of error within the meaning of the Matrimonial Causes Rules, 1950, r. 36 (1), if a true conclusion about what happened at the trial is that an inference was drawn from undisputed evidence which was not justifiable on the materials before the court? I do not propose to consider the authorities on this point, which were reviewed by the Court of Appeal in *Prince v. Prince* (1). I refer particularly to the passage in the judgment of SIR RAYMOND EVERSLED, M.R. ([1950] 2 All E.R. 383, para. C to end of judgment) and, in particular, to the passage (*ibid.*):

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"We think there is a difference, albeit a fine one, between an incorrect selection of conflicting testimony and an erroneous inference drawn therefrom, and an inference drawn from undisputed evidence which was justifiable on the materials before the court, although subsequently proved to be incorrect."

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As I am not expressing any concluded opinion about the matter, I will merely point to the circumstances which may be, and, in the present case (which went undefended, and in which the evidence was all on one side and was not disputed), have been suggested as tending to show that the finding of desertion was not justifiable on the materials before the court, apart altogether from any materials which may be brought before the court on some subsequent occasion. The first and important circumstance is that a court of summary jurisdiction had held one or other of the spouses to be in desertion in respect of the very separation which was being considered on the later occasion. In the present case the husband was held by the justices to have deserted the wife on Sept. 2, 1946, in respect of which separation it is not suggested that any overtures have subsequently been made for a resumption of cohabitation by the husband. On the contrary, the order of the justices dated Dec. 18, 1946, has been regularly implemented by the payment by the husband of £1 a week as ordered. It was, of course, decided in *Harriman v. Harriman* (2) that a finding of a court of summary jurisdiction does not estop the High Court in matrimonial matters. It is, therefore, open to a judge or commissioner sitting in divorce to come to a different conclusion. I should, however, have thought it beyond doubt that where, as in the present case, a husband who has been found by the justices to have deserted the wife, nevertheless alleges in the High Court that she had deserted him, weight must be attached, in assessing the alleged culpability of the wife, to the fact that she

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does hold that order, which has subsisted and been regularly implemented during the period of the desertion alleged against her. That is different from saying that the High Court is in any way estopped on a later occasion from coming to a conclusion opposite to that of the justices. It is giving effect to the continued currency of the order during the intervening period.

A The next criticism is that it was admitted that there was no evidence directed to the charge of constructive desertion distinct from that which was pleaded as being directed to the charge of cruelty. Evidence was led as to the effect on the mental health of the husband of the various matters alluded to in the petition, but the commissioner, having observed that he did not see how the husband could establish cruelty, appears to have paid no further attention to that charge. Evidence was then given of the husband's adultery, which, I may say in passing, did not, so far as I can detect it, deal even in the slightest degree B with the point whether or not that adultery had affected the wife, or even whether or not she was aware of it—a point which still holds good since it was first laid down in *Herod v. Herod* (3). The judgment of the commissioner reads:

“I will grant a decree nisi on the ground of desertion, and exercise discretion”.

C The same allegations were put forward as cruelty and as constructive desertion. The cruelty was dismissed. Although the learned commissioner does not expressly say that he finds the cruelty not proved, he had already said, after hearing the husband's story of the married life, that he did not see how cruelty could possibly be proved, and he pronounced a decree only on the ground of desertion. This appears to raise, in a clear-cut form, the possibility of a D misdirection, inasmuch as the commissioner does not appear to recognise the decision in *Pike v. Pike* (4), where it was held that, in the absence of any evidence directed to the question of expulsion other than that directed to an unproved charge of cruelty, the same conduct could not be dressed up as constructive desertion. I express no final opinion on these matters, although, perhaps, I ought to do so, because on one view of the matter it may be thought E that a conclusion arrived at by ignoring, on the one hand, the potency of the wife's order, and, on the other hand, by the impropriety of using as evidence of constructive desertion matters which are put forward as cruelty and rejected as such, when there is nothing else, is so plainly an error of the court at the trial as to take the case out of the Matrimonial Causes Rules, 1950, r. 36 (1).

F Counsel for the wife reviewed the decision in *Prince v. Prince* (1). I do not want to press any admission of counsel in a legal argument too far, but he did admit, as I think rightly, that, if the true conclusion is that an unjustifiable inference was drawn from undisputed evidence on the materials before the court, it is difficult to resist the conclusion that that is error of the court. He pressed us, however, to rely on the final paragraph of the judgment of the Court of Appeal in *Prince v. Prince* (1) where, by way of explanation of the reason for r. 36 (1), G the Court of Appeal, after considering all the matters about error illustrated by the cases, expressed the view ([1950] 2 All E.R. 384) that the intention of the rule is

“to give or preserve to a Divisional Court (because of the peculiar public concern in matrimonial matters) the right to order a new trial or a re-hearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal”.

H I stress the words “in the ordinary course”, because they are a repetition of, or an allusion to, an earlier passage in the judgment in which SIR RAYMOND EVERSHED, M.R., said (*ibid.*, 382):

“Having regard to the fact that the wife did not enter an appearance to the petition the case was one in which she could not appeal in the ordinary course to the Court of Appeal, and, therefore, there was no question of trespassing on the exclusive jurisdiction of that court”.

I regard the words, "in the ordinary course", twice repeated, as governing that passage. One may feel that, having regard to the unsatisfactory course that this trial took and the desirability of clearing up (I will not say the "error") the possible mistakes which have occurred, the Court of Appeal, as a matter of indulgence, notwithstanding the manifest errors in procedure made by the wife, might have allowed an appeal to be prosecuted. I do not think, however, that it is our business to investigate whether or not the circumstances are such that the Court of Appeal might be prepared to consider the present case exceptional. I think our duty is to act on the plain direction that what matters is whether or not, in the ordinary course, the wife could go to the Court of Appeal, and about that there can only be one answer. She could not, because of her failure to enter an appearance or to take any other steps to put herself right.

There remains the other possible solution, indicated by SIR RAYMOND EVERSHERD, M.R. (*ibid.*, 383):

"The question may be asked: What remedy the respondent spouse has in an undefended case if he is precluded from appealing to the Court of Appeal because he has not appeared in the suit and is precluded from asking the Divisional Court for a re-hearing because he cannot say that the court has not made an error at the hearing?"

The answer is that he must persuade the Queen's Proctor to intervene. So far as I know, no effort has been made to persuade the Queen's Proctor to intervene in the present case. The Queen's Proctor, however, might be influenced by the view (and I know that it has happened in past cases) that the whole thing could be dealt with under r. 36.

If I am right in the view which I take of *Prince v. Prince* (1), namely, that in spite of the fact that the very class of case that we are dealing with is impliedly, if not expressly, left open as regards the question whether or not error of the court is alleged, nevertheless the conclusion is the thing that matters, and, if this case answers the test that it is one in which the wife would not, in the ordinary course, be entitled to go to the Court of Appeal, we are on safe ground in employing the sub-rule to put the matter right. On that ground I think that this motion should succeed, the decree should be set aside, and a re-hearing ordered.

SACHS, J.: The Matrimonial Causes Rules, 1950, r. 36, reads as follows:

"(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court. . . (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal".

[HIS LORDSHIP stated the facts and continued:] In exercising its power under that rule the court considers, not merely the individual merits of the parties, but the interest of the State as well. The power is not confined to cases where there has, in fact, been no service of the petition or a procedural irregularity, or where a party has made what might be called a reasonable mistake as to either how to set about defending or where to go to defend when the case comes on. It is a power which has been and can be exercised where there has been deliberate standing by, as in *Winter v. Winter* (5), or where the party applying for a re-hearing had actually burnt the petition and thought that the court would never give a decree on such evidence as would come before it. It is, therefore, open to this court to act where the mistake has been a stupid one—as it was in the present case. In such a case it can act, with the aid of the fresh material brought before it, on the general merits and justice of the case, apart from any question of error by the commissioner. Accordingly, I start with the view that there has been a silly mistake by the wife, which resulted in the petition being heard undefended when the husband's right to a decree was intended to be

contested, and that the case is one where this court would normally order a re-hearing on grounds on which the Court of Appeal cannot do so.

I now consider whether or not, in the present case, the commissioner was in error in that he was not entitled to draw from the undisputed evidence the inferences which, in fact, he drew. Both counsel have argued that the court was entitled to act on the evidence before it. I have, however, come to the same conclusions as LORD MERRIMAN, P., and am prepared to assume that the commissioner was in error, but it is an error which neither in form nor in substance has been alleged by the wife, nor is it one which, to use words appearing in the judgment in *Prince v. Prince* (1) ([1950] 2 All E.R. 384) is necessarily alleged in order to secure the wife her relief under r. 36.

That leads me to the final point. There was, or is assumed to be, an error on the part of the commissioner when he heard the present case. The question follows whether or not, for that reason, this court ought not to act under r. 36 (1). The history of r. 36 and the principles which lie behind it have been discussed in *Prince v. Prince* (1). In that case references were made to the anxiety which LORD MERRIMAN, P., had expressed in previous cases that this court should be careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal, and the court then dealt (*ibid.*, 383) with the distinctions which relate to whether or not an error is being alleged. Finally, after posing the question (*ibid.*, 384) whether or not, in dealing with an application relating to a case contested at the original hearing, this court had in *Petty v. Petty* (6), imposed too strict a limitation on itself, the Court of Appeal held in *Prince v. Prince* (1) (where, too, the original hearing was contested) that on the facts an error of the court was necessarily being alleged, and that it followed that the matter was thus one to be dealt with by the Court of Appeal and not by the Divisional Court. The point which does not, to my mind, appear to be dealt with in *Prince v. Prince* (1) is: What is the position when an applicant has two separate points on which he can rely—the first being one on which the Court of Appeal can act, but this court cannot, and the second being one on which this court can act and the Court of Appeal cannot? I venture to think that this question is left open in *Prince v. Prince* (1), where (*ibid.*, 383) reference is made to the point being similarly left open in *Peek v. Peek* (7). This may arise, first, where there has been no appearance entered by the applicant before trial, and, secondly, when an appearance has been entered. In the present case no appearance was entered. I agree with LORD MERRIMAN, P., and take my stand, so to speak, on that portion of the judgment in *Prince v. Prince* (1), where SIR RAYMOND EVERSHED, M.R., states (*ibid.*, 384) he is referring to cases

“in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal.”

The present is such a case, and I agree that there is, therefore, nothing to prevent our acting under r. 36 (1).

That leaves open, and I express no opinion on it, a question which may be of particular importance as regards undefended cases where there has been an appearance. When there are two separate points of the type to which I have referred, and, perhaps, the point which can be dealt with by this court is short and clear, and the point which lies within the jurisdiction of the Court of Appeal may not be so short and clear, is the applicant debarred by the existence of the Court of Appeal point from coming to this court? That must be decided when it arises. In the present case the appeal, in my view, should be allowed.

Order for re-hearing of husband's petition.

Solicitors: *Edward Fail & Co.* (for the wife); *Jordan & Lavington* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

STARKEY v. STARKEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Sachs, J.), March 9, 10, 1954.]

Justices—Husband and wife—Maintenance—Ante-dating of order—Committal to prison—No direction for accrual of arrears—Magistrates' Courts Act, 1952 (c. 55), s. 75.

On Apr. 23, 1952, justices dismissed the wife's complaint that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. On Feb. 11, 1953, the Divisional Court allowed the wife's appeal, found the complaint proved, and remitted the summons to the justices to assess the proper amount of maintenance. On Aug. 18, 1953, the justices ordered the husband to pay the wife maintenance at the rate of £5 a week, to take effect from that date, as they held that they had no jurisdiction to ante-date the order. On Feb. 24, 1954, on the wife's complaint, the justices committed the husband to prison in respect of arrears of maintenance at that date.

HELD: the justices had power to ante-date the order of Aug. 18, 1953, to, at any rate, Feb. 11, 1953, when the Divisional Court found that the wife's complaint had been proved, but, as, on Feb. 24, 1954, the justices had ordered that the husband be committed to prison in respect of the arrears of maintenance at that date and had not directed, under the Magistrates' Courts Act, 1952, s. 75, that further arrears of maintenance should accumulate during his imprisonment, it would not now be right, whether as a matter of law or as one of discretion, to ante-date the order of Aug. 18, 1953, and so create further arrears for which in the future the husband might again be committed.

AS TO ENFORCEMENT OF ORDERS IN AFFILIATION AND KINDRED PROCEEDINGS, see HALSBURY, Simonds Edn., Vol. 3, pp. 131-134, paras. 203-208, and HALSBURY, Hailsham Edn., Vol. 21, p. 649, para. 1112; and FOR CASES, see DIGEST, Vol. 3, pp. 403, 404, Nos. 367-379.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 75, see HALSBURY'S STATUTES, Second Edn., Vol. 32, p. 480.

Cases referred to:

- (1) *R. v. Miskin Lower Justices. Ex p. Young*, [1953] 1 All E.R. 495; [1953] 1 Q.B. 533; 117 J.P. 166.
- (2) *Jinks v. Jinks*, [1936] 3 All E.R. 1051; 27 Digest, Replacement, 682, 6510.
- (3) *Baxter v. Eckersley*, [1950] 1 All E.R. 139; [1950] 1 K.B. 480; 31 Digest, Replacement, 664, 7642.
- (4) *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford)*, [1926] 1 K.B. 348; sub nom. *Re Dexters, Ltd. & Hillcrest Oil Co. (Bradford)*, 95 L.J.K.B. 386; 134 L.T. 494; 39 Digest 684, 2702.

APPEAL by the wife against an order of Warwickshire justices, dated Aug. 18, 1953.

On Mar. 14, 1952, on a complaint by the wife justices issued a summons against the husband charging him that he had wilfully neglected to provide reasonable maintenance for her. On Apr. 23, 1952, the justices dismissed the complaint. On Feb. 11, 1953, the Divisional Court allowed an appeal by the wife against the justices' order, and directed that, it being found that the wife's complaint that the husband had been guilty of wilful neglect to provide reasonable maintenance for her was true, the summons be remitted to the justices to assess the proper amount of maintenance to be paid by the husband. On Aug. 18, 1953, the justices ordered the husband to pay the wife maintenance at the rate of £5 a week, to be effective as from Aug. 18, the justices holding that they had no jurisdiction to ante-date the order. On Dec. 2, 1953, the wife gave notice of appeal against that part of the order relating to the date from which the maintenance was payable. On Jan. 14, 1954, on the wife's complaint, the justices issued a summons against the husband to show cause why he should

not be committed to prison for failing to pay arrears of maintenance under the order of Aug. 18, and on Feb. 24, 1954, the justices ordered that the husband be committed to prison for non-payment of £135 15s. arrears, the order to be suspended until Mar. 2, 1954. On Mar. 2, 1954, the husband was imprisoned.

D. P. Draycott for the wife.

The husband did not appear.

A LORD MERRIMAN, P., stated the facts and continued: The object of this appeal is to invite us to make the order for the payment of maintenance retrospective either to Apr. 23, 1952, being the date of the order of the justices, whereby they dismissed the complaint, or to Feb. 11, 1953, being the date on which this court held that the complaint was proved to be true. Counsel for the wife has persuaded me that we should have, as I think the justices would have had, power to make the order operate from one or other of those dates—and certainly from the date when we found the complaint to be true.

B Although none of the papers which were used in the case bears any reference on the face of it to the Magistrates' Courts Act, 1952, which, by s. 133 (3), came into force on June 1, 1953, the justices must have been acting under that Act, and I, therefore, refer to those provisions of the Act which are applicable to this case. We are assured that the husband made no payment to avoid the enforcement of the committal order, and that he has made no payment since his imprisonment which would operate to reduce the term for which he was committed. As the operation of the warrant was withheld until Mar. 2, 1954, if follows, I presume, that he is liable to remain in prison until the beginning of June. It is necessary to recognise what will be the effect of that term of imprisonment on the sum in respect of which the committal was made, namely, £135 15s. In my opinion, that is settled law: see the decision of the Divisional Court of the Queen's Bench Division in *R. v. Miskin Lower Justices. Ex p. Young* (1), where PEARSON, J., after a full review of the authorities and the Acts of Parliament applicable, said ([1953] 1 All E.R. 500):

E “Moreover, the imprisonment discharges the defendant from liability for the arrears for which he was imprisoned . . .”

That conclusion was arrived at on the basis that an imprisonment in respect of an order (*ibid.*, 498)

F “. . . under [the Summary Jurisdiction (Married Women) Act, 1895,] as amended or extended by the Married Women (Maintenance) Act, 1920, and the Married Women (Maintenance) Act, 1949”,

being an order enforceable as an affiliation order, stands on a different footing from a maintenance order pronounced by the Divorce Court, which is enforceable as a civil debt (see *Jinks v. Jinks* (2)) and which, as such, is covered by the provisions of the Debtors Act, 1869.

G In the Magistrates' Courts Act, 1952, s. 74, s. 75 and s. 76 are grouped under the heading: “Arrears under affiliation order, etc.” Section 74 (1) provides:

“ . . . the court shall not enforce payment of the sum under s. 64 of this Act except by an order made on complaint.”

By s. 74 (2):

H “A complaint . . . shall be made not earlier than the fifteenth day after the making of the order for the enforcement of which it is made; but subject to this such a complaint may be made at any time notwithstanding anything in this or any other Act”.

That is to give effect to the Criminal Justice Administration Act, 1914, s. 32 (1) and (2), which made it clear that the time limit of six months applicable to the summary jurisdiction procedure, by virtue of the Summary Jurisdiction Act,

1848, s. 11, did not apply to the enforcement of maintenance orders enforceable as affiliation orders. By s. 74 (7):

“Where on a complaint to enforce [an affiliation order or an order enforceable as an affiliation order] the defendant is not committed to custody, a new complaint may be made on the ground that the circumstances of the defendant have changed”.

That is a reproduction of s. 8 (3) of the Money Payments (Justices Procedure) Act, 1935, though it does not contain words which were in that sub-section, namely, “except . . . any part of that sum remitted under the foregoing sub-section”, which enabled justices, I think for the first time, on an application for enforcement, variation, revocation, discharge or revival of a maintenance order, to remit the payment of any sum due thereunder or any part of any such sum. The power to remit is re-enacted in s. 76 of the Magistrates’ Courts Act, 1952. Section 75 of that Act is, also, important, and reads:

“Where a person is committed to custody under this Part of this Act for failure to pay a sum due under an affiliation order or order enforceable as an affiliation order, then, unless the court that commits him otherwise directs, no arrears shall accrue under the order while he is in custody”.

That section reproduces s. 32 (3) of the Criminal Justice Administration Act, 1914.

The position, therefore, is that, there having been no such special order in the present commitment, the serving of the term of imprisonment acquits the husband of the arrears in respect of which the commitment was made, and no fresh accumulation of arrears at £5 a week has occurred during the term of imprisonment. As regards the future, it is true that any further action will have to await his release from prison, but in respect of any further proceedings it will be possible for a court not merely to make a committal order in respect of arrears which have accrued, but, if it so thinks fit, to allow further arrears to accumulate during the term of the commitment imposed. I have no doubt that this court, by its order dated Feb. 11, 1953, could have directed the justices to assess the maintenance as from a certain date, and, in particular, from Feb. 11, 1953, and that, if this appeal from their decision to make the order run prospectively only from Aug. 18, 1953, had been uncomplicated by anything else, we could, on this appeal, have ante-dated it, for example, to the date of our original order (Feb. 11, 1953). To my mind, however, the justices having imprisoned the husband for three months in respect of twenty-seven weeks’ arrears from Aug. 18, 1953, the date of their order, to Feb. 24, 1954, the date of the committal order, it is not open to us now to fix some date, antecedent to the period in respect of which the commitment was made. The suggestion is that we should make a retrospective order that another six months’ arrears shall have accumulated antecedent to the arrears in respect of which this term of imprisonment is being served. I agree that there is nothing in the Magistrates’ Courts Act, 1952, which touches the point directly, but it seems to me that this application is contrary to the underlying intention of the sections to which I have alluded. It seems to me, putting it generally, to be fundamentally wrong that, having exacted the full sanction for the enforcement of the utmost sum of money which could be recovered under the order as it stood, we should now be asked to make the order operate retrospectively from a date six months earlier with the avowed object of proceeding by yet another complaint to enforce the sum accruing during that period by the same sanction of commitment. I am not prepared to do that. I think that as a matter of law it is fundamentally wrong that we should do so. If it is a matter of discretion, I should, without hesitation, exercise my discretion in favour of rejecting the application.

I am relieved, in view of what, I think, is the avowed intention of the husband to avoid complying with the order, to know that, in future, by virtue of the Magistrates’ Courts Act, 1952, s. 75, he will not necessarily, by going to prison,

wipe out, not only the arrears actually accrued due at the time of the commitment, but also be protected against the accumulation of any arrears during its term, but that any future committal order may provide that arrears shall accumulate during the term of commitment. Thus, when he serves any particular term of imprisonment in future, he may find that it is not necessary for his wife to wait for a further period after his release before substantial arrears can be enforced against him. When once that is realised he may come to the conclusion that the game he is playing is not worth the candle. However, that is merely a matter of speculation. For the moment I think our duty is to dismiss this appeal.

SACHS, J., stated the facts and continued: I am prepared to draw the inference which counsel for the wife asked us to draw, that the husband is contumacious and deliberately will go to such extent as he may to avoid giving effect to the order of the court.

The first point to be considered is whether or not counsel for the wife was right in saying that the justices should have ante-dated the order. That must, of course, depend on the construction of the order of the Divisional Court on which the case was remitted to them. I say no more than to agree with LORD MERRIMAN, P., that on this order they could have ordered payment to be made as from an earlier (I do not pause to consider which) date, and that the justices were wrong in holding to the contrary. Any other construction of the order would be contrary to the justice of the case. The next question was whether or not the fact that the husband was brought before the court on Aug. 18, 1953, by what was in form a summons, but, in effect, a notice of the date on which the remitted summons would be heard, affected in any way the exercise of the justices' discretion or jurisdiction. In my view, it did not. Next, I come to the same conclusion as LORD MERRIMAN, P., that, if there had been no other factor in the present case, the court would, without hesitation, have made an order to be effective from an earlier date than that ordered by the justices. The husband has deliberately adopted delaying tactics, keeping his wife in such measure of poverty as he could, and there are no merits in his acts.

I now consider the effect of the committal order. First, it must be mentioned that the effect of committal orders has been carefully examined by the Queen's Bench Divisional Court in *R. v. Miskin Lower Justices. Ex p. Young* (1), and I take the law as stated by PEARSON, J., who, after reviewing the sections in operation as at that date, said ([1953] 1 All E.R. 500):

"Moreover, the imprisonment discharges the defendant from liability for the arrears for which he was imprisoned . . .",

citing the authorities. There is nothing in the Magistrates' Courts Act, 1952, so far as I am aware, which alters that position. Accordingly, the arrears of £135 15s. before the date of committal will be wiped out if the husband serves his sentence, but he has, in practice, the option, under s. 67 (2) of the Act of 1952, of buying off any portion of the remainder of his sentence at a rate which in the present case, is, roughly, £10 per week's imprisonment. While in prison, having regard to the order which the justices made on Feb. 24, 1954, he is not under any weekly liability, although under s. 75 of the Act of 1952 the justices could have ordered otherwise. In those circumstances the apparent "scheme of things", as I will for convenience describe it, is so worked out that, subject to any order of the court, under s. 75 of the Act of 1952, as regards arrears accruing while he is in prison, a man shall emerge from prison free of debt. To put it in another way, once the wife in this case applied for a committal order, and pursued that application to the point of securing an order under the provisions already mentioned, the husband in effect gets, if I may adopt a phrase used by PEARSON, J., an option to "work off" his debt by imprisonment.

I will refer to *Jinks v. Jinks* (2) where it was held that a committal order in respect of maintenance made by the High Court creates a civil debt which is

subject to a different chain of results. Such a civil debt is not purged by committal, and that brings into startling relief a salient advantage in certain cases of proceeding under s. 23 (1) of the Matrimonial Causes Act, 1950, for maintenance, as opposed to proceeding in a court of summary jurisdiction.

What is the effect of this successful application by the wife to commit the husband to prison, having regard to "the scheme of things" envisaged by the legislature? It seems to me one has to consider the position from two angles, first, on the footing that this court, despite that committal, has a discretion to make an order creating further arrears, and, secondly, whether or not in law there is such a power in this court having regard to that committal order. If we acceded to counsel's argument, supported as it undoubtedly is by the merits of the case, what would be the effect? We would now impose a debt for arrears antecedent to those which are in course of being discharged by the committal order. In the result, the husband would not emerge free from debt, as the legislature intended that he should. Indeed, he would be liable to committal almost at once for the arrears which we would now impose on him. Further, I cannot overlook the fact that, if the justices had acceded to counsel's argument on Aug. 18, 1953, or if the wife had come at the earliest reasonable moment to this court on an appeal, the justices would, presumably, have had before them on any committal proceedings the question of all the arrears, including those which we are now asked to impose. Having regard to the general practice in these cases and to the probable course of events from other angles as well, it seems inevitable that the justices would have remitted precisely those arrears which we are now asked to impose.

In those circumstances I agree with LORD MERRIMAN, P., that, even if this court has a discretion or right to create these new and earlier arrears, it should not exercise that discretion. Further, I incline to the view that this court has no such right—in other words, that the discretion does not even exist. For, where the scheme of things as a whole is that a wife applying for a committal order does so on the known footing that an imprisonment, if served, will wipe out certain arrears, it seems to me to be wrong that she should be able, having got that order, to come to this court to create, in effect, some antecedent arrears. It seems to me that these two proceedings by her are inconsistent, and whether one regards it from the point of view of an election of alternative courses or from the point of view which is sometimes called approbation and reprobation, the principles which are inherent, and, indeed, expressed in, for example, *Baxter v. Eckersley* (3) and *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford)* (4) appear likely to apply.

In the result, although the husband is contumacious and merits, on the matters known to this court, the imprisonment which he is serving, and although, having no merits, he would still deserve to be made to pay all these sums which counsel asks us to make him pay, I have come to the conclusion, in agreement with my Lord, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Wm. Easton & Sons*, agents for *Geoffrey Parker & Peacock*, Stratford on Avon (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

[END OF VOLUME ONE.]



